



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>









# R E P O R T S

OF

All the Cases decided by all the Superior Courts

RELATING TO

MAGISTRATES, MUNICIPAL,

AND

PAROCHIAL LAW.

(REPRINTED FROM THE "LAW TIMES" REPORTS.)

---

EDITED BY

EDWARD WILLIAM COX, ESQ.,

*Barrister-at-Law, Recorder of Helston.*

---

VOL. III.

LONDON:

LAW TIMES OFFICE, 10, WELLINGTON STREET, STRAND. W.C.

1866.

**LIBRARY OF THE  
LELAND STANTON, JR., UNIVERSITY  
LAW DEPARTMENT.**

**α-553 21**

**LONDON:**

**PRINTED BY HORACE COX, 10, WELLINGTON-STREET, STRAND.**

**JUL 5 1901**

# INDEX TO THE NAMES OF THE CASES

## REPORTED IN THIS VOLUME.

### A.

Assessment Committee of the Union of Chaulton v. Overseers of Chaulton .....	page 320
Attorney-General v. Hospital of St. John, Bedford ...	90
Attorney-General at the relation of The Conservators of the River Thames v. The Mayor, Aldermen, and Corporation of Kingston-on-Thames .....	342

### B.

Baillie (resp.) v. Great Western Railway Company (appa.) .....	176
Baker v. Locke.....	205
Barnes v. Grant.....	288
Bayley v. Aldred .....	50
Bayley (app.) v. Wilkinson (resp.) .....	55
Benesh v. Booth .....	182
Bevis (app.) v. Bird (resp.) .....	269
Binder v. Peacock.....	316
Blades v. Higge .....	326
Blain v. Pilkington .....	179
Buckle (app.) v. Wrightson (resp.) .....	153
Burgess v. Peacock (Clerk to the Local Board of Health for the District of Barnsley).....	61

### C.

Caley v. Local Board of Health of Kingston-upon-Hull .....	151
Cator v. Lewisham Board of Works .....	362
Churchwardens, &c., of Potton v. Brown .....	53
Cobb v. Peacock .....	316
Coe v. Wise .....	74
Coles (app.) v. Dickinson (resp.) .....	60
Comley (app.) v. Carpenter (resp.) .....	296
Committee of Visitors of the Cambridgeshire, Isle of Ely and Borough of Cambridge Pauper Lunatic Asylum (appa.) v. Churchwardens, &c., of the Parish of Fulbourn, in the County of Cambridge (respa.) .....	277
Conway v. Richardson .....	96
Cubitt v. Smith .....	140

### D.

Day v. Peacock.....	316
Day (app.) v. Simpson (resp.) .....	281
Dickson v. The Queen .....	290
Doggett v. Catternes .....	164, 287

### E.

Eastwell (app.) v. Richmond (resp.) .....	254
Eddison and others v. Brookes .....	158
Edwards v. Martin .....	400
Edwards and Mann v. Hatton (on admission of an allegation) .....	289, 400
<i>Ex parte</i> Hutsworth.....	27
<i>Ex parte</i> Pater.....	29
<i>Ex parte</i> Sharpe .....	43
<i>Ex parte</i> The Inhabitants of East Stonehouse.....	226
<i>Ex parte</i> Charles Windsor .....	270

### F.

Faulkland Islands Company v. R. ....	page 89
Felkin v. Herbert .....	121
Fisher (app.) v. Howard (resp.) .....	155
Fitzgerald v. Fitzpatrick .....	34
Fletcher v. Boodle .....	215
Freeman v. Gainsford .....	217
Frewen v. Local Board of Health of Hastings .....	279
Fry v. Treasure.....	243
Fry and Greaat v. Treasure (on protest to the constitution of the suit).....	195

### G.

Gardiner v. Colyer .....	84
Gaydon v. Bankroft .....	189
Gell v. The Mayor, &c., of Birmingham .....	44
Gerring v. Barfield .....	125
Giles (app.) v. Siney (resp.) .....	150
Graham (app.) Forde (resp.) .....	371
Gray and Wife v. Pullen and Hubble .....	231
Griffin v. Deighton and another .....	13

### H.

Hadley v. Taylor and others.....	394
Hartley (app.) v. Bowlzer (resp.).....	250
Hayward (app.) v. Overseers of the Poor of the Parish of Brinkworth, Wilts (respa.) .....	74
Heelis v. Blain .....	183
Hill and Bailey v. Haskew .....	126
Hodgson (app.) v. Little (resp.) .....	124
Howard v. The Queen (in error) .....	203
Hunt and another v. Harris .....	293
Huxham (app.) v. Wheeler (resp.) .....	11

### I.

Ibbotson v. Peat .....	259
------------------------	-----

### J.

Jeffries v. Evans .....	346
Jones v. Gough.....	241
Jones v. Mersey Docks and Harbour Board—Mersey Board v. Cameron.....	331

### K.

Kenyon (app.) v. Hart (resp.) .....	227
Kiddle (app.) v. Kayley (resp.) .....	9
Kuowlden, Dron and Oxford v. The Queen .....	81

### L.

Latham and others v. The Queen (in error).....	67
Laughlin and others v. Overseers of Saffron-hill .....	308
Leader v. Yell .....	53
Leatham v. The Visitors, &c., of the Poor of the United Parishes, &c., of Bolton-le-Sane, &c. ....	368
Lee (app.) v. Riley (resp.) .....	233
Local Board of Health of Chatham extra (appa.) v. Rochester Pavement and Road Commissioners (respa.)....	377

London and North-Western Railway Company (apps.) v. Surveyors of Highways of the Township of Skerton (resps.) .....	page 85	<i>Re Harrison</i> .....	page 120
Longland v. Andrews—Longland v. Doling.....	257	<i>Re Harwood</i> .....	115
Lowe v. Howarth .....	399	<i>Re Hayes</i> .....	112
<b>M.</b>		<i>Re Henderson</i> .....	103
M'Donald v. Bulwer .....	97	<i>Re Hewson</i> .....	103
Macey v. Metropolitan Board of Works .....	3	<i>Re Hodgson</i> .....	113
Mason and another (Administrators, &c.) v. Mitchell	223	<i>Re Justins</i> .....	107
Mayor, &c., of Weymouth (apps.) v. C. H. Nugent (resp.) .....	204	<i>Re Kent</i> .....	119
Mawby (app.) v. Hopkinson (resp.) .....	4	<i>Re Kerridge</i> .....	116
Midland Railway Company v. Council of the Borough of Birmingham .....	406	<i>Re Local Board of Health of Tranmere v. Kellett</i> ...	192
Mounsey v. Ismay .....	255	<i>Re Manby</i> .....	113
<b>O.</b>		<i>Re Matthews</i> .....	120
Office promoted by the Rev. Launcelet Dowdall v. Rev. James Hewitt .....	100	<i>Re Monck</i> .....	109
Oram v. Cole .....	179	<i>Re Monckton</i> .....	104
Overseers of Calverley (apps.) v. Overseers of Brad- ford (resps.) .....	249	<i>Re Nunn</i> .....	110
Overseers of the Poor of Sunderland-near-the-Sea (apps.) v. Guardians of the Sunderland Poor Law Union (resps.) .....	384	<i>Re Phillips</i> .....	120
<b>P.</b>		<i>Re Rawle</i> .....	112
Pearson v. Local Board of Health of Kingston- upon-Hull .....	356, 360	<i>Re Reilly</i> .....	96
Pearson (app.) v. Tazewell (resp.) .....	354	<i>Re Rey</i> .....	110
Pettitward v. Metropolitan Board of Works .....	350	<i>Re Rounthwaite</i> .....	114
Pew (app.) v. Metropolitan Board of Works (resps.)	263	<i>Re Skinner</i> .....	115
Pope (app.) v. Whalley (resp.) .....	252	<i>Re Titus Thewlis</i> .....	121
Powell v. Bradley .....	212	<i>Re Turle</i> .....	107
Powell v. Boraston .....	228	<i>Re Turner</i> .....	119
Powell v. Farmer .....	230	<i>Re Tweedy</i> .....	109
Powell v. Guest .....	209	<i>Re Walker</i> .....	110
Powell (app.) v. Jones (resp.) .....	211	<i>Re Walford</i> .....	108
Price and another v. Kirkham and another .....	141	<i>Re Whimper</i> .....	112
<b>R</b>		<i>Re Whittingham's Trust</i> .....	37
<i>Re Adams</i> .....	109	<i>Re Wills</i> .....	119
<i>Re An appeal between the Board of Guardians of the Kettering Union (apps.) v. Committee and Directors of the Northampton General Lunatic Asylum (resps.)</i> .....	373	<i>Re Woolf</i> .....	111
<i>Re Ballhatchett</i> .....	116	<i>Re Wyatt</i> .....	114
<i>Re Bayley</i> .....	117	<i>Reed v. Edwards</i> .....	143
<i>Re Bennett</i> .....	108	<i>Reeve (app.) v. Wood (resp.)</i> .....	177
<i>Re Birkenhead, Lancashire, and Cheshire Junction Railway Company</i> .....	106	<i>Reg. v. Askerton</i> .....	225
<i>Re Brayne</i> .....	111	<i>Reg. v. Backhouse and others</i> .....	319
<i>Re Broughton Local Board of Health</i> .....	273	<i>Reg. v. Bjornsen</i> .....	302
<i>Re Buckenham</i> .....	118	<i>Reg. v. Blinfield</i> .....	150
<i>Re Calvert</i> .....	118	<i>Reg. v. Brickhall</i> .....	41
<i>Re Clark</i> .....	114	<i>Reg. v. Briggs</i> .....	154
<i>Re Colman</i> .....	111	<i>Reg. v. Bulmer</i> .....	63
<i>Re Cope</i> .....	108	<i>Reg. v. Collins and others</i> .....	65
<i>Re Corbett</i> .....	117	<i>Reg. v. Colvill</i> .....	273
<i>Re Crose</i> .....	115	<i>Reg. v. Commissioners of Metropolitan Police</i> .....	68
<i>Re Curtis</i> .....	106	<i>Reg. v. Coroner of Dover</i> .....	195
<i>Re Davenport</i> .....	111	<i>Reg. v. Coroner of Margate</i> .....	226
<i>Re Daw</i> .....	104	<i>Reg. v. Coroner of Staffordshire</i> ..	87
<i>Re Dutton and Thorogood</i> .....	118	<i>Reg. v. Dant</i> .....	285
<i>Re Edis</i> .....	115	<i>Reg. v. Wm. Fisher</i> .....	407
<i>Re Enfield</i> .....	105	<i>Reg. v. Fretwell</i> .....	23
<i>Re Fothergill</i> .....	107	<i>Reg. v. G. and F. G. Fullford</i> .....	17
<i>Re Fry</i> .....	116	<i>Reg. v. Maria Giles</i> .....	198
<i>Re Goddard</i> .....	110	<i>Reg. v. John Glover</i> .....	66
<i>Re Griffiths</i> .....	117, 120	<i>Reg. v. Governor of the Debtors' Prison in White- cross street—Reg. v. Governor of Newgate</i> .....	313
<i>Re Grigaby</i> .....	108	<i>Reg. v. Guardians of the Hastings Poor-Law Union</i> ..	401
<i>Re Hackney Charities</i> .....	93	<i>Reg. v. Guardians of the Poor of the Isle of Wight</i> ...	26
<i>Re Hackney Charities (Poole's and White's Charities)</i>	245	<i>Reg. v. Guardians of the Newport Union</i> .....	41
<i>Re S. and G. Hadfield</i> .....	105	<i>Reg. v. Harris</i> .....	266
		<i>Reg. v. Heath and others</i> ..	310
		<i>Reg. v. Henshaw and Clark</i> .....	24
		<i>Reg. v. Heywood and others</i> .....	39
		<i>Reg. v. Ingham</i> .....	42
		<i>Reg. v. Inhabitants of the Parish of Buckland</i> .....	278
		<i>Reg. v. Inhabitants of Cleckheaton</i> .....	148
		<i>Reg. v. Inhabitants of the Township of Denton, in the County of Lancashire</i> .....	153
		<i>Reg. v. Inhabitants of Great Salkeld</i> .....	52
		<i>Reg. v. Inhabitants of St. Leonard, Shoreditch</i> .....	382
		<i>Reg. v. Edwin Johnson</i> .....	307
		<i>Reg. v. Johnson and Anderson</i> .....	170
		<i>Reg. v. Patrick Joyce</i> .....	285
		<i>Reg. v. Justices of Essex</i> .....	193
		<i>Reg. v. Justices of Salop</i> .....	171
		<i>Reg. v. Justices of Sussex, re An Appeal between the Parish Officers of the Parish of Colemore (apps.) and the Parish Officers of the Parish of Funtington (resps.)</i> .....	233

# INDEX TO NAMES OF CASES.

v

Reg. v. Justices of Worcestershire, re An Appeal between the Guardians of the Winchcombe Union and the Guardians of the Stourbridge Union ..... page	312	Reg. v. Worksop Board of Health ..... page	7
Reg. v. Justices of the West Riding of Yorkshire 280,	319	Reg. v. Wray.....	266
Reg. v. Kayley .....	9	Richards v. Birley .....	1
Reg. v. Langmead .....	21	Roberts v. Perceval .....	207
Reg. v. J. Lee and another .....	20	Russell (Clerk to the Local Board of Health) v. Trickett	384
Reg. v. Levi .....	305		
Reg. v. Mayor, &c., of Aberavon .....	174	S.	
Reg. v. Middle Level Commissioners .....	28	Saunders (app.) v. Baldy (resp.) .....	403
Reg. v. Mullany .....	307	Saunders (Executor, &c.) v. Slack .....	191
Reg. v. Mutters.....	168	Scott (app.) v. Durant (resp.) .....	219
Reg. v. John Mutters .....	197	Sharp (app.) v. Fields (resp.) .....	8
Reg. on the prosecution of the Churchwardens and Overseers of Wennington v. Robert Dare.....	144	Shephard and another v. Payne and another.....	14
Reg. on the prosecution of Hughes (app.) v. Overseers of Bilston (resps.).....	403	Shephard and another (apps.) v. Postmaster-General (resp.) .....	172
Reg. on the prosecution of the Parish Officers of Badgworth (resps.) v. Midland Railway Company (apps.) .....	146	Sheppard and others (apps.) v. Churchwardens, &c. of of Bradford (resps.) .....	31
Reg. on the prosecution of the Parish of Willoughby v. Dawson.....	200	Smith (app.) v. Foreman (resp.) .....	214
Reg. on the prosecution of Thomas Staley and another (apps.) v. Overseers of the Poor of the Township of Castleton, in the Parish of Rochdale, Lancashire .....	71	Spiller v. Maude .....	170
Reg. on the prosecution of Thomas Taylor v. Darlington Local Board of Health .....	69	Stacey (app.) v. Whitehurst (resp.) .....	220
Reg. on the prosecution of the Vestry of St. Mary, Ilkington, v. Keeper of the House of Correction in Coldbath Fields.....	122	Steels v. Bosworth .....	180
Reg. on the prosecution of the Vestry of St. Marylebone v. Board of Works for the Strand District ...	122	Sutton v. Spectacle-makers' Company .....	28
Reg. v. Overseers of South Weald.....	51		
Reg. v. Overseers of Sutton, in Lancashire .....	194	T.	
Reg. v. Parker and Smith.....	38	Taylor (app.) v. Humphreys (resp) .....	160
Reg. v. Patent Eureka and Sanitary Manure Company (Limited) .....	405	Tepper v. Nicholls.....	186
Reg. v. Pedler .....	247	Thomas (app.) v. Jones (resp.) .....	178
Reg. v. Samuel Porter .....	16	Tomlins (app.) v. Nuisance Removal Committee of Great Stanmore (resps.) .....	261
Reg. v. Purday .....	148		
Reg. v. Rathmines and Rathgar Improvement Commissioners .....	132	V.	
Reg. v. Reynolds .....	326	Vestry of Chelsea (apps.) v. King (resp.).....	162
Reg. v. James Robertson .....	169	Vestry of Marylebone (apps.) v. Viret (resp.) .....	347
Reg. v. Robinson .....	304	Vestry of St. George's, Hanover-square (apps.) v. Sparrow (resp.).....	33
Reg. v. Mary Senior .....	23		
Reg. v. Shaw.....	299	W	
Reg. v. Charlotte Smith .....	321	Wallington (app.) v. Willes (resp.) .....	87
Reg. v. Spurrell and Walker.....	404	Ward (app.) v. Gray (resp.).....	268
Reg. v. Stevens and Anderson .....	309	Watson (app.) v. Martin (resp.) .....	154
Reg. v. Tivnan and others.....	44	H. B. Were (app.) v. Clerk of the Peace of the County of Devon (resp.) .....	201
Reg. v. Tubberfield .....	166	Whymper (app.) Harney (resp.) .....	221
Reg. v. Wilkinson .....	25	Wigan v. Strange .....	395
		Williams v. Golding .....	392
		Wilson v. Churchwardens of Sunderland .....	155
		Y.	
		Yewdall (app.) v. Craven (resp.) .....	152
		Young (app.) v. Edwards, Surveyor of the Corporation of Stockton-on-Tees (resp.) .....	165





# INDEX TO SUBJECTS OF CASES.

## ALEHOUSE.

Opening within prohibited hours—Jurisdiction of justices.....	page 23
Class of houses to which licence extends.....	25
Certificate of good character.....	53
A person going by train is a traveller, and entitled to refreshment.....	155
So is a person walking into the country.....	160
Construction of the term "traveller" in the statute...	160

## ANIMALS.

Liability of owner for injury done by a straying horse	283
--	-----

## APPEAL.

Right to begin.....	31
Against order for criminal lunatic—By whom notice to be signed.....	41
Costs refused where case struck out, for not having been duly transmitted and notice given.....	96
When appeal against stopping a pathway under an Inclosure Act may be heard.....	193
Against order of removal—When notice and grounds of appeal to be sent—To what sessions— <i>Reg. v. Justices of Suffolk</i> overruled.....	283
Against summary convictions—Prisoner liable to costs though he does not appear.....	148
Against a church-rate under a local Act—Jurisdiction of justices.....	155
Reference by order of sessions—The order silent as to costs—Jurisdiction of subsequent sessions.....	280
There is no appeal against an order for the maintenance and expenses of a lunatic pauper in an asylum	373

## APPRENTICESHIP (SETTLEMENT BY).

Indenture between guardians of a union executed under the common seal.....	26
--	----

## ARREST.

Warrant for must be founded on an information that discloses a charge of felony.....	97
--	----

## ASSAULT.

Invalid conviction for, under the Municipal Corporation Act.....	41
An action for damages will lie after a conviction, imprisonment and fine, or a penalty for the same assault.....	399

## ASSAULT (INDECENT).

On a girl between 10 and 12, is not an offence if she is a consenting party.....	307
--	-----

## ASSESSED TAXES.

Executor's liability for.....	111
-------------------------------	-----

## ARMORIAL BEARINGS.

Crest and plate not that of the owner.....	120
--	-----

## CARRIAGES.

Two-wheeled carriage used for carrying passengers...	116
Farmer's used like a dog-cart.....	117
Light-cart used at markets and fair.....	117

Pony-cart used for business, but also by wife and child.....	page 117
Four-wheeled van for delivery of goods.....	118
Used by a licensed hawkers.....	118
Constructed to carry millinery, but having a seat ...	118

## HORSE DUTY.

Drawing a four-wheel van used for conveying goods...	118
Butcher also farming land.....	119
By a farmer and limeburner.....	119

## HORSE DEALER'S DUTY.

Innkeeper selling horses for others but not on his own account.....	119, 120
Veterinary surgeon buying and exchanging horses ...	120
Cattle dealer buying and selling colts.....	120

## INHABITED HOUSE DUTY.

Officers' apartment in a pauper lunatic asylum not liable.....	103
A lunatic asylum is liable.....	103
Town-hall not liable.....	104
Office of Commissioners of Sewers not liable.....	104
A lunatic asylum liable to.....	105
House occupied as solicitor's offices.....	105
Railway-station offices and house.....	106
Value of house held on lease.....	106
House rented at 19 <i>l.</i> 19 <i>s.</i> ....	107, 108
Value of a railway station.....	107
Value where house only partially tenanted.....	108
House occupied by a clergyman rent free.....	108
Farmhouse, farmer being also a mine agent.....	108
House of business, two rooms occupied by policeman to take care of it.....	111
Apartments occupied as a residence in a post-office...	111
House occupied by Lieut.-General of the Tower.....	112
A police-station.....	112
Offices in a town-hall.....	112
Offices in a corn exchange.....	113
Offices of a solicitor, forming portion of a dwelling-house.....	113
A farmhouse.....	114
A cabinet-maker's shops.....	114
A registry office.....	114
Value-rental.....	121

## SERVANTS.

In a lunatic asylum.....	105
To the governor of a college.....	109
Trainers of race-horses.....	109
Labourer employed in stables and gardens.....	109
Servant to a licensed victualler.....	110
Spirit retailer's apprentice.....	110
Attendants in a private lunatic asylum.....	110
House porters and watchmen in a bank.....	110
Policeman acting as groom.....	111
Labourer employed as a coachman.....	115
Policeman taking charge of carriage of superintendent	115
Shopboy cleaning boots and shoes.....	115
Riding-master grooming horses.....	115
Servant to shoemakers taking charge of van.....	118

## ATTEMPT.

To commit larceny, what it is.....	65
------------------------------------	----

<b>ATTORNEY AND SOLICITOR.</b>		
Retainer of by a corporation must be under the common seal .....	page	28
<b>BANKRUPTCY.</b>		
<i>London Gazette</i> is evidence of .....		305
<b>BEER ACT.</b>		
Harbouring persons who appeared to have been recently drinking beer by a person licensed to sell beer not to be consumed on the premises is within the statute .....		371
<b>BEERHOUSE.</b>		
Selling beer at a fair without a licence.....		11
What is not a false certificate of character .....		53
A charge of opening on a Sunday may be heard by any justices of the county .....		299
<b>BETTING HOUSES.</b>		
(See <i>Gaming</i> ).		
<b>BOROUGH.</b>		
Incorporated by charter—Exemption from county and police-rate.....		201
<b>BRIDGE.</b>		
Duty of Commissioners to re-erect under a local Act...		28
Soldiers not exempt from toll for passing over a floating bridge .....		268
<b>BUILDING ACTS.</b>		
(See <i>Metropolitan Building Act</i> ).		
<b>BURIAL ACTS.</b>		
Burial boards—Fees of parish clerks and sextons... ..		44
Filling a vacancy in the board after lapse of a month ..		51
Fees for payable to incumbents of districts .....		316
<b>CAB ACT.</b>		
Commissioners can suspend licence of omnibus drivers ..		68
<b>CARRIAGES, HACKNEY.</b>		
Must have an excise licence as well as the licence of the Commissioners under the Towns Police Clauses Acts .....		153
<b>CARRIAGES, STAGE.</b>		
Commissioners can suspend licence of omnibus drivers ..		68
<b>CHAPEL OF EASE.</b>		
Fees and appointments.....		34
<b>CHARITY.</b>		
When held to be within the Municipal Corporations Act .....		90
Order made by Commissioners in a contentious case—Time for appeal—Legal estate in the property .....		93
How private inhabitants cannot under a. 8 appeal against order of commissioners .....		245
<b>CHURCH, LAW OF THE.</b>		
Right of incumbent to access to all parts of the church—Lay rector—Chancel.....		13
Fees payable by churchwardens to archdeaconal courts—Usage .....		14
District chapelry—Pew rents—Marriages—Fees—Appointment of clerk and sexton—Order in Council—Trust deed.....		34
Alms collected at the offertory in a proprietary chapel not having a district assigned to it belong to the rector .....	page	100
Burial fees payable to incumbents of districts .....		316
<b>CHURCH-RATE.</b>		
Illegal items in estimate—Irregularity at vestry—Duty of chairman—Costs—Appeal .....		1
Jurisdiction of justices where validity is disputed ...		27
Liability of prebendal stall and common lands—The rate must be equally assessed, though the basis of the rate is unimportant.....		126
Appeal against, under a local Act—Jurisdiction of justices .....		155
One churchwarden cannot join his ex-churchwarden in a suit for subtraction of without his consent.....		195
Same case on appeal.....		243
When jurisdiction of justices to make order is overruled— <i>Bona fides</i> of objection.....		247
Amendment of libel in suit for.....		288
Ecclesiastical Court—Application to take evidence <i>vis à voce</i> .....		400
<b>CHURCHWARDENS.</b>		
Fees payable by, to archdeaconal courts .....		14
<b>CLERGY, LAW OF.</b>		
Ecclesiastical parish—Incumbent of new chapelry cannot take surplice fees .....		241
(See <i>Parish Law and Church-rate</i> ).		
<b>COINING.</b>		
What sufficient proof of uttering a medal resembling a coin .....		304
<b>COMMISSIONERS.</b>		
Under a Local Improvement Act—Liability—Execution against .....		191
<b>COMMISSIONERS, PUBLIC.</b>		
Not liable for injury done by works under their charge ..		74
<b>CONSOLIDATION ACTS.</b>		
Towns Police—Hackney carriages plying for hire must have an excise licence also .....		153
<b>CONSPIRACY.</b>		
Jurisdiction of quarter sessions to try .....		66
Indictment for preferred at two separate sessions.....		81
<b>CONSTABULARY, COUNTY.</b>		
A single parish may constitute a district.....		226
<b>CORONER.</b>		
Inquisition for murder need not state the manner of death—The jurors need not view the body at the same time .....		42
Court will not quash inquisition on the ground that the evidence was not taken on oath .....		87
When court adjourned to a certain day and not then held, proceedings cannot be resumed .....		195
Jurors dispersing without a formal adjournment.....		226
<b>COSTS.</b>		
Of a <i>mandamus</i> obtained and obeyed without argument .....		96
Refused where case stated by magistrates was struck out, notice not having been served .....		96

## COUNSEL.

May be fined by a Court of Quarter Session for contempt .....	29
Right to begin .....	31

## COUNTY POLICE.

Exemption from turnpike toll .....	257
------------------------------------	-----

## COUNTY RATE.

Exemption from, of a borough incorporated by royal charter .....	201
--	-----

## CRIMINAL LAW.

Ill-treatment and neglect of a lunatic under Local Government Act .....	16
Fer bringing forward a house into the street .....	17
False pretences—Evidence of—Statement of in indictment .....	20
Receiving—Recent possession is evidence of .....	21
Perjury—Jurisdiction under Sunday Beer-Trading Act .....	23
Shooting and wounding—By firing into a crowd .....	23
False pretences—Statement of in the indictment .....	24
Night poaching—Proof of commencement of prosecution .....	38
Pleading—Indictment for three larcenies need not aver that they were committed within six months .....	39
Extradition Acts and treaties .....	44
False pretences—What sufficient evidence of .....	63
Larceny—What constitutes an attempt to commit .....	65
Embezzlement—Relation of master and servant, a County Court bailiff not a servant .....	66
Indictment—Two counts and a judgment on one only—Jurisdiction of quarter sessions—Conspiracy .....	67
Not necessary to aver that the conditions of the Vexatious Indictment Act have been complied with .....	81
Evidence—Indictment for assaulting a constable—Evidence of general bad character of prisoner may be given to justify suspicion .....	166
Of nuisance by working a quarry near a public street .....	168
Threats—Demanding money with is indictable, though the money was obtained, and it was larceny also .....	169
In an indictment for attempting to steal in a dwelling-house, it is not necessary to specify the goods .....	170
On a charge of felony that charge may be abandoned, and the prisoner charged with and convicted of malicious injury to property .....	172
Larceny—By an adulterer—Evidence of possession .....	197
False pretences—What is evidence of an existing fact .....	198
Evidence of general good character may be met by evidence of general ill repute, but not by specific instances .....	238
Extradition Treaty—The crimes contemplated are those only that are such by the law of England .....	270
Forgery—A guarantee against loss by dishonesty of a servant is an undertaking for payment of money within 24 & 25 Vict. c. 98, s. 23 .....	285
Manslaughter—Turning a vicious horse on a common where it killed a child, is culpable negligence .....	285
Perjury—On the hearing of an information for selling beer on a Sunday—Indictment—What sufficient corroborative evidence .....	299
Murder on the high seas—British ships—Proof of registration—Alien owner .....	302
Coining—What sufficient proof of uttering a medal resembling a coin .....	304
Evidence—The <i>London Gazette</i> is evidence of bankruptcy in a criminal prosecution .....	305
Perjury—In an action in the County Court the fact of defendant's name is material, and a false statement of it is perjury .....	307
Indecent assault—Is not an offence on a girl between 10 and 12, if she is a consenting party .....	307

Manslaughter—Master not criminally liable for the death of a servant not of tender years by reason of insufficiency and badness of food and lodging .....	321
Dying declaration—Its admission is question for the Judge—Circumstances under which it was admitted .....	321
Practice—The Court will not remove an indictment for felony found at quarter sessions on the ground of local prejudice—The recorder should send it to the assizes .....	326
Larceny—Why taking game is not larceny .....	326
Assault—An action for damages will lie after conviction, imprisonment, and fine for the same assault .....	399
Indictment—Venue—The Court will not change the venue for any other cause than inability to obtain a fair trial in the original jurisdiction .....	405
Malicious injury to property—Damaging a steam-engine so as to prevent its working is within the statute .....	407

## CROWN, THE.

Exemption from payment of wharfrage duties by prescription .....	204
--	-----

## CUSTOM.

To enter land on a certain day for purposes of horse-racing is good, but it is not an easement .....	255
--	-----

## DANCING.

A ballet of action is not a stage-play within the Theatres Licensing Act .....	395
--	-----

## DIVORCE ACT.

A protection order under this Act does not extend to protect the gains of prostitution .....	223
--	-----

## DOG.

Liability of owner of, for destroying pheasants in a preserve .....	143
Kept for the care of cattle .....	107
Belonging to a prisoner .....	115

## ECCLESIASTICAL COURT.

Amendment of libel in a suit for church-rate .....	288
Whether court will pronounce against the rate on ground of inequality, unless defendant proved that he was injured by the inequality .....	289

## ECCLESIASTICAL LAW.

The alms collected at the offertory in a proprietary chapel not having a district belong to the rector .....	100
--	-----

(See *Church-rates*).

## ELECTION LAW.

Borough—Notice of objection—When there are two lists of voters in the borough not necessary to specify in which list objector's name appears .....	179
Revising barrister—Practice—A revising barrister having concurrent jurisdiction with another, cannot re-hear and alter the decision of the former .....	179
County—Freehold—Inmates of a hospital have not an equitable interest entitling them to vote .....	180
Objection—Practice—A duplicate notice sent by post not invalid for having the word "Copy" at the head of it .....	182
County—Freehold—Possession of a rentcharge for some months before 21, entitles to be registered at 21 .....	183
County—Freehold—Shareholders of Putney Bridge not entitled to vote .....	186

Borough—Freemen—There is a continuous lineal right to persons claiming freedom by birth through a father who was a freeman before the date of the claim .....	page 189
Borough—Rating—Nonpayment of a rate, good on the face of it, invalidates the vote .....	205
County—Freehold—Inmates of borough hospitals are entitled to vote .....	207
Borough—Residence—Being in a gaol out of the borough is a breach of residence .....	209
Borough—Payment of rates—Appropriation of payment to the property in respect of which the claim is made .....	211
Borough—Occupation—The occupation required may be before the claimant comes of age .....	212
County—£50 rental—Rents paid to different landlords cannot be tacked to make up a qualification... ..	214
County—Freeholders—A shareholder in a music-hall not entitled to vote .....	217
Practice—Appeal dismissed for want of proper signature .....	219
Borough—What is a building—Tool-shed .....	228
Borough—Building—Potato-shed—Pigstye .....	230

## EMBEZZLEMENT.

Bailiff of a County Court is not a servant.....	66
---	----

## EVIDENCE.

Of false pretences .....	20
Of larceny and receiving, by recent possession .....	21
Of perjury .....	23
In night poaching—That the proceedings were commenced within twelve months .....	38
Of previous conviction under the Vagrant Act must be by proof of record at quarter sessions .....	150
On an information for opening a public-house during prohibited hours, proof that party is not a traveller is on the informer .....	160
Of general bad character, but not of particular acts, may be given on an indictment for assaulting a constable .....	166
Of nuisance by working a quarry .....	168
Of ancient right and mode of fishing .....	269
In perjury—What sufficient corroboration.....	299
On an indictment for perjury before a magistrate not necessary to prove that an information was laid ...	299
If an indictment alleges that a party has been summoned to answer a certain charge, whether same should not be proved .....	299
In a case of murder on the high seas—Proof of register of ship .....	302
What sufficient proof of uttering a medal resembling a coin .....	304
The <i>London Gazette</i> is conclusive evidence of a person having been declared bankrupt .....	305
When a dying declaration rightly received.....	321
Will be allowed to be taken <i>vidæ voce</i> in the Archæ Court in a suit for subtraction of church-rate .....	400

## EXCISE.

Selling beer at fair without a licence.....	11
Hackney carriages in a town, under the Towns Police Clauses Act, must have both licences .....	153
Spirit licence—Grocer—Whether higher duty applicable to spirit grocers .....	290

## EXTRADITION LAWS.

What is "piracy" under the treaty with the United States—Power to commit and deliver up .....	44
---	----

## EXTRADITION TREATY.

The crimes to which the treaty refers are such only as are crimes by the law of England.....	270
--	-----

## FACTORIES ACTS.

Employing persons under age in paper-making, the manufacture being part in Manchester and part in Hertfordshire.....	page 60
A mixed manufacture of cotton and steel for crinoline is within .....	221

## FAIRS.

(See *Markets and Fairs Act*).

## FALSE IMPRISONMENT.

The owner of property not justified in giving into custody a person found committing a nuisance thereon .....	50
A warrant of apprehension must be founded on an information which discloses a charge of felony .....	97

## FALSE PRETENCES.

Indictment for—Sufficiency of .....	20
Statement of in indictment .....	24
What is evidence of .....	63
What is an existing fact .....	198

## FISHERY LAWS.

What a salmon fishery within sect. 20—Obstruction to the free passage of fish .....	124
Salmon Fishery Act 1861—What is a fixed engine within sect. 11 .....	178

## FISHERIES.

Evidence by reputation of ancient right and mode of fishing .....	269
---	-----

## FORGERY.

A guarantee of honesty is an undertaking for payment of money within 24 & 25 Vict. c. 98, s. 23 .....	285
---	-----

## FRIENDLY SOCIETY.

Security for loan by—Rule requiring notice to principal not necessary to be observed in respect of the surety .....	141
The sole surviving member entitled to income for life .....	170

## GAME LAWS.

Trespass in pursuit of game—Jurisdiction of justices ousted by a <i>bonâ fide</i> claim of right.....	9
Indictment for night-poaching—Proof that the offence was within twelve months.....	38
Reservation of right of sporting to the lessor and any friend with him extends to several friends at the same time .....	84
A grant of land in fee by the Crown, and a licence to depasture cattle on the Crown lands, carries with it a right to capture wild animals.....	89
Liability for destruction of pheasants by a dog given to hunt on his own account .....	143
Aiding and abetting trespass in pursuit of, by waiting in a cart in the road while a companion went into the field and shot a hare and brought it back to the cart .....	220
Entering a close and picking up a dead pheasant shot flying over it, is not a trespass in pursuit of game... ..	227
Although it is lawful for an adjoining proprietor to allure game to his own land, he may not frighten away the game on his neighbour's land.....	259
Waste by the side of a highway is not open land within the Night-Poaching Act .....	266
What is the property in game of the owner of the soil and of a trespasser .....	326
The reason why poachers are not indictable for larceny is that the game while alive is in the same category as fruit, and part of the soil.....	326

- A right of sporting reserved in a lease includes rabbits ..... page 346  
Cutting down furze and underwood is not a breach of covenant for quiet enjoyment of a right of shooting reserved ..... 346  
To an information for taking game without a certificate it is no answer that the act was committed in "close time." The penalty applies to the offence if committed at any time of the year ..... 403

#### GAMING.

- The current coin of the realm not an instrument of gaming under the Vagrant Act—Pitch and toss is not gaming ..... 154  
Bets made at a meeting in Hyde Park are within the Betting Houses Act ..... 164  
Standing under a tree in Hyde Park for the purpose of making bets on race-horses is not a place within s. 1 of the Betting Houses Act..... 287

#### GAOL.

- Order of sessions regulating classes of prisoners—A commitment to Coldbath-fields for non-payment of parish rates illegal..... 273

#### GILBERT UNION.

(See *Lunatic Pauper*).

#### HABEAS CORPUS.

- Where a writ allowed to go without argument, and was obeyed, the Court has no authority to grant costs... 96

#### HEALTH, PUBLIC.

- Rate not signed by five members nor under seal ..... 7  
Private Improvement Clauses—Notice to repair—Appointment of arbitrator..... 55  
Power of Local Board to make bye-laws affecting buildings in existence at the time of the formation of the district ..... 61  
Injury to watercourses by conveying sewers into them ..... 69  
Interest on expenses incurred under s. 65 runs from the time amount was ascertained ..... 87  
Invalidity of highway-rate for part of a district ..... 273  
An election of members of the local board in the absence of the chairman is void ..... 319

(See *Public Health*).

#### HIGHWAY.

- A road lowered by a railway company in the construction of a bridge is not an immediate approach or necessary work which the company is bound to keep in repair ..... 85  
User by innkeeper of ground before inn to stand carriages no answer to a charge of obstruction ..... 125  
The trackway along a canal held to be..... 132  
Indictment for non-repair as a cart and carriage way—Finding of jury that it was only a pack and prime way, and not out of repair as such—Prosecutor not entitled to costs..... 148  
Outgoing surveyors to collect the arrears of a highway-rate and pay them to the district board ..... 150  
Where defendants plead "guilty" to an indictment for non-repair, prosecutor is not entitled to costs ..... 153  
Exemption of hamlet repairing its own highways—Part of one parish rated in another ..... 200  
Before directing indictment for non-repair, justices should be satisfied by evidence that it is a highway ..... 225  
Waste laying at the side is not open land within the Night-Poaching Act..... 266  
Indictment—Court cannot order costs if parish acquitted on the ground that the road is not a highway ..... 278  
Costs of an indictment for an obstruction may be charged by the highways board to the parish in which the obstruction occurred..... 310

- A provisional order of justices naming only one way-warden for a parish containing three hamlets, each maintaining its own highways, is void ..... page 319

#### HORSE-RACING.

- A custom to enter land for purposes of horse-racing is good, but it is not an easement..... 255

#### HOUSE DUTY.

(See *Assessed Taxes*).

#### HUSBAND AND WIFE.

- Protection order—Reversionary legacy—Desertion ... 37  
Justices have no power to discharge a protection order not made by themselves ..... 43  
A protection order under Divorce Act will not apply to the gains of prostitution ..... 223

#### INCLOSURE.

- Local Act—Rateability for expenses of ..... 158

#### INCLOSURE ACT.

- Evidence of notice to divert path being affixed on church door ..... 193  
When appeal may be heard ..... 193

#### INDECENT ASSAULT.

- On a girl between 10 and 12, is not an offence if she is a consenting party ..... 307

#### INDICTMENT.

- For obtaining by false pretences—Sufficiency of ..... 21  
For larceny—Charging three cases need not aver that they were within six months..... 39  
Two counts on, and judgment on one only—Error ... 67  
Not necessary to aver that the conditions of the Vexatious Indictment Act have been complied with ..... 81  
Plaintiff in error must be personally in Court on a motion for judgment upon an indictment for a misdemeanor ..... 263  
For perjury at the hearing of an information for selling beer on a Sunday ..... 299  
The Court will not change the venue for any other cause than inability to obtain a fair trial ..... 405

(See *Criminal Law*).

#### INHABITANT.

- Meaning of term ..... 185

#### INJUNCTION.

- Against the flow of sewage into the Thames..... 342

#### INNKEEPER.

- A person going by train is a traveller, and entitled to refreshment ..... 155  
A person walking into the country is a traveller ..... 160  
Rule for guidance in determining who is a traveller... 160

#### JURISDICTION.

- Of justices in a case of trespass in pursuit of game is ousted by a *bond fide* claim of right..... 9  
Of justices on a charge of selling beer within the prohibited hours..... 23  
Of justices in church-rates, where validity of rate is in dispute ..... 27  
A charge of felony against a prisoner may be abandoned, and he may be charged and summarily convicted of malicious injury to property ..... 172  
Of justices to make order for payment of church-rates - Power to determine *bona fides* of objection... 247

Of subsequent sessions to order costs after a reference by an order silent as to costs .....	page 280
Of any justices of the county to bear offence of Sunday trading in beer .....	299
Where the party appears and permits a charge to be proceeded with without objection he waives information and summons.....	299

## JUSTICES OF THE PEACE.

Jurisdiction of, ousted by claim of title .....	9
Jurisdiction of, in church-rates, where validity of rate disputed .....	27

## LANDLORD AND TENANT.

What is a hiring of a tenant for a year so as to give a settlement.....	401
---	-----

## LARCENY.

It is a presumption of fact whether recent possession points to larceny or receiving .....	21
Indictment charging three larcenies need not aver that they were within six months.....	39
What constitutes an attempt to commit .....	65
In an indictment for attempting to steal, not necessary to specify the goods .....	170
By an adulterer—Evidence of possession .....	197
Taking live game is not larceny, because, like fruit, it is part of the soil.....	326

(See *Criminal Law*).

## LIGHTING ACT.

(See *Watching and Lighting*.)

## LOAN SOCIETY.

Recovery by from surety—Notice to principal .....	141
---	-----

## LOCAL GOVERNMENT ACTS.

Indictment for bringing forward a house into a street without consent of Local Board .....	17
Power to make bye-laws affecting buildings existing at the date of the constitution of the district .....	61
Injury to watercourses by conveying sewers into them .....	69
Interest on expenses incurred by repairs runs from the time when the amount due was ascertained ..	87
Provisional order of Secretary of State cannot be removed by certiorari .....	279

(See *Public Health Acts*.)

## LOCAL IMPROVEMENT ACTS.

Exemption of clerk to from personal liability—Execution against goods of commissioners—Mandamus ..	191
--	-----

## LOCAL LAWS.

Ouse River Commissioners .....	28
Sunderland Vestry Act.....	155
Nottingham Inclosure Act .....	158
Stockton-on-Tees town Improvement .....	165
Aberavon Corporation .....	174
Bradford Improvement .....	191
Bradninch Charter .....	201
Chippenham Turnpike .....	254
Carlisle Racecourse .....	255
Northam Bridge and Roads .....	257
Cirencester Roads .....	296
Hull Improvement Act.....	360
Rochester Improvement Act.....	377

## LUNATIC PAUPER.

Ill treatment of by a brother—Culpable negligence...	16
By whom notice of appeal against order of maintenance is to be signed .....	41

When the settlement is in a parish in a Gilbert Union, the order of maintenance should be on the parish and not on the guardians .....	page 368
There is no appeal against an order made under 16 & 17 Vict. c. 97, s. 96, for the maintenance and expenses of a pauper sent to an asylum .....	373

## MAGISTRATES' COURTS PRACTICE.

If a party appears and allows a charge for which the court has jurisdiction to proceed without objection he waives the want of information and summons...	299
---	-----

## MALICIOUS INJURY TO PROPERTY.

A charge of may be made against a prisoner in custody for felony, and summary conviction thereupon .....	172
Damaging a steam-engine so as to prevent its working is within the statute .....	407

## MANDAMUS.

Judgment against clerk to local commissioners—Non-liability—Execution against goods of commissioners ..	190
---	-----

## MANSLAUGHTER.

Turning a vicious horse on a common having an open public foot-path where it killed a child is culpable negligence .....	285
A master not criminally liable for the death of his servant not of tender years, by reason of insufficiency and badness of food and lodging.....	321

## MARKETS AND FAIRS ACT.

What is a stall within sect. 13 of this Act .....	252
---	-----

## METROPOLITAN BUILDING ACT.

Who is the "owner" of a house within the meaning of the Act .....	293
One month's notice of action under s. 108 applies to a class—The words "other person" include persons having official duties, and not a builder .....	392

## METROPOLIS COMMISSIONERS.

Have jurisdiction to suspend licences of omnibus drivers .....	68
--	----

## METROPOLIS LOCAL MANAGEMENT.

Remedy for works causing damage beyond the district S. 75—What is an "erection," "building," or "structure" under this section .....	33
Boundary of parishes—Contribution order .....	122
Contractor liable for not building according to regulations of .....	140
Powers to prevent nuisances in first Act do not apply to the extended area .....	162
Liability of contractor and owner for negligence in making a drain under this Act—Nuisance.....	231
Principle of a sewers rate—Separate sewerage district S. 69—New sewers—Cost of constructing house drains, when on the vestry and not on the owner...	347
Compensation for land affected by sewers—Transfer of liabilities of commissioners of sewers .....	350
Where a Local Board's drainage works polluted a stream which flowed through plaintiff's land out of the district, the remedy is by action, and not under the compensation clauses of the Metropolis Local Management Act .....	362

## MISDEMEANOR.

Disobedience to Local Government Act in bringing forward a house into the street.....	17
---	----

MUNICIPAL CORPORATION.

Not liable for costs of an attorney not retained under the common seal .....	page 28
Invalid conviction under for assaulting a constable ...	41
When a charity held to be within the Municipal Act...	91
The owner of rated property in the town is a good relator for a <i>quo warranto</i> , though he has not a vote .....	154
A charter granted on petition of a majority at a meeting is not void because a majority afterwards opposed it .....	174
A conviction by the County Court for bribery at a municipal election does not create a six years' disability from office .....	266

MURDER.

On the high seas—Proof of register of ship .....	302
--	-----

MUSIC AND DANCING LICENCE:

A ballet is not a stage-play—The music halls case	395
---	-----

NEGLIGENCE.

Public commissioners not answerable for injury by ...	74
Liability of owner of a straying horse for damage done	283

NEWGATE.

(See *Prison*.)

NIGHT POACHING.

Waste by the side of a highway is not open land within the 9 Geo. 4, s. 49.....	266
---	-----

NUISANCE.

The owner of property cannot give into custody a person found committing a nuisance there.....	50
By working a quarry near a public street.....	168
The Court will not grant an injunction to restrain an anticipated nuisance, as work in course of construction by the town of Kingston to convey its sewage to the Thames .....	342
Where a Local Board in constructing drainage works polluted a stream which flowed through plaintiff's land out of the district, the remedy is by action, and not under the compensation clauses of the Metropolis Local Management Act .....	362
Liability of occupier of premises for having an unfenced hole near a highway .....	394

NUISANCE REMOVAL ACTS.

Justices may fine owner, under s. 14, for disobedience of order, although it is addressed to the nuisance committee as well as to the owner .....	261
---	-----

OMNIBUS.

Commissioners of Metropolitan Police may suspend licence of omnibus drivers.....	68
--	----

OVERSEER.

Appointment of a servant occupying the house as part of his service .....	42
What is a sufficient appointment of an assistant-overseer.....	171
A farm bailiff hired at 14s. per week, and the occupation of a cottage, is a substantial householder qualified for this office .....	404

PARISH LAW.

What is the boundary of a parish.....	122
Meaning of term "inhabitant".....	155

What is a sufficient appointment of an assistant-overseer .....	page 171
Time for taking poll under Small Tenements Act.....	194
Exemption of a hamlet from highway rate—Part of one parish rated in another .....	200
Liability of incoming tenant for proportionate part of rate .....	215
Where new ecclesiastical parishes are created, the incumbent of the new chapelry not entitled to surplice fees unless resigned by incumbent of the parish .....	241
One of two churchwardens cannot join the other in a suit for church-rates.....	243
In district parishes burial fees payable to incumbents	316

PERJURY.

Sunday beer trading—Jurisdiction of justices .....	23
On an information for trading in beer on a Sunday—Summons—Indictment—What is sufficient corroborative evidence .....	299
In an action in the County Court the defendant's name is material to the issue, and a false statement of it is perjury.....	307

POACHING.

(See *Game Laws*.)

POLICE.

Exemption of county police from turnpike toll....	257
---	-----

POLICE, COUNTY.

A single parish may be a separate district—Objection to report .....	226
--	-----

POOR-LAW.

Settlement by apprenticeship .....	26
A reformatory is liable to be rated.....	31
Removability from one parish to another parish in the same union .....	52
Liability of incoming tenant for proportionate part of rate .....	215
Time for giving notice and grounds of appeal against an order of removal—To which sessions— <i>Reg. v. The Justices of Suffolk</i> overruled .....	233
Settlement by estate—Grant of lease to a squatter by lord of the manor.....	249
Settlement—What is a break of residence .....	312
Union assessment committee—The redeposit of the valuation list after alteration must be by the overseers .....	320
Where a lunatic pauper's settlement is in a parish in a Gilbert Union, the order of maintenance should be on the parish and not on the guardians .....	368
There is no appeal against an order for the maintenance and expenses of a lunatic pauper sent to an asylum .....	373
Residence need not be in a house; sleeping in the open air will be a residence to give status of irremovability	382
Settlement by renting a tenement—What is a hiring for a year .....	401
A farm bailiff engaged as a weekly servant at 14s. per week, and the occupier of a cottage rent free, is a substantial householder qualified to fill the office of overseer .....	404

POOR-RATE.

A reformatory not liable to .....	31
Meaning of "net annual value of works" reasonably expected to let from year to year—Cotton-mill ...	71
Assessment should be made at the rent that might reasonably be expected to be obtained, not at the actual rental .....	74
Principle of assessment—Deductions to be made from gross estimated rental .....	144

Railway company not liable to for a right of running over another line .....	page 146
Is sufficiently demanded by a collector employed by the overseers to support a summons by him for non-payment.....	152
A pauper lunatic asylum is assessable on the lower scale, although receiving patients not being paupers	277
National school-houses are liable to though no profit is made of them .....	308
Occupiers of gasworks erected by the Crown at Aldershot are liable to .....	309
Meaning of beneficial occupation—Rateability of premises occupied by servants of the Crown .....	331
Rating of small tenements—Full rateable value should be inserted.....	384
A contract to take beer from the landlord of a public-house in consideration of a smaller rent does not lower the rateable value .....	384
A sum paid for water, even though by the landlord, is not an item for deduction in estimating the net annual value .....	403

## POOR REMOVAL.

(See *Poor-Law*).

## PRINCIPAL AND SURETY.

(See *Friendly Society*).

## PRISON.

Committals for non-payment of poor-rate may be to Whitecross-street prison, but not to Newgate .....	313
--	-----

## PUBLIC CARRIAGE.

What is such—Liability to payment of toll on each passing of the gate .....	354
---	-----

## PUBLIC HEALTH ACT.

Right of drainage into a ditch—Remedy is under the Act, and not at equity .....	121
Board are empowered only to level private ways, not to raise them to a level with adjoining streets .....	151
Validity of bye-law made by when there was also a Local Improvement Act .....	165
Award under must be made within three months—Court cannot enlarge time for .....	192
Action by Local Board of against overseers for contractor—Absence of a specification in the contract not an answer .....	384

(See *Health, Public*).

## PUBLIC HOUSE.

Class of houses to which alehouse licence extends ...	25
Sale of beer, &c., during prohibited hours—Person going by train is a traveller .....	155
So is a person walking out of town into the country...	160
Proof that he is not a traveller is on the informer.....	160

## QUARTER SESSIONS.

May punish counsel for contempt .....	29
Jurisdiction of to try conspiracy .....	67
Jurisdiction of subsequent sessions to order costs when reference ordered without naming them .....	280
Court will not remove an indictment for felony from grounds of prejudice in the locality—The recorder should send it to the assizes .....	326

## QUO WARRANTO.

The owner of a rated property in the town is a good relator, though he has not a vote .....	154
---	-----

## RAILWAY.

Becoming a highway for the construction of a bridge is not liable to keep the approaches in repair .....	85
Not liable to be rated for a right to run over another line .....	146
Land used for sidings and standing carriages necessary for conducting the traffic of a railway is rateable, under a Local Improvement Act, at the lower rate as land used as a railway .....	406

## RATING.

Reformatory liable to .....	31
Of a cotton-mill—Meaning of term annual value.....	71
Of a farm—Actual rental—Real value.....	74
To church-rate—Liability of prebendal and common lands—Equality of rate—Rule of rating .....	126
Railway not liable for right of running over another line .....	146
Under a Local Inclosure Act for expenses of Act ...	158
To highway-rate—Of a hamlet repairing its own highways .....	200
County and police-rate—Exemption of borough incorporated by royal charter .....	201
Liability of incoming tenant for proportionate part of rate .....	215
Of pauper lunatic asylums .....	277
Of national school-houses .....	308
Of occupiers of gasworks erected by the Crown at Aldershot .....	309
Liability of servants of the Crown to be rated to the poor-rate for premises occupied by them as such...	331
The full rateable value of the tenements should be inserted under the Small Tenements Act.....	384
A public-house bound to take beer from the landlord on consideration of lesser rent is not therefore to be placed on a lower rateable value .....	384
A sum paid for water, even though by the landlord, is not a deduction in estimating the net annual value	403
Sidings and turn-tables occupying ten acres, used for loading trucks and standing carriages, rateable as land used as a railway, under a Local Improvement Act, making such land rateable at one-fourth only	406

(See *Church-rate—Poor-rate*).

## RECEIVING.

Recent possession is evidence of .....	21
--	----

## REMOVAL (POOR).

(See *Poor Law*).

## SALMON FISHING.

What is a fixed engine within sect. 11 of the Act of 1861 .....	178
---	-----

(See *Fisheries*).

## SEARCH WARRANT.

Must be founded on an information that discloses a charge of felony .....	97
---	----

## SETTLEMENT.

By apprenticeship.....	26
By estate—Grant of lease to a squatter by lord of the manor .....	249
What is a break of residence .....	312

(See *Poor Law*).

## SEWAGE.

(See *Nuisance*).

## SHOOTING.

Injury done by firing into a crowd .....	23
--	----



<b>SMALL TENEMENTS ACT.</b>		
Time for taking poll for adoption of.....	page	194
The full rateable value of the tenements is to be inserted in the rate-book .....		384
<b>SOLDIERS.</b>		
Not exempt from toll for passing over a floating bridge .....		268
<b>SUMMARY CONVICTION.</b>		
On an appeal against prosecutor is liable to costs, though he does not appear .....		148
<b>THAMES EMBANKMENT ACT.</b>		
Injury to owner of wharf—Compensation .....		3
<b>THEATRE.</b>		
Pepper's Ghost, having a dialogue, is an entertainment of the stage under the Theatres Act .....		281
A ballet of action is not within the Licensing Act—The case of the Music Halls.....		395
<b>THREATS.</b>		
Demanding money by will be sustained, though the money was obtained, and it was larceny .....		169
<b>TOLL.</b>		
Exemption from under a local Act—For seafaring persons—Who are such.....		8
<b>TOWNS IMPROVEMENT ACT.</b>		
Validity of a bye-law—Local Act .....		165
<b>TRAVELLER.</b>		
A person going by train is a traveller entitled to refreshment .....		155
So is a person walking into the country.....		160
Construction of the term "traveller" in the statute...		160
<b>TURNPIKE.</b>		
Parochial contribution towards deficiency in trust fund	4	
Evasion of toll by taking horses from one team that had passed and adding them to another that had not passed.....		250
Liability under local Act to subsequent tolls on the same day—Carriage having a modified licence to carry passengers .....		254
Exemption of county police from toll .....		257
A floating bridge is not within the clause in the Mutiny Act that exempts soldiers from toll .....		268
Liability of a stage coach or waggon to several tolls on the same day .....		296
What is a carrier's cart or stage-coach—Exemption from more than one payment of toll on the same day .....	page	354
Security upon tolls—Sinking fund—Contribution by parish to make good deficiency of repairs of turnpike-road—Construction of statutes .....		377
<b>UNION ASSESSMENT ACT.</b>		
The redeposit of the revised list after correction by the committee must be by the overseers .....		320
<b>UNLAWFUL WOUNDING.</b>		
By shooting into a crowd without malice against any one in particular .....		23
<b>VAGRANCY.</b>		
A previous conviction under the Vagrant Act must be proved by production of the record filed with the quarter sessions.....		150
The current coin of the realm not an instrument of gaming under the Vagrant Act.....		154
A wife not a competent witness against her husband in a charge of desertion under this Act .....		177
<b>VENUE.</b>		
The court will not change the venue in an indictment for any other cause than inability to obtain a fair trial .....		405
<b>VESTRY.</b>		
For making church-rates irregularly at, duty of chairman .....		1
<b>VEXATIOUS INDICTMENTS ACT.</b>		
Not necessary that it should appear on the record that the conditions of this Act have been complied with .....		81
<b>WATCHING AND LIGHTING.</b>		
Nullity of rate for, by reason of a wrong heading.....		53
<b>WATERCOURSES.</b>		
Injury to by conveying sewers into them—Powers of local boards .....		69
<b>WEIGHTS AND MEASURES.</b>		
A weighing machine whose index marks wrongly is subject to the penalty, though in fact adjusted at each weighing .....		176
<b>WHITECROSS-STREET PRISON.</b>		
(See Prison.)		



# REPORTS OF ALL THE CASES

DECIDED BY THE

## Superior Courts

RELATING TO THE

## LAW ADMINISTERED BY MAGISTRATES

AND TO

## PAROCHIAL AND MUNICIPAL LAW.

COMMENCING HILARY TERM 1864.

Priv. Co.]

RICHARDS v. BIRLEY.

[Priv. Co.]

### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,  
Barrister-at-Law.

Thursday, Feb. 18, 1864.

(Present—The Right Hon. Lord KINGSDOWN,  
KNIGHT BRUCE, L. J., TURNER, L. J., and Dr.  
LUSHINGTON.)

RICHARDS v. BIRLEY.

*Church-rate—Illegal items in estimate—Irregularity at  
vestry meeting—Duty of chairman—Costs of resisting  
illegal rate—Discretion of Ecclesiastical Court—  
Appeal on the point of costs only.*

*Where a vestry meeting is held for the purpose of  
passing a church-rate, and the churchwardens produce  
an estimate containing items alleged to be illegal, such  
as an item for warming the church, the chairman  
ought to allow the question of these items, and of the  
quantum of the rate, to be first disposed of, before the  
motion for a church-rate is put.*

*It is no legal ground for refusing a vote tendered at the  
poll that the voter's rates had been paid, not by him-  
self but by other persons in order to enable him to vote;  
but in order to vitiate the vote on that ground, the  
rejected voter ought to have tendered his vote.*

*Where the Ecclesiastical Court in a suit for subtraction  
of church-rate holds the rate to be void on the ground  
of irregularities at the vestry meeting, but nevertheless  
in its discretion refuses to give the deft. ratepayers  
their costs of the suit, if this discretion has been bona  
fide exercised by such court, the Privy Council will not  
entertain an appeal solely on the ground of this refusal  
of costs.*

This was an appeal from a decree of the Chancery  
Court of York in a cause of subtraction of church-  
rate.

The apps., the defts. in the court below, were co-  
partners, being householders and parishioners of the  
parish of Kirkham, in the county of Lancaster,  
and province of York. The resps. were the church-  
wardens of the said parish.

The parish of Kirkham, previous to 1840, con-  
sisted of fifteen townships, but by order in council  
all except two were formed into separate ecclesias-  
tical districts. The parish now consisted of the  
townships of Kirkham and Medlar with Wesham.

MAG. CAS.—VOL. III.]

Since 1840 the inhabitants of these townships have  
been accustomed to repair the parish church of  
Kirkham, and to provide things necessary for  
divine service, &c.

On the 10th Jan. 1861 the churchwardens and  
parishioners of the parish of Kirkham met in the  
vestry of the church, pursuant to due notice, for the  
purpose of laying a rate for the requisite repairs,  
cleansing and support of the said church, and for  
the purpose of providing bread and wine for the  
celebration of the Holy Communion, and for all  
other customary and incidental expenses connected  
with the due celebration of divine service in the  
said church, or incidental to the office of church-  
wardens. The vicar of the parish took the chair,  
and the churchwardens produced the following esti-  
mate of expenses.

The Churchwardens' estimate of expenses for the year.

Wine for Holy Communion .....	£2	0	0
Bread do. ....	0	10	0
Moore Michael, Copying Parish Register.....	1	10	0
Gas Company's Account for lighting.....	6	0	0
Vestry Clerk .....	3	3	0
Oakey, Rate book.....	0	5	0
Coal and Coke for heating Church.....	7	10	0
Jno. Ward for Candles, Brushes, &c. ....	2	5	0
Swarbrick, Washing .....	1	12	0
Jno. Wray, Salary .....	7	10	0
Do. for heating the Church.....	2	10	0
Do. for winding Clock .....	1	5	0
Do. Sundries .....	0	15	0
Ringers .....	13	4	0
Wardens for collecting Rate, and other expenses .....	2	14	0
Sidesmen .....	1	2	6
Court Fees .....	12	10	0
Davis, repairing Organ .....	3	0	0
Guardian Assurance Office.....	4	2	0
Rd. Lund .....	0	16	9
Roberts .....	0	13	1
Winstanley .....	0	11	6
Ward (Smith) .....	0	12	10
Catterall .....	5	8	7
Ward, Rd.....	0	14	5

8 17 2

70 8 0

3 3 0

£87 5 0

An original motion for a rate of 1½d. per pound  
was duly seconded; whereupon an amendment was

B

Priv. Co.]

RICHARDS v. BIRLEY.

[Priv. Co.]

moved and seconded that the item in 'the said estimate relative to warming the church should be struck out of the estimate; but the vicar, who was chairman, refused to put such amendment, and it never was put.

It was next moved and seconded by way of amendment to the said original motion for a rate, that such vestry meeting should be adjourned for six weeks, for the purpose of affording reasonable opportunity to the parishioners and inhabitants of Kirkham to raise and pay to the said churchwardens by voluntary subscriptions the said amount estimated by the churchwardens to be necessary; but the chairman refused to put, and never did put to the meeting the said amendment.

It was further moved and seconded that no rate be made; but the said chairman refused to put, and never did put this motion.

At the said vestry meeting, when the churchwardens' estimate was read, the same was not duly or at all put to the said meeting for their approval; and exception being made to the estimate, the said chairman ruled that such exception was then out of order.

The said estimate contained divers items which were not necessary or proper to be, and which could not legally be, included in a rate made for the repair of the said church and for the performance of divine service therein, and in particular the said estimate and rate so contained one item in the words and figures following, to wit: "Vestry Clerk, 3*l.* 3*s.*, and one other item in the words and figures following, to wit: "Guardian Assurance Office, 4*l.* 2*s.* 6*d.*"

The chairman refused to put the items of the said estimate of the churchwardens to the meeting *seriatim*, or at all except as once hurriedly read by the said Thomas Langton Birley, one of the churchwardens, and one of the promoters, and the chairman also declared that he would not allow the said items, or any consideration of them, or any amendment to any motion to be gone into before or until the resolution to lay a rate moved and seconded by the churchwardens was determined. And thereby the vestry meeting was prevented and precluded from taking into consideration the matters of intended amendments, which were necessary and proper to be considered by the said meeting in determining what amount was necessary to be provided for the repair of the parish church and the performance of divine service therein, and how such amount was to be raised.

The original motion being put from the chair and negatived by a show of hands, a poll was duly demanded and fixed for the 14th Jan. 1861. Michael Sharry, who was then a parishioner and inhabitant of the parish, and then resident and rated to the poor thereof, and who had not refused or neglected to pay any rate for the relief of the poor of the said parish of Kirkham, which had been made or become due within three calendar months then immediately preceding, tendered his vote at the poll; the chairman refused to receive or record the same, and in consequence of such refusal the proper vote of the said Michael Sharry was neither received nor recorded thereat. It was then urged upon the said William Law Hussey that the said vote was a legal and proper vote, and ought to be received and recorded; the chairman insisted that the said Michael Sharry was not entitled to have his vote recorded in the said poll, because the rate of the said Michael Sharry had not been paid by himself, but had been paid for him by some other person, namely, by the landlord of the said Michael Sharry, who paid the said rate by reason of some private arrangement between them for that purpose.

Divers other parishioners and inhabitants whose rates had in point of fact been paid for them by

other persons by reason of certain private arrangements between such ratepayers were within the sound and hearing of the voice of the said chairman when he so stated and refused, and were thereby deterred and prevented from so tendering their said votes by reason of such declaration and refusal.

The numbers at the close of the poll were for the church-rate 198, against the rate 156, leaving a majority in favour of the rate of 1*l.* 4*d.* in the pound.

At the time the rate was made Messrs. Richards and Bowdler jointly occupied a coal hill and office in the parish at the rateable value of 6*l.* 10*s.* and they were duly rated to the said church-rate at the sum of 9*l.* 4*d.* This sum was duly demanded and refused, and a summons was taken out before the justices to enforce payment; but they gave notice that they disputed the validity of the rate, whereupon the summons was dismissed.

The churchwardens then instituted the present suit of subtraction of church-rate in the Chancery Court of York.

The suit duly came on for hearing in the Chancery Court of York on the 29th May 1863; and the Chancellor of the court, after hearing counsel on both sides, said it was not necessary that he should give his general views on the question of church-rates, but there was one point in this case which he could not hesitate to say he thought was so fatal to the rate, that without entering into the other four or five objections (and there were two or three that he should hesitate about) he must decide against it, and it was very possible the result of that decision would be to carry it up to the court above, because there might be an objection to his decision as to the costs. He could not establish the rate, because the course adopted, to his mind, was radically wrong. It was quite clear that means ought to have been afforded to the dissenters to test the quantum of the rate by the preliminary objections, and one of the material ones he considered to be that which related to the warming of the church; for though the sum was not large, the principle was one which it was quite material to maintain. There was no attempt altogether to render the meeting an abortion; and when they came to enter into the question of supply, it was according to common sense that these things should be determined by *seriatim* objections which might have been made to a vast many of the items. The result might have been that the sums might be 1*l.* 4*d.* or 1*l.* in the pound; it was depending on that principle. The main thing was the principle; and before they came to the question of how much must be granted, must depend on the proposition of the quantity. Churchwardens have an onerous and invidious duty to perform; and in this case, there being no appearance whatever of any conscious irregularity or desire to obstruct the reasonable views of the ratepayers in the vestry, he should make no order as to costs, and leave both parties to pay their own costs. He was certainly decidedly of opinion that the vote of Michael Sharry should have been taken. He stated this because it was important for the regulation of churchwardens and vicars who might preside on any future similar occasion. Had the others tendered their votes, he thought it was quite clear it would have vitiated the rate at once.

And the said Chancellor finally decreed accordingly on the 11th June 1863.

The debts now appealed to Her Majesty in Council.

Dr. Deane, Q.C. and Quain, for the apps., contended that the decision of the judge below in refusing the costs was erroneous. He seemed to proceed on the assumption that because the churchwardens did their duty in one sense they ought to be exempted from paying costs. But he lost sight of the important fact that the rate was entirely bad

V.C. W.]

MACEY v. THE METROPOLITAN BOARD OF WORKS.

[V.C. W.]

and the irregularities were gross, and the defts. had done only their duty in resisting it. The rate contained items clearly illegal, and yet no opportunity was allowed the apps. to dispute those items. [Lord KINGSDOWN.—How can you get over the case of *Attenborough v. Kemp*, 5 L. T. Rep. N. S. 67? You are appealing only on a question of costs.] That case does not preclude us from maintaining this appeal. There the facts were very different. In the present case the apps. had done all they could to resist the rate, and they were held to be right. The ordinary rule therefore ought to have effect that they should get their costs. The judge has proceeded on a misapprehension or mistake, and the court in *Attenborough v. Kemp* expressly excepted such a case from the rule that no appeal is allowed on a question of costs merely.

Sir H. Cairns, Q.C. and S. Shepherd, for the resps., were not called upon.

Dr. LUSHINGTON.—Their Lordships are of opinion that it is expedient and necessary to adhere to the rule which was laid down, and the principles enunciated in the case of *Attenborough v. Kemp*, and they think that the apps. on the present occasion have not brought themselves fairly within the meaning of that rule. According to that case it was stated, "Their Lordships do not wish to lay down as a general rule that in no case could there be an appeal in respect of costs, and of costs alone; because there might be cases where discretion has not been fairly exercised upon the question at issue, and the decision of the court below has proceeded upon mistake or misapprehension." Now, whether the discretion exercised by the court below in this case was wise or not, is a question which it is not necessary to discuss; for their Lordships do not discover that that discretion has not been fairly exercised. Neither can they find out that the decision of the court below proceeded upon any mistake or misapprehension. The judgment in that case goes on to say: "Such cases their Lordships desire to leave untouched; but where there has been *bona fide* care and discretion exercised on the part of the judge who has decided the case, their Lordships have no hesitation in stating their opinion to be that, in such a case, no appeal will lie in respect of costs alone." Their Lordships have no reason whatever to doubt that on the present occasion *bona fide* care and discretion was exercised, therefore the case merely resolves itself into this, not, as their Lordships say, in that case, whether the discretion was exercised fairly or *bona fide*, but whether the discretion was exercised wisely or not; and that is a ground upon which their Lordships will not permit an appeal to be prosecuted. We are therefore of opinion that it is not necessary to trouble the counsel for the resps., and we must dismiss this appeal with costs.

*Decree affirmed with costs.*

Apps.' solicitors, Toller and Sons.

Resps.' solicitors, Lloyd and Chevallier.

#### V.C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, ESQs.,  
BARRISTERS-AT-LAW.

March 8 and 4, 1864.

**MACEY v. THE METROPOLITAN BOARD OF WORKS.**  
*Thames Embankment Act 1862—Injury to owner of wharf—Compensation—Injunction.*

*Where damage is occasioned to a party whose premises are not entered upon, but are injuriously affected by the exercise of the powers given by the Thames Embankment Act (25 & 26 Vict. c. 93), and for*

*which damage compensation is required to be made by sect. 14 of that Act, the payment, ascertaining, or depositing of the amount of compensation is not a condition precedent to the commencement of the works which occasion the damage.*

The plt. in this suit, James Muford Macey, is a builder, who occupies a wharf and premises known as Milford-wharf, situate in Milford-lane in the Strand, and having a frontage to the river Thames. The plt. holds the premises under a lease for a term of which about twenty-five years are unexpired. The plt. carries on his business at the said wharf, and a great part of his business consists in sawing up and utilising large balks of timber, which are brought by barges to the river front of his said wharf, and are there unloaded and placed on the wharf.

By the Act 25 & 26 Vict. c. 93, known as the Thames Embankment Act 1862, the defts. are empowered to embank the left bank of the river Thames from Westminster-bridge to Blackfriars-bridge.

By sect. 1 of that Act the Lands Clauses Consolidation Act 1845 (with certain exceptions) is incorporated therewith; and by sect. 4 the word "lands" is made to include easements, interests, rights and privileges in, over, or affecting lands.

Sect. 8 defines the works authorised by the Act, among which are, "the making and maintaining an embankment and viaduct on the left bank of the river Thames, to be constructed in whole or in the greater part on the bed or foreshore of the river Thames;" and, "the reclaiming and inclosing all or so much of the bed or foreshore of the river Thames as shall lie between the present left bank of such river and the said intended embankment."

Sect. 14 provides, that it shall be lawful for the board to inclose and fill up the bed and shore of the river Thames, as shown in the deposited plans; and also to remove, destroy, alter, divert, stop up, or inclose such wharves, jetties, quays, or other property as shall in the judgment of the board be necessary to be removed, destroyed, altered, diverted, stopped up, or inclosed for the purposes of this Act, making compensation to all persons having any interest in any wharves, jetties, quays, or other property taken for or injuriously affected by such works, or other the exercise of the powers of the Act.

By the 30th section, the provisions of the Acts relating to the local management of the metropolis, viz., the Acts 18 & 19 Vict. c. 120; 19 & 20 Vict. c. 112; and 21 & 22 Vict. c. 104, are extended and applied to the objects of the present Act, so far as not inconsistent with the provisions thereof.

Part of the plt.'s wharf and premises, and the whole of his river frontage, with such rights and easements as he might be entitled to over, or in respect of the bank, or shore, or waterway of the Thames, lie within the limits of deviation defined by the Act.

In Oct. 1863 the defts. gave notice in writing to the plt., that they were about to construct the embankment in the manner shown on a plan accompanying the notice, and to exercise the powers given them by the above 14th section, and requested the plt. to give notice whether he made any, and, if any, what claim for compensation in respect of the construction of the works, and on what account; the defts. offering to treat with the plt. in respect of any compensation to which he might be entitled.

The defts. did not propose to take any part of the plt.'s wharf, but only to construct the embankment along the foreshore in front thereof.

The plt. in reply, on the 9th Nov. 1863, stated the nature of his interest in the said wharf and premises, and claimed the sum of 12,600*l.* in respect of his premises being injuriously affected by the intended works. On the 24th Feb. 1864 the

V.C. W.]

MAWBY v. HOPKINSON.

[Q. B.]

defts.' agent called on the plt., and read to him a letter, by which it appeared that the defts. had given orders that steps should be at once taken to fill up the bed of the Thames in front of Milford-wharf to the height of four feet above high-water mark.

The plt. thereupon stated that if the defts. did anything in contravention of the powers of their Act he should at once apply to the Court of Ch. for an injunction.

On the 26th Feb. 1864, by the defts.' order, a barge containing sixty tons of chalk was moored opposite to the plt.'s wharf, and workmen began throwing the chalk into the river close to the frontage of the wharf.

On the 27th Feb. 1864 the plt. filed his bill in this suit, which stated the above facts, and alleged that the defts. had not yet made or offered to make him any compensation, that they refused to do so, and that his business would be most seriously affected, and in some respects utterly destroyed, by the execution of the intended works, and the bill prayed that the defts. might be restrained by injunction from entering on or taking or continuing in possession of or carrying on their works on, or disturbing the plt. in his quiet enjoyment of the bed or foreshore of the river in front of his premises, unless and until they should have complied with the provisions of the Lands Clauses Consolidation Act so far as the same are incorporated with the special Act. An interim order had been obtained, and the cause now came on upon a motion to continue the injunction until the hearing of the cause.

*Osborne, Q.C.* and *Pontifer*, for the plt., contended that the compensation to which the plt. was entitled ought to be ascertained by a jury, under the provisions of the Lands Clauses Consolidation Act, as a condition precedent to the defts.' commencing their works in front of the plt.'s wharf. The plt. is entitled to an easement over the foreshore in front of his wharf, and as, by sect. 4 of the special Act, the word "lands" is made to include "easements," the case is brought within sect. 84 of the Lands Clauses Act. The plt. is also entitled to the actual support of his barges on the mud of the foreshore at low water. If the defts. are right the plt. might not obtain any compensation till the works are entirely finished. They cited

*Attorney-General v. Conservators of the Thames*,  
1 Hem. & Mil. 1;

*Hutton v. London and South-Western Railway*, 7 Hare, 259.

*Rolt, Q.C.*, *Sir H. Cairns, Q.C.* and *C. Hall*, for the defts., contended that the plt.'s argument would equally apply to the case of a yard abutting on a road leading down to the river. The plt.'s case is no higher in principle; the only difference is in the amount of damage. The keeping barges lying at a wharf would be a nuisance if the river were not wide enough for every one; just as a cart standing on a highway beyond a reasonable time. The plt. has no right to keep his barges resting on the mud, except as incident to the right of unloading. The powers of sect. 14 in the special Act are much larger than would be given to a company, because it is a great public work that is to be executed. It must be seen what the damage is before the compensation can be assessed. They cited

*North London Railway Company v. Metropolitan Board of Works*, John. 405;

Sects. 27, 39, 75, 77, 78, 81 of the special Act, and sects. 69, 150, 151, 165, 225 of the Act 18 & 19 Vict. c. 120, were also referred to.

*Osborne, Q.C.* in reply.

The VICE-CHANCELLOR—The principles applicable to this case have been so fully argued before, that the

court would not be justified in interfering with the exercise of the powers of this Act. In this particular case it appears that the plt. has neither an easement over nor a right in land. He has no land nor any other peculiar right on the foreshore. He has nothing beyond the right of access from the river to his wharf, and of loading and unloading his barges there. This is no right in the soil of the foreshore. It is a right like that of the occupier of a house which abuts on a highway, of access from his house to the highway, and passage along the highway. If prevented from entering his own house, he would have a right to compensation for special damage, but he has no right to the soil of the street. The right of passing over the river is exactly similar. The plt. has nothing but this right, in common with other occupiers of wharves. He has no right of keeping his barges on the mud, except for the purpose of loading and unloading, which might not always be possible in one tide. He has no right to block up the highway of the river. The 84th section of the Lands Clauses Consolidation Act relates to cases in which lands are required to be purchased or permanently used, and the 68th section to works injuriously affecting lands; and by the Thames Embankment Act it is enacted that "lands" shall include "easements." The question to be asked here is, are the board about to take and permanently use "lands" (including therein "easements"), or are they only about to affect "lands" injuriously? In building this embankment they are not going to take any land or any easement belonging to the plt.; but they are going injuriously to affect his right of access to his wharf. The case does not rest only on the Lands Clauses Act, but on the special Act, the 39th section of which virtually incorporates the Local Management and Main Drainage Acts. This being so, the 14th section gives power to fill up the bed and shore of the river, and the 15th section to purchase lands, and to purchase and extinguish rights or easements over the shore or bed of the river. Under this power the board might purchase such an easement as a pier; but a general right like the present one was not intended by this section. The Drainage Acts, which are incorporated with the special Act, provide a method of ascertaining the compensation for damage by means of arbitration. But in whatever way the amount of compensation is to be ascertained, the real question in this case is, must the compensation, to which the plt. may be entitled, be paid or deposited before the works can be commenced at all? He really has no right in land which is to be taken; but his property will be injuriously affected by the proposed works. If it were necessary that the compensation should be first paid, it would be necessary that the extent of a contingent damage should be first estimated. On the balance of convenience and inconvenience, it is certainly more convenient that the amount of compensation should be ascertained after the injury has taken place. The court will make no order on this motion.

Solicitors: for plt., *Boys and Tweedies*; for defts., the Solicitor to the Metropolitan Board of Works.

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Wednesday, Jan. 27, 1864.

MAWBY (app.) v. HOPKINSON (resp.)

Turnpike—Repairs of road—Trust deficiency—  
Highway rates.

A Turnpike Act provided for the application of the tolls to payment of (1) expenses of the Act, (2) salaries, (3) interest of debt, (4) repairs of road

Q. B.]

MAWBY v. HOPKINSON.

[Q. B.]

not exceeding 800*l.*, (5) reduction of principal debt, (6) further repairs of road.

The estimated revenue of the trust was 1087*l.*, and expenditure 1017*l.*, and, after allowing for salaries, interest and 800*l.* towards repairs, the surplus, 83*l.*, was applied towards reduction of principal debt. That left a deficiency of 217*l.* to be raised by parochial contributions, and 22*l.* 3*s.* 11*d.* was the contribution claimed from parish B. under 4 & 5 Vict. c. 55:

Held, that justices might make an order under that statute for payment of such contribution from parish B.

Case for the opinion of this court.

At the special sessions of the highways holden for the Petty Sessional Division of Bourn, in the parish of Kesteven, in the county of Lincoln, on the 21st May last, William Hopkinson (hereinafter called the resp.), as clerk to the trustees of the Bourn District of the Lincoln Heath and Market Deeping roads, exhibited an information in writing pursuant to the provisions of the stat. 4 & 5 Vict. c. 56 (which has since been periodically re-enacted, and was last renewed by the statute 23 & 24 Vict. c. 67), before the justices then present, alleging that the funds of the said Bourn district were insufficient for the repair of the said turnpike-road within the said parish of Bourn, and applying for an order for the appropriation of a portion of the highway rate levied or to be levied in the said parish of Bourn, towards the repair of the said turnpike-road. Upon the hearing of the said information an order was made by the said justices that the sum of 22*l.* 3*s.* 11*d.*, part of the rate or assessment levied or to be levied for the repair of the highways in and for the said parish of Bourn, should by the said Robert Osborn Mawby and George Phillips, the surveyors of the highways for the parish of Bourn (hereinafter called the apps.), on the 2nd July then next be paid to the trustees of the said turnpike trust called the Bourn district, which sum of 22*l.* 3*s.* 11*d.* to be wholly laid out in actual repair of such part of the said turnpike-road as lies within the said parish of Bourn.

The apps. being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, have, pursuant to sect. 2 of the said statute, 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this court.

Upon the hearing of the said information it was proved on the part of the resp., and admitted and found as facts, that by the Lincoln Heath and Market Deeping Roads Act 1860, after repealing the former local Act, 3 Geo. 4, it is enacted (sect. 31), that the tolls and other moneys payable to and received by the trustees in virtue and for the purposes of the said Act, within the Bourn district, shall be appropriated and applied as follows:—

1. In paying the proportion to be contributed by the said district of the expenses of and incident to the procuring and passing of the said Act.

2. In paying the salaries of the clerk, surveyor and other officers employed by the trustees in and for the same district, and the other expenses of and incident to the management of the roads therein not exceeding in any one year 150*l.* (exclusive of the costs of prosecuting and defending actions, suits, indictments and proceedings before magistrates, and of the wages of toll collectors, and of the costs of newly erecting toll-houses when necessary.)

3. In paying interest from the commencement of the said Act after the rate of 8*l.* per cent. per annum on the sums of 1775*l.* and 25*l.* borrowed under the provisions of the repealed Act as therein men-

tioned and still subsisting, or on so much thereof as should for the time being be unpaid.

4. In paying the expenses incurred and to be incurred in repairing and maintaining the roads within and constituting the said district, but not exceeding in any one year 800*l.*

5. In reducing and paying off in manner therein-after provided, the said sums of 1775*l.* and 25*l.*, or so much thereof respectively as should for the time being be unpaid.

6. In paying the further expenses of maintaining, repairing and improving the roads within the said district, and of putting the said Act into execution in relation thereto.

And that by sect. 35 it is enacted that when and so often as the sum applicable to the discharge of the same principal moneys respectively shall amount to 200*l.*, the trustees shall apply the same in payment in manner therein mentioned of a proportionate part of such principal moneys.

That the said sums of 1775*l.* and 25*l.* are still subsisting and unsatisfied, there not having been hitherto any sum to be set apart towards payment thereof.

That the proportion to be contributed by the said Bourn district of the expenses of and incident to the procuring and passing of the said Act have been paid off and discharged.

That the annual revenue from tolls, &c., within the said district for the current year will amount to 1087*l.*, a sum exceeding the estimated expenses of maintenance and repairs.

That the salaries of the clerks, surveyor and other officers employed by the trustees in and for the said district, and the other expenses of and incident to the management of the roads therein, will amount for the current year to 150*l.*

That the interest on the said sums of 1775*l.* and 25*l.* for the current year will amount to 54*l.*

That the expenses of repairing and maintaining the roads within and constituting the said Bourn district during the current year are estimated by the surveyor to amount to 1017*l.*, of which sum 169*l.* 3*s.* 7*d.* will, it is estimated, be expended within the said parish of Bourn, the estimate being founded upon the actual expenditure within each parish during the past year.

It was admitted by the apps. that due notice of the intended application had been given.

It was contended on behalf of the apps. that the revenue from tolls, &c. within the said district is sufficient for the repairs and maintenance of the said roads within and constituting the said district, and that by the fourth paragraph of sect. 31 of the Act of 1860 the trustees of the said road are at present limited to 800*l.* in their expenditure upon the maintenance and repairs of the said roads, and they state the account thus:—

An estimated receipt of .....	£1087	0	0
Costs of repairs as per local Act...	£800	0	0
Salaries .....	150	0	0
Interest of debt .....	54	0	0

1004 0 0

Balance of cash in hand 83 0 0

Whilst on the other hand the resps. contended that the said local Act merely limited their expenditure out of the revenues of the said trust to the said sum of 800*l.*, and that they were entitled to spend a sufficient sum to keep and maintain the said road in a good state of repair, and to call upon the different parishes to contribute a sufficient sum to make up the difference between the sum allowed to be deducted by the said Act from the revenues of the said trust, and the amount required to keep the said roads in a good and sufficient state of repair, and they state the account thus:—

Q. B.]

CATOR v. THE LEWISHAM BOARD OF WORKS.

[Q. B.]

Annual revenue .....	£1087 0 0
Salaries and management .....	£150 0 0
Interest .....	54 0 0
Amount to be applied towards the repairs and maintenance of the road (the principal debt being still unpaid) .....	800 0 0
	1004 0 0
Surplus revenue to be applied towards debt being still unpaid .....	83 0 0
Estimated expenses of repairs.....	1017 0 0
Amount to be applied towards such expenses from the annual revenue of the district .....	800 0 0
Deficiency to be raised by parochial contri- butions .....	217 0 0

Our judgment was in favour of the resp., we being of opinion that the said trustees were not limited by the said Act to the expenditure of the said sum of 800*l.* upon the said roads, but that the said Act merely limited the amount to be expended out of the revenues of the said trust to that sum, and that the said trustees were entitled under the provisions of the said Act, 4 & 5 Vict. c. 59, to call upon the different parishes to make up the difference between that sum and the amount required to be expended in keeping and maintaining the said roads in a good state of repair within the said district, and we accordingly made an order on the said apps. for payment by the said apps. of 22*l.* 3*s.* 11*d.*, being part of the rate or assessment levied or to be levied for the repair of the highways in and for the said parish of Bourn, such sum of 22*l.* 3*s.* 11*d.* to be wholly laid out in the actual repair of such part of the said turnpike-road as lies within the said parish of Bourn from which the same is received. The case then set out the order above mentioned.

The question for the opinion of the court is, whether our judgment was in point of law correct, and whether the trustees are limited by the said Act in their expenditure upon the said turnpike-road to the said sum of 800*l.*, or whether they may lawfully expend a larger sum in keeping and maintaining the said turnpike-road in a good and sufficient state of repair, and call upon the different parishes to make up the difference between the said sum of 800*l.* and the amount required for such purpose; and whether the trustees of the said road can call upon the surveyors of the highways of the said parish of Bourn, under these circumstances, to appropriate a portion of their rate to its repairs.

If the court should be of opinion that the said order was legally and properly made, then the said order to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

The 4 & 5 Vict. c. 59 (an Act to authorise for one year the application of a portion of the highway rates to turnpike-roads: continued by 23 & 24 Vict. c. 67, to Oct. 1865), sect. 1, enacts, that justices, upon information exhibited before them by the clerk or treasurer of any turnpike trust that the funds of the said trust are insufficient for the repairs of the turnpike-roads within any parish, &c., may examine the state of the revenues and debts of such turnpike trusts and inquire into the state and condition of the repairs of the road within the same, &c., and if after such information it shall appear to the said justices necessary or expedient for the purposes of any turnpike-road so to do, then they may adjudge and order what portion (if any) of the highway rates, &c., shall be paid by the parish surveyor, &c. to the said trustees, such money to be wholly laid out in the actual repairs of such part of such turnpike-road as lies within the parish from which it was received.

*Field* for the resp.—The order of the justices was

properly made. Sect. 81 of the private Act of 1860 merely directs how the expenditure of the money to be raised under the Act is to be made. It does not limit the repair of the roads to the sum of 800*l.* The roads are not to be left out of repair, and if the funds raised by the Act were not sufficient, the justices had power to make the order in question.

*Beasley* for the app.—The limit of repairs is 800*l.* If this is a good order, the effect of it is to cast on the parish of Bourn an additional burden, which is applied virtually in paying off the turnpike trust debt.

COCKBURN, C. J.—The road is not to be left out of repair, and if the trust-funds are not sufficient, the justices had power to make the order in question.

BLACKBURN and MELLOR, JJ. concurred.

*Order confirmed.*

Monday, Feb. 22, 1864.

CATOR v. THE LEWISHAM BOARD OF WORKS.

*Metropolis Local Management Act—Works causing damage beyond the district—Remedy for—18 & 19 Vict. c. 120, ss. 51, 86.*

*A board of works, in executing drainage works in their district, authorised by the Metropolitan Local Management Act, polluted a stream which in its progress onward flowed through the plt.'s land out of the district:*

*Held, that the plt.'s remedy for damage from the pollution of the stream was under the compensation clauses of the Metropolis Local Management Act, and not by action.*

*Special case for the opinion of the Court.*

The facts are stated in the judgment of the Court. The main facts were, that the board of works drained certain offensive ditches, &c. into a stream in their district which flowed through plt.'s land out of the district, whereby the water of the stream was rendered unfit for cattle and ordinary domestic purposes.

*Bovill* (*Lush* and *Murphy* with him) for the plt.—The nuisance in this case is admitted, and the only question is whether it was lawfully done in the execution of the powers of the Metropolis Local Management Act. If it was, no doubt the plt.'s remedy is under the compensation clauses. But it is submitted that the local board has no power beyond its own district, and for any injury caused by them out of their own district, as in this case, the aggrieved party has a remedy by action. Again, they were bound so to execute their works as not to create a nuisance: (18 & 19 Vict. c. 120, ss. 82, 88, 42, 68, 69, 86, 135, 186.)

*Mellish* (*Raymond* with him) for the defts.—The board by sect. 86 were compelled to drain these places, and if so the compensation clauses apply: (ss. 69, 86.)

*Stainton v. Lewisham District Board of Works*, 26 L. J. 300, Ch.

*Reg. v. Metropolitan Board of Works*, 32 L. J. 105, Q. B.; 9 L. T. Rep. N. S. 139.

Sect. 86 of the Metropolis Local Management Act (18 & 19 Vict. c. 120) enacts that

"Every vestry and district board shall drain, cleanse, cover or fill up all ponds, pools, open ditches, sewers, drains and places containing or used for the collection of any drainage, filth, water, matter, or thing of an offensive nature or likely to be prejudicial to health which may be situate in their parish or district;" and further empowers such board (after notice to and refusal by the owner or occupier of the premises) "to execute such works as may be necessary for the abatement of such nuisance." "Provided that where any work by any vestry or district board done or required to be done in pursuance of the provisions of this Act interferes with or prejudicially affects any ancient mill or any right connected therewith or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby in manner hereinbefore provided; or it shall be lawful for the vestry or board, if they think fit, to contract for the purchase of



[Q. B.]

REG. v. THE WORKSOP BOARD OF HEALTH.

[Q. B.]

such mill, or any such right connected therewith or other right to the use of water, and the provisions of this Act with respect to the purchase by the vestry or board hereinafter authorised shall be applicable to every such purchase as aforesaid.

By sect. 58 of the 24 & 25 Vict. c. 102, it is enacted that,

Whenever it may become necessary for any vestry or district board, for the purpose of carrying out the drainage works, authorised in the Act of 18 & 19 Vict. c. 120, to carry any sewer or work beyond the limits of the Metropolis as defined by that Act, it shall be lawful for any such vestry or district board to execute works in parts situate beyond or without such limits, and to cleanse, maintain and repair such works as they shall from time to time deem necessary, provided always that no work shall be performed or commenced by any vestry or district board beyond the limits of the metropolis as above defined, except for the purpose of continuing or forming part of a work commenced or executed within their respective parish or district.

*Cur. adv. vult.*

BLACKBURN, J.—In this case, which was heard before my Lord, the late lamented Mr. Justice Wightman and myself, and in which no decision had been come to before the death of our late lamented colleague, we have come to the conclusion, though not without some hesitation, that our judgment should be for the defendants. The point may be very shortly stated. The drainage of the district of Lewisham has for many years been carried into a stream called the County Bridge Stream, which stream flows into the river called the Poole river, both of which in their progress onwards flow through land belonging to the plaintiffs, beyond the limits of the Lewisham district. The population and the number of houses in a part of the Lewisham district having of late years greatly increased, and the want of additional drainage having occasioned an accumulation of offensive matter and caused serious inconvenience, the defendants, the Board of Health for the district, executed the drainage works stated in the case, availing themselves, as heretofore, of the County Bridge Stream to carry off the sewage matter. The effect of the additional and more effective branch has been to cause a quantity of offensive matter to pass down into the County Bridge Stream and the Poole river sufficient to pollute the river, which before was affected by the drainage only in an inappreciable degree, to such an extent as to cause substantial injury to the plaintiffs. It is not disputed that for such injury the plaintiffs are entitled to compensation, but the question is whether his remedy is by action or by proceeding to obtain compensation under the 86th section of the 18 & 19 Vict. c. 120. The drainage works executed by the defendants were, beyond all question, such as they were authorised, and indeed required, to make, and it cannot, we think, be disputed that had the damage to the plaintiffs occurred in the district, the only redress to which he would have been entitled would have been by compensation under the 86th section of the 18 & 19 Vict., for it is plain that section contemplates and provides for the possibility of damage being done to water rights by the execution of sewage works, and would comprehend a case in which a stream was polluted by offensive matter being discharged into it. But it was contended for the plaintiffs that the authority and power of the board to carry out the drainage of the district is confined to the limits of the district, and that they are not authorised to do anything that will cause any injury to those who are beyond the local boundary of their jurisdiction. And the 58th section of the subsequent Act, the 25 & 26 Vict. c. 102, is referred to as showing that such a board, in the absence of express statutory enactment, would have no authority beyond the limits of the district for which they are appointed. It is however to be observed that the 58th section of the 25 & 26 Vict. c. 102, has reference to works to be executed beyond the limits of the district, not to an injury arising within the district for

works executed within it. Here all that has been actually done by the board has been done within the district. The injury of which the plaintiffs has reason to complain is only in consequence of what has been done within the district, and, so far as the district itself is concerned, rightly done. Now the words of the 86th section of the 18 & 19 Vict. are sufficiently large to embrace an injury done by the pollution of a stream, whether within the local limits of the district or without; and to hold that the present case does not fall within the provisions would be virtually to establish that no Board of Health or vestry could ever avail themselves, for the purpose of drainage, of a stream flowing beyond the local limits, if any damage should occur to the proprietors or occupiers further down the stream. For if the work causing such injury beyond the boundary ceases, because of such injury, to be within the powers of the local authority, and therefore is actionable, the injury being a continuing one, fresh actions might from time to time be brought and the work causing the damage would have been undone. We cannot think that the Legislature intended to place this restraint on the power conferred by the Act, and we think, therefore, that it will be safer and better so to construe the Act as to make the powers of the local authority and the provisions for compensation embrace such a case as the present. It follows that the proceeding by action was not open to the plaintiffs, and consequently that our judgment must be for the defendants.

*Judgment for the defendants.*

• Saturday, April 23, 1864.

REG. v. THE WORKSOP BOARD OF HEALTH.

*Public Health Act—Rate—Non-corporate district—Rate not signed by five members, nor under seal.*

By sect. 149 of the Public Health Act (11 & 12 Vict. c. 63) it is enacted that, whenever the consent, sanction, approval, or authority of the local board of health is required by the provisions of the Act, "the same shall (in the case of a non-corporate district) be in writing under their seal and the hands of five or more of them."

*Held, that this provision applies only to cases where something is to be done by others requiring the authority of the local board, and not to that which the local board themselves do.*

*Where, therefore, a local board of a non-corporate district resolved to make a general district rate, and made it accordingly, but neither the resolution nor the rate was signed by five members, nor under seal,*

*Held, that the rate was not, on that account, invalid.*

This was a case stated by the Nottinghamshire Quarter Sessions for the opinion of this court.

It appeared that one Alfred Broadhurst was assessed to a general district rate under the 11 & 12 Vict. c. 63 (Public Health Act), and that he appealed to the quarter sessions on the grounds, first, that the rate was for past as well as for future expenses; secondly, that the purposes for which the rate was made were not set forth in the estimate with sufficient particularity; and thirdly, that the rate was not under the seal and hands of five members of the local board. The sessions decided against the appellant with reference to the first two objections, and for him with reference to the third, and therefore quashed the rate subject to the present case.

The 87th section empowers the local board to make a general district rate.

The 98th section enacts that the local board of health, before proceeding to make any general rate, &c.,

Shall cause an estimate to be prepared of the money required for the purposes in respect of which the rate is to be made,

Q. B.]

SHARP v. FIELDS.

[Q. B.]

showing the several sums required for each of such purposes, the rateable value of the property assessable, and the amount of rate which for those purposes it is necessary upon each pound of such value; and the estimate so made shall forthwith, after being approved of by the said local board, be entered in the rate-book and be kept in their office open to public inspection during office hours thereat.

By sect. 35 it is enacted that the local board shall, in the case of a non-corporate district, cause to be made a seal for the use of such board in the execution of the Act:

And documents, or copies of documents, purporting to proceed from the said local board, and to be signed by any five or more members thereof and to be sealed or stamped with such seal or (in case of a corporate district) to be sealed with the common seal, shall be received as *prima facie* evidence in all courts and places whatsoever.

The 149th section enacts

That whenever the consent, sanction, approval, or authority of the general board of health is required by the provisions of this Act, the same shall be in writing under their seal and the hands of two or more members thereof; and whenever the consent, sanction, approval, or authority of the local board of health is so required, the same shall (in the case of a non-corporate district) be in writing, under their seal and the hands of five or more of them, or (in case of a corporate district) under their common seal.

The district in question was a non-corporate district, and the rate was made by a resolution of the local board, which was signed only by the chairman and was not under seal, and the rate also was signed only by the chairman and was not under seal.

The estimate upon which the rate was made contained the items as follows:

Salaries of officers .....	£178 10 0
Rents, rates and collectors' poundage .....	70 18 3
Watering the public streets and expenses of fire engines .....	61 0 0
Election expenses, filling in and covering old sewers and drains, and cleansing sewers and outfall .....	65 0 0
Law charges, surveyors' estimates and incidental expenses .....	74 0 0

Welsby (Cave with him) now appeared in support of the order of sessions, and contended, first, that the rate was void inasmuch as neither the resolution for making it, nor the rate itself, was signed by five of the members of the local board, nor under seal. [COCKBURN, C. J.—Is not the meaning of the section, that where others rely upon the authority of the local board for an authority for what they do, that authority shall be under the hands and seal of the board, and can it be necessary where the act in question is that of the local board itself?] No such distinction is made in the section. Secondly, that the rate was void inasmuch as the estimate upon which it was made did not show the several sums required for each purpose, "election expenses, filling in and covering old sewers and drains, and cleansing sewers and outfall," being all included in one item. He abandoned the objection of the rate being as well for past as future expenses.

Bovill, Q. C., in support of the appeal, argued, first, that the provision requiring the consent, sanction, approval, or authority of the local board to be under their seal, and the hands of five of them, does not apply to an act done by themselves, but only applies to their consent, sanction, approval, or authority when required to give validity to the acts of others, and that the course to be adopted by the local board with reference to their own acts is pointed out by the 34th section, which only requires that questions shall be decided by a majority of votes; secondly, that the provision of sect. 98, relative to the estimate, is directory only and not compulsory, and its non-observance does not invalidate the rate:

*Reg. v. The Justices of Leicester*, 7 B. & C. 6;

*Lefever v. Miller*, 26 L. J. 175, M. C.;

*Reg. v. Fordham*, 11 A. & E. 73;

*Noel v. Mayor of Worcester*, 9 Ex. 457.

COCKBURN, C. J.—We have no difficulty whatever as to the objection taken with reference to the ab-

sence of the signatures of five members of the local board, and the seal, being of opinion that there is no foundation for it, and that the view we early took in the argument of the meaning of the 149th section is the correct one, namely, that the section applies only to cases where something is to be done by others, requiring the authority of the local board, and not to that which the local board themselves do. With regard to the other objection, it will be more satisfactory to consult the authorities relied upon before giving judgment.

*Cur. adv. vult.*

Attorney for app., Clough, Worksop.

Attorney for resps., Appleton, Worksop.

Saturday, April 30, 1864.

SHARP (app.) v. FIELDS (resp.)

"Seafaring person"—Who is—Exemption from toll under a local Act.

By a local Act, passed in 1834, the company of proprietors of the Southampton and Itchen Floating Bridge and Roads was incorporated, and certain tolls were payable for passing over such bridge, there being an exemption from toll in favour of "any fisherman or seafaring person being an inhabitant of the said parish of St. Mary Extra." By a section in a subsequent Act it is enacted that the words "fishermen, seafaring men and seafaring persons" in the said recited Acts or any of them shall not be deemed or construed to extend to or include any person who shall not be *bonâ fide* a fisherman, seaman, mariner, sailor or pilot."

The resp. — had for many years been engaged upon one of the Peninsular and Oriental Company's steamships trading between Southampton and Alexandria, and was an inhabitant of the said parish of St. Mary Extra; he signed articles like all other seamen employed on board, and was *bed-cabin* steward; he was liable to do what the captain ordered him to do either above or below deck, but, without special orders, his duties were confined to the *bed-cabins*; he had occasionally lent a hand in making and shortening sail and in heaving the capstan when weighing anchor, but he never kept watch on board and never steered:

Held, that he was "a seafaring person" within the statute, and so entitled to exemption from toll.

This was a case stated by justices under the 20 & 21 Vict. c. 43, upon a decision by them under the provisions of a local Act. The case stated as follows:—

The company of proprietors of the Southampton and Itchen Floating Bridge and Roads was incorporated by an Act of Parliament, passed in 1834, which Act was amended by other Acts passed in 1835, 1839 and 1851 respectively. All these Acts were repealed by an Act passed in 1863 (26 & 27 Vict. c. 102, local and personal), except some few clauses which were retained in the schedules to the last-named Act. Certain tolls are payable to the said company for the passage of passengers, horses, and vehicles over the ferry at Itchen, but certain persons claim to be entitled to exemption under the following clauses, which are retained in the schedule to the Act of 1863.

By the 81st section of the Act of 1834 it is enacted

That no toll whatever shall be demanded or taken for passing upon the said bridge of or from any fisherman or seafaring person being an inhabitant of the said parish of Saint Mary Extra.

By the 82nd section of the same Act it is enacted

That nothing in this Act contained shall extend, or be construed to extend, to take away from any fisherman, seafaring man, or other handicraft inhabitants of the village of Itchen aforesaid, or their respective wives or families, or to

Q. B.]

REG. v. KATLEY—KIDDLE v. KATLEY.

[Q. B.]

deprive them, or any of them, of any right which they now enjoy of passage across the said river, or of carrying across the said river any goods, wares, merchandise, or chattels.

By the 25th section of the Act of 1851 it is enacted

That the words fisherman, seafaring man and seafaring persons in the said recited Acts or any of them shall not be deemed or construed to extend to or include any person who shall not be bona fide a fisherman, seaman, mariner, sailor, or pilot, or who should not have been such fisherman, seaman, mariner, sailor, or pilot, and be incapacitated by age or infirmity.

By the 28th section of the same Act it is enacted

That if any dispute or difference shall arise between the said company, and any person claiming the benefit of any exemption or privilege under the provisions of the said recited Acts or of this Act, the same shall be decided by two justices of the peace of the county of Southampton, or of the town and county of the town of Southampton, who upon information or complaint made to them by any person claiming such exemption or privilege shall issue his summons to the clerk of the said company, and on hearing such complaint shall determine whether such claim should be allowed by the said company and shall either dismiss the said summons, or shall order and direct that the name and residence of such claimant shall be registered in manner by the said Act provided, subject to a penalty in default.

Charles Frederick Fields claimed to be exempt from the payment of toll for passing across the river Itchen upon and by the bridge and boats of the said company by reason of his being a seafaring person, to wit, a mariner, and being an inhabitant of the parish of St. Mary Extra; and having claimed to be registered as exempt from such toll, but such claim having been disputed by the said company, an information was preferred by him against the company, and upon the hearing the justices decided the dispute in favour of the resp., and determined that his claim should be allowed by the company, and that the name and residence of the resp. should be registered accordingly.

It was proved that the resp. was an inhabitant of the parish of St. Mary Extra, and that he was bed-cabin steward on board the Peninsular and Oriental Company's steamship *Ceylon*, trading between Southampton and Alexandria; that he had made thirty-nine consecutive voyages in such ship, and each voyage had signed articles like all other seamen employed on board; that he considered himself liable to do what the captain ordered him, either above or below deck, but, without special orders, his duties were confined to the bed-cabins. It appeared that, although his ordinary duties were confined to the bed-cabins, he had occasionally lent a hand in making and shortening sail, and in heaving at the capstan when weighing anchor, but that he never kept watch on board, and never steered. He stated that he was not a fisherman, seaman, sailor, or pilot; but he claimed to be a mariner and a seafaring person. On the part of the resp. it was contended that, the resp. having upon each voyage signed the articles required to be signed by seamen, and being liable to all the privileges, immunities and liabilities attaching to seamen in the ship in which he had served, was a seafaring person within the meaning of the above-recited Acts and of the Merchant Seamen's Act. On the part of the app. it was contended that the resp. was neither a fisherman, seaman, mariner, sailor, or pilot, but simply a steward, or waiter, or chamberlain, and that the fact of his acting as such on board a ship would not entitle him to the exemption above mentioned.

The justices, however, being of opinion, that the resp. was a seafaring person within the meaning of the above-mentioned Acts, gave their determination against the app.

The question of law is—

Whether the resp. Charles Frederick Fields is a seafaring person or mariner within the meaning of the above-mentioned Acts (all of which are to be taken as part of the case), and entitled to the

exemption he claims from toll while living in the parish of St. Mary Extra?

*H. James* appeared for the resp., but

*Phinn, Q. C. (Mellor with him)* was called upon to support the case of the app. [BLACKBURN, J.—Is not the resp. a seafaring man?] In the first Act "seafaring man" has a very wide meaning, but this is cut down by the subsequent Act. These vessels carry in fact a host of hotel officials. [BLACKBURN, J.—A ship's cook is nevertheless a seaman, although he may attend only to the cooking.] He would in the royal navy be subject to the Mutiny Act. [COCKBURN, C.J.—But here the resp. does occasionally the ordinary duties of a sailor.] So would a marine upon certain occasions, but he would not be called a seaman. This person is a bed-chamber steward. [BLACKBURN, J.—Still he assists in the ship.] So upon an emergency would every one. [BLACKBURN, J.—Here it is his duty to do so when called upon: (*Wilson v. Zulueta*, 14 Q. B. 405.) COCKBURN, C.J.—What would you say to a ship's carpenter?] In the navy he is a warrant officer. [COCKBURN, C.J.—If a man had entered simply, say as cook, with a stipulation that he was not to do any other duty, I should agree with you, but here he is liable to do ordinary duty.] His ordinary duties are to attend the bed-cabins.

COCKBURN, C.J.—It is said in the case that he signed the articles required to be signed by seamen. If he signed them merely collusively for some indirect purpose, that would not do; but if he has really signed as ordinary articles, he would be a seaman and liable to perform the duties of a seaman. We are all of opinion that the justices were right.

*Judgment for the resp.*

REG. v. KATLEY.

KIDDLE (app.) v. KATLEY (resp.).

*Game—Trespass—Bona fide claim of right—Jurisdiction of justices ousted—1 & 2 Will. 4, c. 32, ss. 8, 30.*

An information was laid against the app. under sect. 30 of the 1 & 2 Will. 4, c. 32, for a trespass in pursuit of game. At the hearing he gave in evidence a lease, dated 1794, for ninety-nine years of the land upon which the trespass was alleged to have been committed, to a party through whom he claimed, the lessor being the party through whom the informant claimed the right to the game. The lease contained the following reservation to the lessor: "and also liberty to hawk, hunt, set and fowl in and upon the said demised premises during the term hereinafter granted." The app. having set up his title through the lessee to take game upon the land, and so disputed the right of the justices to adjudicate, they held that the claim of right was not sufficient to oust their jurisdiction and convicted the app.:

*Held*, that the objection being made bona fide it was a reasonable one, and that the jurisdiction of the justices was ousted.

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by justices at petty sessions of the app. for a trespass on lands in search of game, without the licence or consent of the owner of such lands. The facts stated were the following:—

At the hearing of the information on the 8th June last *Bishop* appeared for the resp. and *Floud* for the app. The following evidence was given:

*William Holcombe* said: I am a gamekeeper. I live in the parish of East Budleigh. On the 21st May I saw *Louis Kiddle* on *Shutwood Farm*; it is occupied by *Kiddle's* father.

*Floud* asked *Mr. Bishop* if he admitted that the

Q. B.]

REG. v. KAYLEY. KIDDLE v. KAYLEY.

[Q. B.]

estate was a leasehold one for ninety-nine years determinable on lives?

*Bishop* said he did admit it.

Examination continued.—There was a Mr. Kendall with Louis Kiddle; they had a gun each and two dogs, and a ferret was in the hedge. Mr. Kiddle asked if I was the keeper in Hayes Wood? I said "Yes." He then said he had a right to shoot over the property from his father, as it was leasehold property. He had a bag with him, and said he had got six or seven rabbits. Mr. Bishop then relied upon the 42nd section of the 1 & 2 Will. 4, c. 32.

For the defence,

William Kiddle said: I am the father of Louis Kiddle, and the occupier of the Shutwood estate. I rent it of Mr. John Wilson of Exeter. He holds under Prescott, who was the original lessee. I have had permission from him to kill the game on that estate, and we have continually done so for the last five years. I gave my son permission to kill the rabbits on the estate. I produce a copy of the lease that was handed to me by my landlord.

*Bishop* objected to the document being put in, as not being a copy.

The hearing was ultimately adjourned, that the trustees of Lord Rolle might be summoned to produce the original lease. At the adjourned hearing, Mr. Bishop produced the counterpart of the original lease of the Shutwood estate, signed by the lessee, dated the 3rd Sept. 1794, and made between Denys Rolle of Bicton, in the county of Devon, Esq., of the one part, and Robert Prescott of East Budleigh, in the said county, yeoman, of the other part. The lease witnessed that, in consideration of 200l. and the yearly rent reserved, he, the said Denys Rolle, demised unto the said Robert Prescott all that, &c. (the premises in question), reserving the timber, &c., "and also liberty to hawk, hunt, set and fowl in and upon the said demised premises during the term hereinafter granted, . . . "for and during the full term and time of ninety-nine years," if certain parties named should so long happen to live.

*Bishop* relied on the 8th section of the 1 & 2 Will. 4, c. 32.

*Floud* renewed his objection to the jurisdiction of the bench to decide the case, on the ground that his client claimed a *bonâ fide* right. He contended that the words in the lease were only a reservation to Denys Rolle, his heirs and assigns, which means himself and friends, but not servants. He referred to the case of *Reg. v. Cridland and others*, 27 L. J. 30, M. C. Secondly, he contended that the app. was not in pursuit of game, as under sect. 2 rabbits are not game, and he referred to *Spicer v. Barnard*, 28 L. J. 176, M. C. Thirdly, he contended that, as W. Kiddle, the father and occupier, had given the son leave to kill the rabbits, that of itself was an answer to the summons.

The following evidence was then given:—

John Wilson:—I am the owner of the Shutwood estate. W. Kiddle is my tenant. My uncle Vinnicombe purchased it of Prescott and bequeathed it to me by will. I have given Kiddle all the right to the game that there is in it. During my uncle's life I recollect a Mr. Gascoyne, who took Tidwell's house, asking my uncle to let him shoot on Shutwood, and he gave him permission to do so. I always understood the right was in my uncle, and upon that understanding I have given Mr. Kiddle leave to shoot there.

By the Bench.—I never heard that my uncle's right was disputed.

*Bishop* said, under sect. 8, he put in the lease and claimed the exclusive right to the game.

The 30th section decidedly brings "rabbits" within the meaning of the word "game."

We being of opinion that the claim of right set up was not sufficient to oust our jurisdiction, as the counterpart of the lease showed a reservation of the right to hunt, hawk, &c., and that the evidence given before us brought the case within the said 30th section of the Act, gave our determination against the app. in the manner before stated.

The questions of law arising on the above statement for the opinion of the court therefore are:

1st. Whether the claim of right set up by the app. was such a *bonâ fide* claim as to oust our jurisdiction.

2nd. Whether the words in the lease, to "hawk, hunt, set and fowl," amount to an absolute reservation to the lessor, his agents, &c., of the right of shooting and sporting over the said closes of land in exclusion of the lessee and his assigns, agents, &c.

If the court should be of opinion that the said conviction was legally and properly made, and the app. is liable as aforesaid, then the said conviction is to stand. But if the court should be of opinion otherwise, then the said information and complaint is to be dismissed.

By sect. 8 of the 1 & 2 Will. 4, c. 32, it is enacted:

That nothing in this Act contained shall authorise any person, seized or possessed of, or holding any land, to kill or take the game, or to permit any other person to kill or take the game upon such land in any case where by any deed, grant, lease, or any written or parol demise or contract a right of entry upon such land for the purpose of killing or taking the game hath been or hereafter shall be reserved or retained by or given or allowed to any grantor, lessor, landlord, or other person whatsoever; nor shall anything in this Act contained defeat or diminish any reservation, exception, covenant, or agreement already contained in any private Act of Parliament, deed, or writing relating to the game upon any land, nor in any manner prejudice the rights of any lord of any manor, lordship, or royalty, or of any steward of the Crown, of any manor, lordship, or royalty appertaining to His Majesty.

By sect. 30, after imposing a penalty upon any person trespassing in the pursuit of game, it is provided,

That any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise, as hereinbefore mentioned, &c.

*M. Smith*, Q. C. (*Yonge* with him), now appeared in support of the conviction, and argued that the defence set up by the app. was altogether untenable, since it was clear from the lease of 1794 that the right to the game was reserved to the lessor. [COCKBURN, C. J.—Can it be said that the lessor has an exclusive right; has he anything more than a concurrent right with the lessee to the game?] The statute was intended to give landlords greater rights over the game than before: (*Spicer v. Barnard*, 1 El. & El. 874.) [BLACKBURN, J.—If under the lease the lessee had a right to kill game, the statute does not take that right from him.] I contend he never had the right. [BLACKBURN, J.—But if there is a well-founded ground for doubt, it is not a case for the justices to determine.]

*Reg. v. Thurlstone*, 1 El. & El. 502;

*Cornwall v. Saunders*, 3 Best & S. 206.

[BLACKBURN, J.—Where an impossible right is set up the *bonâ fides* is immaterial, but can you say that here there was not reasonable ground?] Under sect. 30 the landlord has the right to the game. It is contended that the lease gives an exclusive right to the game to the landlord. [COCKBURN, C. J.—Before the Game Act, under this lease the lessee would have had a right to the game, reserving, however, permission to the lessor to take it; does the statute take away the right from the lessee?]

[Ex.]

HUXHAM v. WHEELER.

[Ex.]

*Kingdon*, for the app., was not called upon, but he mentioned

*Wickham v. Hawker*, 7 M. & W. 108.

COCKBURN, C. J.—The only question asked is, whether the claim of right set up by the app. was such a *bond fide* claim as to oust the jurisdiction of the justices? and as they do not find *mala fides*, I assume that they mean, is there enough on these facts to give colour to the claim? I must say that I think there is, and that it is so far from being clear that the lessee had not the right to take game, he might very well suppose from the clause in the lease that he had a right of sporting concurrently with the lessor, and the question was, therefore, one in which the justices ought not to have interfered.

BLACKBURN, J.—When in such a case a *bond fide* and probable right of property is set up, the justices ought to hold their hands. Now, under this old lease, I think it is very questionable whether or not the whole right to the game was given to the lessor, and it is, moreover, very doubtful whether or not the 8th section affects the rights of the parties. I don't say that these doubts must be decided in favour of the app., but it is a matter sufficiently doubtful to take it out of the jurisdiction of the justices.

SHER, J. concurred.

*Judgment for the app.*

Attorney for the app., *Floud*.

Attorney for the resp., *Bishop*.

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Wednesday, April 20, 1864.

HUXHAM (app.) v. WHEELER (resp.).

*Excise—Selling beer at fairs without licence.*

The 29th section of 1 Will. 4, c. 64 (the *Beerhouse Act*), by which the selling of beer at any lawful fair was excepted out of the general operation of the Act, is repealed by the 12th section of 25 & 26 Vict. c. 22, and therefore the sale of beer without an excise licence at a lawful fair, in exercise of a right by grant which had existed since the reign of Edward III., is no longer lawful, nor is such sale any longer exempted from the operation of the Excise Licensing Acts.

Special case stated by three justices of the city of Gloucester under 20 & 21 Vict. c. 43, upon the application of the app., an officer of Excise, acting on behalf of the Crown, who was dissatisfied with the decision of the said justices dismissing an information exhibited by him against the resp. under 4 & 5 Will. 4, c. 85, charging him with retailing beer to be consumed upon the premises without a licence; and the question raised for the opinion of the court was, whether persons can sell beer at fairs without an excise licence.

The case set out the information and summons, and then stated as follows:—That it was proved on behalf of the app. that on the 12th Oct. 1863 an officer of excise went to resp.'s house in the city of Gloucester (the door being open), and asked for and was served by resp. with a glass of beer, which he drank in the house, and paid resp. 1½d. for, and that resp. had no licence to sell beer on or off the premises. The app. admitted that a mop or hiring fair was then being held in the street in which resp. lived.

By the 7th section of 11 Geo. 4 & 1 Will. 4, c. 64, any person not being licensed as the keeper of a common inn, alehouse, or victualling house, who shall sell any beer by retail without an excise

licence, shall forfeit 20*l.*, but the 29th section of the same Act provides,

That nothing in that Act contained shall prohibit any person from selling beer in booths or other places, at the time and within the limits of the ground or place in or upon which is holden any lawful fair in like manner as such person was authorised to do before the passing of that Act.

The Act 4 & 5 Will. 4, c. 85 (under which the information was laid), after reciting the 11 Geo. 4 & 1 Will. 4, c. 64, enacts, by sect. 11,

That all the penalties, forfeitures and provisions contained in the said recited Act, with reference to persons doing the things thereby prohibited without the licence required by the said recited Act, should (except where they were altered by the Act now in recital, or were repugnant thereto) be deemed and taken to be applicable to all persons doing without the licence required by the Act now in recital things of the same description as the things prohibited without the licence required by the said recited Act, as fully and effectually as if all the said penalties, forfeitures and provisions had been repeated and reenacted in the Act now in recital.

And by sect 17

Every person not being duly licensed to sell beer by retail, to be drunk or consumed in or upon the house and premises where sold, without having an excise retail licence in force authorising him to do so, is liable to a penalty of 20*l.*

It was admitted by resp. that he sold beer at the place and on the occasion in question without having a licence, but he alleged that he was entitled to sell beer by retail at and during a fair annually held in Barton-street, Gloucester, on the 28th and 29th Sept. and the three following Mondays, the same being mop or hiring days, and that such custom had prevailed since the grant next mentioned.

It was proved that, in the reign of Edward III. a grant of the manor and lordship of Dudstone and King's Regis was made by the Crown to the abbot of St. Peter, Gloucester, with a right to hold fairs and mops, and that such fairs and mops were held from that time to the reign of Charles II., when a grant of the manor, with all rights, privileges and immunities belonging thereto, was made to the corporation of Gloucester, which rights were confirmed by a charter of Charles II., granted in 1672, as follows:—"We do grant, approve, ratify and confirm to the aforesaid mayor, &c., such and the like fairs, marts, markets, customs, liberties, franchises, immunities, exemptions, &c., and to their successors for ever."

Evidence was given by old inhabitants that the fairs had been held in Gloucester for sixty years and upwards, and that during that time beer had been sold during the fairs and mops, without licence, by persons living in Barton-street, where such fairs had been usually held.

The app. contended that, by sect. 12 of 25 & 26 Vict. c. 22, which enacts, that "so much of any Act as permits the sale of beer, spirits, or wine at fairs or races without an excise licence shall be and the same is hereby repealed," whatever right resp. had to sell beer by retail without a licence by virtue of the saving clause in 1 Will. 4, c. 4, was repealed, and therefore the justices ought to convict the resp. But the justices dismissed the information on the ground that resp. was entitled by prescriptive right and by charter to sell beer by retail without an excise licence, and that such right was not taken away by 25 & 26 Vict. c. 22, s. 12, or by any of the said Acts. And thereupon this case was stated by the justices, who decided that if the court should be of opinion the information had been wrongfully dismissed, the resp. should be convicted in the mitigated penalty of 5*l.*

App.'s points:—1. That inasmuch as 4 & 5 Will. 4, c. 85, s. 17, expressly subjects to a penalty every person selling beer by retail to be drunk, &c., without having any excise retail licence, and as it is admitted that resp. sold beer to app. to be drunk, &c., having no such licence, it follows that he is liable to the penalty for so doing, unless he can show some exemption therefrom. 2. That the exemption given by

[Ex.]

HUXHAM v. WHEELER.

[Ex.]

11 Geo. 4 & 1 Will. 4, c. 64, s. 29, being repealed by 25 & 26 Vict. c. 22, s. 12, such exemption cannot avail resp. 8. That the supposed prescription to sell beer in Barton-street during the fairs could not have any operation against the express enactment of an Act of Parliament. 4. That such supposed prescription is not valid in law.

Resp.'s points:—1. That resp. was entitled by custom, prescription, or charter, to sell beer by retail without a licence at his house in Barton-street, during the holding of the fairs and mops in the case mentioned. 2. That neither by 25 & 26 Vict. c. 22, nor by any other Act or Acts of Parliament, was he prevented from so doing.

Locke, Q.C. (with whom were the *Attorney-General*, the *Solicitor-General* and *Welsby*) for the app.—The decision of the justices was wrong, because the right reserved in the old statute was repealed by the 25 & 26 Vict. c. 22, sect. 12. Until 11 Hen. 7, c. 2, anybody might sell beer anywhere, when it was enacted that “two justices might reject common ale selling in any place, and take security from all sellers for behaviour.” Then the 5 & 6 Edw. 6, c. 25, s. 6, permitted the selling of beer “in booths or other places at fairs and races in such like manner and sort as it hath been used or done in time passed.” The Magistrates' Licensing Act (9 Geo. 4, c. 61) repealed all former Acts, but retained the right of selling beer in booths at fairs, “in like manner as such persons were authorised to do before the Act.” Similar reservations or exceptions from the operation of the Acts of the right to sell at fairs were contained in all the licensing Acts to 1 Will. 4, c. 64, under sect. 7 of which, and also under sect. 17 of 4 & 5 Will. 4, c. 85, resp. would be liable, were it not for sect. 29 of the 1 Will. 4, c. 64 reserving the right as heretofore. But the right was now abolished by sect. 12 of 25 & 26 Vict. c. 22, which in terms expressly repeals “so much of any Act as permits the sale of beer at fairs or races without an excise licence.” It is all one whether the previous Acts “permitted” the sale or created an exception to the prohibition of it. The word “permit” includes everything, and nobody (whether heretofore privileged or not) can now sell beer anywhere without a licence.

Powell, Q.C. (with *Gilmore Evans*) for resp.—Everybody originally might brew and sell beer at pleasure. The right in question did not depend on and was not affected by any statute. It had existed since the grant of Edw. III. to the present day, notwithstanding the numberless Acts of Parliament which had been passed relating to the sale of beer and to excise licence. The case finds that mops and fairs had been held for sixty years and upwards, at which beer was sold without a licence. The exception in the 6 Edw. 6 was not a *permission*, because, originally, everybody might sell beer. Subsequently, for revenue and police purposes, alehouses and beerhouses were licensed, but all the Acts relating to licences, from 6 Edw. 6 downwards, contained exceptions in favour of the right to sell at fairs, &c., “as such persons had previously been accustomed to do.” But these were not *permissive* exceptions, for they left the *status* of the excepted persons untouched. All having originally the right to sell, and the statutes prohibiting ninety from selling, but leaving the other ten as they were, the latter continued to sell under their original right, and not by *permission* of the statutes, the effect of the Acts being not to “*permit*” the excepted persons to sell, but to *prohibit* all others from doing so. [Pigott, B. refers to Webster's Dictionary for the meaning of the word “*permit*.”] The exceptions in the various Acts saved the sellers from the penalties; but no Act that had passed, since the original grant, had in any way affected the right to

sell, and such an ancient right could not on a forced construction of the word “*permit*” be taken away except by clear and positive enactment. He cited

*The Mayor of Leicester v. Burgess*, 5 B. & Ad. 246;

*Rez v. Pugh*, 1 Doug. 188;

*Reg. v. Archdall*, 8 A. & E. 281.

Locke, Q.C. was not called on to reply.

POLLOCK, C.B.—There can be no doubt that the construction of Acts of Parliament, and especially of repealing Acts, ought to be strictly confined to the language of the Act, which it is for the court to construe, and to gather therefrom the intention of the Legislature, and to see whether what was intended can be reasonably collected from the words of the statute, notwithstanding any apparent defect or discrepancy in the language used. No doubt, where an Act of Parliament is passed which is to bring about a particular result, we are bound by our office to give that construction to it which we believe to be the true construction, that is, what was meant by the Legislature; and I think we can arrive at that in the present case without much difficulty. There is no doubt that *prima facie* the permission to sell beer, is not, grammatically speaking, the same thing as the prevention of a prohibition from applying to a person selling. All these persons have continued to sell beer by reason of the original power to sell, which has never, strictly speaking, been taken away. I cannot accede to the view of the Act of Parliament (the 1 Will. 4, c. 64) suggested by Mr. Locke in his argument, that the power was taken away by one clause (sect. 7), and given again by another (sect. 29). The Act must be taken and read as a whole altogether. With regard to the 12th section of the 25 & 26 Vict. c. 22, I think the Legislature, in saying, “so much of any Act which *permits* the sale of beer, &c., without a licence, shall be repealed,” may well have meant also “or which creates an exception to the prohibition of the sale of beer,” for we find that no other meaning can be attributed to the language of the section than an intention to prohibit under all circumstances the sale of beer without a licence. As my brothers Martin and Pigott have both observed, in the course of the argument, that is a sensible and reasonable meaning of the words used. We ought not to make it a question of weighing syllables, or to prevent the natural meaning of the words having that construction which any sensible and reasonable person would say the Legislature really meant; we are not to prevent the reasonable operation of the words used because of some fancied grammatical difficulty. We are to take what is the broad meaning of the Legislature; and I agree with the rest of the court, that there can be no doubt the Legislature meant this because they could not have meant anything else. For these reasons it appears to me that the appeal in this case should be allowed, and the decision of the magistrates, dismissing the information, reversed, and that the conditional conviction which they pronounced should be affirmed.

MARTIN, B.—I am very clearly of the same opinion. The real question is, what is the meaning of the 12th section of the 25 & 26 Vict. c. 22? and I agree with Mr. Powell that it is an imperfection of language, perhaps, to say the question is, what the Legislature meant. The real question is, what is the meaning of the Legislature to be collected from the words they have used? It is not what we may suppose passed in their minds, or what they meant to have said; but what is the real meaning, to the best of our judgment, of the words they have used? Now the origin of these excise licences with respect to the sale of beer, is the Act of 1 Will. 4, c. 64, and that Act enacts that all persons may procure licences to sell

[Ex.]

GRIFFIN v. DEIGHTON AND ANOTHER.

[Ex. Ch.]

beer, and it states that any one may apply for and obtain an excise licence for that purpose. An excise licence is a thing created by a modern Act of Parliament (1830), and it is not a thing that can be referred to the common law or to any permission given by the common law, but it is a modern parliamentary excise licence. Now the 7th section of that Act enacts "that if any person not being duly licensed to sell beer as the keeper of a common inn, alehouse, or victualling house, shall sell any beer by retail without having an excise retail licence," he shall forfeit a certain sum. That is a general enactment—if any person shall do so and so. And if the statute were that no person could sell beer without having got that excise licence, I apprehend it would clearly cover any person who lived in a borough where there was some peculiar privilege or custom. The Act, having created the power to sell beer which did not exist before, would have subjected everybody to pay for a retail licence for the purpose of contributing to the revenue of the State. But I collect, and it is clear from the Act of Parliament, that it had long been the practice for persons at fairs to open booths, and there to sell beer without a licence; and if they sold beer at fairs, like any other commodity, it was not thought fit to interfere with them. Accordingly the last-mentioned Act (1 Will. 4, c. 64), in the 29th section enacts, "that nothing in this Act contained shall extend to prohibit any person from selling beer in booths or other places at the time and within the limits of the ground or place in or upon which is holden any fair, in like manner as such person was accustomed to do before the passing of this Act." I have very little doubt that it was by virtue of such exemptions as have been referred to in the Act of 6 Edw. 6 and all the other Acts. Now would there be any difficulty, supposing any one wished to explain what was the true effect of that 29th section? Would it not be a proper explanation of it to say that, by virtue of that section, persons are at liberty and are permitted to sell beer in booths at a fair? Would not that be the mode in which any person, desirous to explain this Act of Parliament (which it is the duty of the court and of the judges to do) would explain it? What would be meant by saying that by one section of the Act, which is general, all persons are required to take out a licence to sell beer, but by a subsequent section the Act is not to prohibit persons from selling beer on a fair or race-ground? Surely it would be a correct and as reasonable an explanation of the Act as could well be given to say that, by its operation, persons are permitted to do so. And then comes the 12th section of the 25 & 26 Vict., that "so much of any Act as permits the sale of beer, spirits, or wine, at fairs or races, without a licence shall be and the same is hereby repealed." Mr. Powell was unable to point out anything to which that could by possibility apply except to a case like the present; but then, he says, that section does not apply to this case, because, he says, the word "permit" is not, critically speaking, the proper word to have been used; but he leaves us there without pointing out anything to which it can apply. It seems to me that the exemption he claims is one which ought not to be permitted to exist, and that we ought to give our judgment on what we really believe to be the meaning of the Legislature, and their intention as expressed in words by them in this Act, which no doubt does state what was the purpose, and there is no doubt that it effects the purpose intended.

BRANWELL, B.—I am of the same opinion. I confess I cannot agree with Mr. Powell in the critical objection which he has taken to the word used in the statute. I doubt whether it is not verbally accurate. The words of the statute are, "So much

of any Act as permits the sale of beer, spirits, or wine at fairs or races, without an excise licence." Surely it is a correct expression to say, that those sections of the Act do permit it without a licence, because they continue the permission that the common law gives to everybody everywhere, and at those places without a licence. No human being can doubt what the meaning of the thing is, because some meaning must be attributed to it, and the only possible meaning that can be given is that contended for by the Crown. It must be admitted that, if any secondary interpretation is put upon the word "permit," which I do not believe there was, it is but a very little way removed from the primary interpretation. I cannot help thinking that the case is a very plain one. It has been said that the word "allow" might have been used. Suppose it had been, would that have been applicable? I think it would, and yet I cannot see the difference between it and the word "permit."

FIGOTT, B. had gone to chambers before the judgment was given.

*Judgment for the Crown.*

Attorney for app., *The Solicitor of Inland Revenue.*  
Attorneys for resp., *Rogerson and Ford*, 31, Lincoln's-inn-fields, agents for *P. and C. Cooke*, Gloucester.

### EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

ERROR FROM THE QUEEN'S BENCH.

*Wednesday, Feb. 3, 1864.*

(Before ERLE, C.J., WILLIAMS and WILLES, JJ.  
and CHANNELL, B.)

GRIFFIN v. DEIGHTON AND ANOTHER.

*Church—Right of incumbent to access to all parts of the church—Lay rector—Chancel.*

*The possession of the parish church is in the incumbent and churchwardens, who have a right of access to every part of it. Where, therefore, there was a door leading from without into the chancel upon which the lay rector had placed a lock which he kept locked except during divine service:*

*Held, that the incumbent (the vicar) had a right of access to the chancel through the door at all times.*

This was a writ of error from the Q. B. (see 8 L. T. Rep. N. S. 500), where the facts are fully stated. *Bridge (Lush, Q.C. with him) appeared for the plt. Manisty, Q.C. appeared for the deft.*

The following cases were cited:

*Clifford v. Wicks*, 1 B. & Ald. 498;  
*Burton's Comp.* 466;  
*Jones v. Ellis*, 2 Y. & Jer. 265;  
*Godbolt's Rep.* 200;  
*Spooner v. Brewster*, 3 Bing. 136;  
*Jarrett v. Steele*, 3 Phil. 170;  
*Lee v. Matthews*, 3 Hagg. 173;  
*Rich v. Bushnell*, 4 Hagg. 164;  
*Gibson's Codex*, 224;  
*Morgan v. Curtis*, 3 M. & Sel.

ERLE, C. J.—This was an action of trespass by the lay rector against the vicar for taking off a lock of a door leading into the chancel, and the substance of the plea is, that the vicar claimed a right to go through all parts of the church and through all the doors, and that the lay rector put a lock upon the door leading into the chancel to prevent him from doing so, and that he took it off to secure his ingress and egress, and this defence on the part of the vicar was held to be a good defence, and I am of opinion that the judgment of the court below should be affirmed. I do not mean to go into the question of



EX. CH.]

SHEPARD AND ANOTHER v. PAYNE AND ANOTHER.

[EX. CH.]

the rights of the lay rector to the freehold, for no such right as that appears to be in question in the consideration of the case before us, which involves a claim of right on the part of the incumbent who has duties to perform in the church, and I do not think that I can express the right better than in the words of Sir John Nicholl, in his judgment in *Jarrett v. Steele*, 3 Phil. 167, where he says, "all persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in this country; that the possession of the church is in the minister and churchwardens, and that no person has a right to enter it when it is not open for divine service, except with their permission and under their authority." I feel that is a perfectly sound interpretation of the law. The words in this plea are not to be torn from their natural meaning, which clearly say that the churchwardens and vicar claim possession of the entire church. It is not necessary to say what are the rights of the lay rector in the church, for my judgment proceeds upon the principle laid down by Sir John Nicholl. It seems to me to be peculiarly necessary that the vicar should have access to the church from any part, and more particularly to the chancel, where at times he has special duties to perform.

WILLIAMS and WILLES, JJ., and CHANNELL, B. concurred. *Judgment of the court below affirmed.*

#### APPEAL FROM THE COMMON BENCH.

Nov. 30, 1863, and Feb. 4, 1864.

SHEPARD AND ANOTHER v. PAYNE AND ANOTHER.

*Fees payable by churchwardens to registrars of archidiaconal court for visitations.—Presumption of immemorial usage—Variation in amount of fees.*

From 1727 to 1801 visitation fees of the unvarying amount of 7s. 6d. for the Easter visitation, and 4s. 6d. for the Michaelmas visitation, were received by the registrars of an archidiaconal court from the churchwardens of a parish within the archdeaconry. From 1801 to 1857 fees of a varying amount, but always slightly in excess of 7s. 6d. and 4s. 6d., were received. A dispute having arisen in 1857 as to the fees payable to the registrars, and an action having been brought by the registrars to recover fees of 7s. 6d. and 4s. 6d. for the Easter and Michaelmas visitations in 1857 and subsequent years:

*Held*, that the uniform receipt for seventy-one years of the amounts of 7s. 6d. and 4s. 6d. was overwhelming evidence that the excess subsequently claimed was an usurpation on the part of the registrars, but that such modern usurpation did not affect their title to the original fees of 7s. 6d. and 4s. 6d., which had been received for 180 years, and that in favour of vested interests a legal origin of the right to those fees would be presumed unless the contrary were proved.

This was an appeal from a decision of the Court of C. B., affirming the right of the registrars of the Archdeaconry Court of Colchester to recover certain visitation fees from the apprs. the churchwardens of the parish of Little Totham, within the archdeaconry. The special case stated for the opinion of the court, and the judgment of the court, will be found in 6 L. T. Rep. N. S. 716.

*Mellish, Q.C.* (A. Wills with him) for the apprs.—The two main propositions of law which the apprs. maintain are, first, that there cannot be a payment due by immemorial custom, varying from time to time in amount; secondly, that it is unreasonable that the fees of a court should vary from time to time, at the discretion of an officer of the court, and that if they are changed at all it must by direction

of the court. The Court of C. P. admitted that no fee could be claimed here in respect of a *quantum meruit* for services rendered by the registrars, and that the claim could be supported, if at all, only on the ground of there being an immemorial custom that the disputed fees should be paid. The ancient fee for presentment was only 4d., and a reference to canons 116, 185, 186, which may be used as evidence, shows that 4d. was the fee legally payable. There are three proofs that 4d. is the fee legally payable: first, the entries in the old visitation books that 4d. was paid; secondly, the canons of 1603, especially canon 116; thirdly, Archbishop Whitgift's table of fees. As a conclusion of fact the court must be of opinion that the fees have been raised by no authority but that of the registrar. The fees have varied considerably in successive years, and it cannot be assumed that the bishop and archdeacon, in direct opposition to canon 116, consented to an increase of the fee. No table of fees was ever hung up as required by canon 186. If the increase from 4d. to 7s. 6d. was legal, the increase to 12s. was equally legal. It is said that the canons are binding on the clergy but not on the laity; but it is by no means clear that they are not binding on the officers of the Ecclesiastical Court in a matter relating to their fees:

1 Stephen's Laws of the Clergy, 227;

Matthews v. Burdett, 2 Salk. 673;

Moore v. Moore, Cas. Ch., temp. Lord Hardwick, 158.

It cannot be that a fee should be liable to be raised at the discretion of the registrar, subject only to the limitation that a jury should not think the total amount unreasonable, unless the court are prepared to hold that there could be a custom valid in law that the fee should be so raised. The question must be decided on principle, as there is no authority directly in point. Cases somewhat analogous are to be met with in 2 Inst. 533, *de tallagio concedendo*, and 4 Inst. 274. With respect to the power of a court to fix the amount of fees payable to its officers, the consent of the court will not make the fee binding upon the public, though it will bind its own officers and prevent them from charging a higher fee. The following authorities prove that either a fee must be fixed by custom, or that if fixed by the court it is not binding upon the public until a jury have decided that it is a reasonable fee:

Veale v. Priour, Hardr. 351;

Viner's Abr. tit. "Fees";

Goslin v. Ellison, 1 Salk. 330;

Burdeaux v. Lancaster, Ib. 332;

Ballard v. Gerard, Ib. 333;

Johnson v. Lee, 5 Mod. 238;

Spry v. Gallop, 16 M. & W. 716.

Custom, though it may not fix the amount of fee, gives a standard from which it may be calculated. Canon 119 shows that the preparation of presentment papers was not a duty for which the registrar received ancient fees. [MELLOR, J.—By canon 116 no fee is to be paid for voluntary presentments.] In addition to the above objections, there is the minor point, that the fee was demanded by the registrars in cases where they had not performed the work in respect of which their fee was payable.

*Coleridge* (Hannen with him) for the resps.—The argument for the resps. is founded upon the following propositions. 1. That the court of the archdeacon is an ancient recognised court, with ancient recognised officers. 2. That the officers are entitled to certain fees, for which, if withheld, an action lies. 3. That an action lies for fees which are either ancient and customary, or settled by a proper authority as reasonable. 4. That the fees in this case come within each of these descriptions. 5. That the



[Ex. Ch.]

SHEPARD AND ANOTHER v. PAYNE AND ANOTHER.

[Ex. Ch.]

canons cited are not applicable to the fees in dispute. These propositions are deduced from

- 4 Inst. 339;
- Com. Dig. tit. "Courts," N. 9;
- Ib. "Ecclesiastical Persons," C. 5;
- 2 Rolle Abr. tit. "Prohibition," pl. 36, p. 285;
- Chiverton v. Tudgeon*, 2 Rolle Rep. 150;
- Canon, 123;
- Ballard v. Gerard*, 1 Ld. Raym. 708, and 12 Mod. 608, where the judgment of Lord Holt, C.J. is given at greater length;
- Bac. Abr. tit. "Offices," 10.

To validate an ecclesiastical custom, the space of time required is less than that required at common law, and for the purpose of establishing a civil right accruing to a layman according to an ecclesiastical custom, the ecclesiastical time required should be regarded. [BLACKBURN, J.—If the right to this fee depends on an ecclesiastical custom, it would seem that you ought to have sued in the Ecclesiastical Court.] The action will not lie in the Ecclesiastical Courts. The courts of common law have interfered by prohibition where officers have sued for their costs in their own courts. [BLACKBURN, J.—Those cases may be accounted for by saying that fees can only be claimed by common law right, which must be a right derived from time immemorial or custom. Com. Dig. "Prohibition" F. 12, is an authority against you. CHANNELL, B.—Can it be that in a temporal court the officer may bind another person by evidence of a custom existing during forty years only, because such evidence would have bound civil individuals in an ecclesiastical court?] There is, however, in this case evidence of payments having been made from time immemorial, as much evidence as would be considered sufficient to go to a jury in any other case. As to the reasonableness of the fees, see *Thomasina*, part 3; *Disc. circa Benefic.* c. 81, s. 1. [By the Court.—There is sufficient evidence of beneficial service rendered by the registrars, and if the Court of C. P. have decided that the fees are reasonable, this court will not overrule that decision.] The canons cannot affect any right possessed by a layman before they were enacted: (*Middleton v. Croft*, 2 Atk. 650; 1 Str. 1056.) The canons cited respecting the fee of 4d. only apply to voluntary presentments for criminal and other matters: (*Archdeacon Hale's Pr. in Cr. Causes*, 53.) This appears from the original Latin, see canons 26, 53, 76, 90, 116, which last canon is obviously mistranslated in the English version. The fees in Archbishop Whitgift's table apply to fees payable under this canon. Canons 117 and 119 must be construed by the light of the previous canons. The "Booke of Articles" referred to is a book of precedents of declarations. Contemporaneously with Whitgift's table, existed sets of questions sent out by the bishops (collected in *Cardwell's Doct. Annals*), containing the same inquiries as are now made by the books of articles; yet they are not mentioned by Whitgift, which proves that his table was drawn up for a different subject-matter from the present.

*Mellish, Q. C. in reply.*—In former times the non-repair of the church was an ecclesiastical offence, and came within the canons cited, even according to the application given to them by the resps. The English translation is a contemporaneous exposition of the meaning of the Latin version, even if not of equal authority with the latter.

*Curr. adv. vult.*

*Feb. 4.*—BLACKBURN, J.—In the case of *Shepard v. Payne*, which was argued before my Lord Chief Baron, my brothers Bramwell, Channell, Mellor and myself, I will proceed to deliver the judgment of the court, with the exception of my brother Bramwell, on whose behalf I will add a few words. This was an appeal from the decision of the Court of C. B. in

a case in which power was given to draw inferences of fact. The appeal was argued after last Michaelmas Term, before the Lord Chief Baron, my brothers Bramwell, Channell, Mellor, and myself. We are of opinion that the judgment of the court below ought to be affirmed. By the C. L. P. A. 1854, sect. 32, the court of error is required to draw any inferences of fact from the facts stated in the case, which the court where it was originally decided ought to have drawn. The inferences which the court below have drawn are stated in their judgment, delivered by my brother Willes. We agree in them all, but they appear to have thought it unnecessary to say whether the proper inference to be drawn from the facts was, that fees of the fixed amount of 7s. 6d. and 4s. 6d. were immemorial inasmuch as the fees need not be of a fixed and ascertained, but may be of a reasonable amount, and they drew the inference of fact that these amounts were reasonable. Mr. Mellish, in the argument, suggested that this meant that in point of law there might be an ancient fee varying in pecuniary amount from time to time with the changes in the value of money and other circumstances, and subject only to the restriction that it should be reasonable, and he questioned the accuracy of this position. Without expressing, or indeed forming, any opinion upon this question, we prefer to rest our judgment, affirming that of the court below, on this, that in our opinion the facts stated in the case are such that it should be presumed that the fees of 7s. 6d. and 4s. 6d. were immemorial fees attached to the office of registrar, if that presumption is necessary to give them validity. The facts stated in the case show that from 1727 to 1801 visitation fees of the unvarying amounts of 7s. 6d. and 4s. 6d. were uniformly received; from 1801 to 1857, when the present dispute originated, fees of a varying amount, but always slightly in excess of 7s. 6d. and 4s. 6d. were received. The amount in excess of 7s. 6d., and 4s. 6d. is not now claimed, and if it were, the uniform receipt for seventy-one years (from 1727 to 1801) of the amounts of 7s. 6d. and 4s. 6d. would be overwhelming evidence that the excess was an usurpation. But the modern usurpation of an excess does not affect the title to the original fees of 7s. 6d. and 4s. 6d. These have been received from 1801 to 1857 as much as from 1727 to 1801, so that the title to them depends upon an unbroken perception as of right for 180 years. That does not in itself give any title; but in favour of vested interests, and for the quieting of titles, the rule of evidence has been established, that where there has been long continued modern user of a right capable of a legal origin, the existence of that legal origin should be presumed unless the contrary be proved. This presumption is not one *juris et de jure*, which cannot be rebutted, but neither is it one purely of fact, and only to be drawn when the jury really entertain the opinion that in fact the legal origin existed. The true rule seems to be laid down by Lord Wensleydale (then Parke, B.) in *Jenkins v. Harvey*, 1 Cr. M. & R. 877, where he says that the correct mode to direct a jury is to tell them, that from uninterrupted modern usage they should find the immemorial existence of the payment (if that be necessary for its validity) unless some evidence is given to the contrary, or, as he says, in delivering the written judgment of the court on the second trial of the case (2 Cr. M. & R. 407), "From proof that an office existed in 1752 the jury may and ought to presume it to be prescriptive, if that be necessary to make it valid, unless the contrary be proved." The claim in that case was by the corporation of Truro for a metage due of 4d. per chaldron for coals in that port and it was supported. I mention this as showing what is meant by the latter part of the sentence

quoted. I suppose neither the Barons of the Exchequer nor the jurors as antiquarians believed that 4d. a chaldron was actually paid before Richard I. returned from the Holy Land, but the modern user was enough to cast upon the other side the onus of proving that it was an usurpation. We think that in the present case the modern usage for 180 years, to take fees of 7s. 6d. and 4s. 6d., raised a strong presumption that visitatorial fees of that amount were immemorial, and though the other facts stated in the case are such as to raise an inference that the amount had formerly been varying, and lower in amount, we do not think they are sufficient to satisfy the onus cast upon those who seek to upset an enjoyment for so long a time by showing the origin to be an usurpation. We think, therefore, that if it be necessary for the validity of those fees, that fees of that amount should be immemorial, that presumption ought to be made. In every other respect we agree with the reasons given in the judgment of the court below, which we think ought to be affirmed. My brother Bramwell asked me to add this, "I do not presume to differ from this opinion, but being satisfied with the reasons given by my brother Willes in the court below, I think it right to say that, for those reasons, I concur in affirming the judgment." *Judgment affirmed.*

Attorneys for apps., *Digby and Son.*

Attorneys for resps., *Aldridge and Bromley.*

#### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*Saturday, April 23, 1864.*

(Before ERLE, C. J., POLLOCK, C.B., MARTIN, B., BLACKBURN and MELLOR, JJ.)

REG. v. SAMUEL PORTER.

*Lunatic—Ill-treatment of—Neglect by brother having care of—16 & 17 Vict. c. 96, s. 9.*

*A brother who abuses, ill-treats, or wilfully neglects his lunatic brother, of whom he has the care or charge, is liable to punishment under the 16 & 17 Vict. c. 96, s. 9.*

Case reserved for the opinion of this Court by Martin, B.

The prisoner was convicted at the last Cornwall Assizes, upon the following counts of the indictment which are framed upon the latter part of the 9th section of the statute 16 & 17 Vict. c. 96.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before and at the time of the committing of the offence next hereinafter mentioned, the said Robert Porter was a lunatic within the meaning of the statute in such case made and provided. And that the said Samuel Porter before and at the time of the committing of the offence had the care and charge of the said Robert Porter. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. Porter, having the care and charge of the said R. Porter as last aforesaid, unlawfully did wilfully neglect the said R. Porter so being such lunatic as aforesaid, against the form of the statute, &c.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before and at the time of the committing of the offence next hereinafter mentioned, the said R. Porter was a lunatic within the meaning of the statute in such case made and provided, as the said S. Porter well knew. And that the said S. Porter before and at the time of the committing of the said offence had the care and charge of the said R. Porter. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. Porter, so having the care and charge of the said R. Porter as last

aforesaid, unlawfully did wilfully neglect the said R. Porter so being such lunatic as aforesaid, as the said S. Porter well knew, against the form of the statute, &c.

Sixth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before and at the time of the committing of the offence next hereinafter mentioned, the said R. Porter was alleged to be a lunatic within the meaning of the statute in such case made and provided. And that the said S. Porter before and at the time of the committing of the said offence had the care and charge of the said R. Porter. And the jurors aforesaid, upon their oath aforesaid, do further present that the said S. Porter so having the care and charge of the said R. Porter as last aforesaid, unlawfully did wilfully neglect the said R. Porter so being such alleged lunatic as aforesaid, against the form of the statute, &c.

The evidence was, that the lunatic became so upwards of twenty-five years ago. At first the care and charge of him was taken by his father and mother. They have been dead many years, and upon the death of the survivor a sister took charge of him. She went to America upwards of eleven years ago, and since this the prisoner, who is his brother, took upon himself and has had the sole and exclusive care and charge of him, and continued to have it until December last, when the lunatic was removed to the county asylum.

A sum of 6s. or 7s. a-week was received and taken by the prisoner under some family arrangement of the rents of some houses, which apparently were the property of the lunatic, in respect of such care and charge.

The lunatic was kept in a room adjoining the prisoner's house, and was attended to and supplied with food exclusively by the prisoner, or, in his absence, by his wife. He was entirely deprived of reason, and in body was perfectly helpless and unable to move.

At the close of the evidence for the Crown, it was objected by the counsel for the prisoner, that the case was not within the above-mentioned section, inasmuch as the care and charge was by a brother of a brother in the private house of the former, and *Reg. v. Randle*, 6 Cox C. C. 549, was cited.

I request the opinion of the court as follows:

First, whether, if a brother voluntarily takes upon himself, under such circumstances as above-mentioned, the care and charge of a lunatic brother, and keeps him in his private house, and abuses or ill-treats, or wilfully neglects him, it is a misdemeanor within the 9th section of the 16 & 17 Vict. c. 96?

If the answer be in the negative, then

Secondly, whether, assuming that the wilful neglect of the lunatic be an indictable offence at common law, can the prisoner be lawfully convicted of it under the above counts; and if so, then, whether such wilful neglect is an indictable offence at common law?

SAMUEL MARTIN.

*H. T. Cole* for the prisoner.—The conviction cannot be sustained. The prisoner was found guilty of neglect *simpliciter*. The provisions in the Lunacy Acts providing against the abuse and ill-treatment and neglect of lunatics apply only to persons attending on them when in licensed houses or registered asylums, and not to cases like the present. The 8 & 9 Vict. c. 100, s. 56, is expressly limited to such persons. The 16 & 17 Vict. c. 96 was passed to amend that Act, and seems to have had in view only houses licensed for the reception of lunatic patients and registered hospitals or asylums. Sect. 9, on which the counts of the indictment now in question were framed, is as follows:

If any superintendent, officer, nurse, attendant, servant, or

C. CAS. R.]

REG. v. GEORGE FULLFORD AND FREDERICK GEORGE FULLFORD.

[C. CAS. R.]

other person employed in any registered hospital or licensed house, or any person having the care or charge of any single patient, or any attendant of any single patient, in any way abuse, ill-treat, or wilfully neglect any patient in such hospital or house, or such single patient; or if any person detaining, or having the care or charge, or concerned or taking part in the custody, care, or treatment of any lunatic, or other person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic or alleged lunatic, he shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, or to forfeit for any such offence, on a summary conviction thereof before two justices, any sum not exceeding 20*l*.

The words "any person having the care or charge of any single patient" seem to refer to a different case from that of a brother or other blood relation taking upon himself the care of a lunatic relative. [MELLOR, J.—The title of the Act is simply for the regulation of the care and treatment of lunatics, without any limitation. POLLOCK, C.B.—The fact of the prisoner being the lunatic's brother has nothing to do with the construction of the statute.] The statute only contemplates the case of a person having the charge of a single patient for gain and emolument under a money contract. [ERLE, C. J.—By the 8 & 9 Vict. c. 100, s. 44, a licence was not required for the reception of a single lunatic into a house, but only where two or more were received. And sect. 90 places persons who receive for profit "any one patient" under certain obligations, from which persons who derive no profit are exempt. But then, if a person takes charge of a lunatic person for no money, why is he exempt from the penalties of the 16 & 17 Vict. c. 96, s. 9, in case he in any way abuses, ill-treats, or wilfully neglects such lunatic?] The patient Robert Porter has never been found lunatic. [BLACKBURN, J.—If the prisoner shut him up and did not allow him to be seen, and treated him as a lunatic, as against him the patient must be regarded as an alleged lunatic.] In *Rex v. Smith*, 2 Car. & P. 449, it was held that one who had an idiot brother as an inmate in his house, and omitted to supply him with proper food, &c., was not indictable at common law for such neglect. And in *Reg. v. Rundle*, 6 Cox C. C. 549, it was held that a husband who ill-treats his lunatic wife was not subject to the penalties of 16 & 17 Vict. c. 96, s. 9.

*M. Smith*, Q. C. and *Stock*, for the prosecution, were not called upon.

POLLOCK, C. B.—This conviction must be affirmed. We are all of opinion that this case is not governed by *Reg. v. Rundle*, which was entirely a different case. The present case falls within the words of the 16 & 17 Vict. c. 96, s. 9, for the prisoner was a person having the care of a lunatic patient and had wilfully neglected him. This case being within the words of the section and not within any of the cases which have created exceptions to it, the conviction ought to be sustained.

ERLE, C. J. had left the court, but had intimated that he was of opinion that the conviction ought to be affirmed.

MARTIN, B.—I am of the same opinion. Mr. Cole has failed to answer the question I put to him, "if the section does not apply to this case, to what does it apply?" He said it does not apply to the case of blood relations. Now, as I read sect. 9, the Legislature has provided for three cases: 1. the case of attendants and others employed in registered hospitals and licensed houses; 2. the case of any skilled person having charge of a single patient; and 3. the case of any one who takes on himself to attend or take charge of any single patient. And if any one in such last class abuses, ill-treats, or wilfully neglects the lunatic, he is liable to the penalties created by the section. The prisoner is

[MAG. CAS.—VOL. III.]

clearly within the third class. This is a very salutary enactment.

BLACKBURN and MELLOR JJ. concurred.

Conviction affirmed.

Saturday, April 23, 1864.

(Before ERLE, C.J., POLLOCK, C.B., MARTIN, B., BLACKBURN and MELLOR, JJ.)

REG. v. GEORGE FULLFORD AND FREDERICK GEO. FULLFORD.

*Misdemeanor—Local Government Act—Indictment for bringing forward a house in a street without consent of local board—Street—24 & 25 Vict. c. 61, s. 28.*

*Whether a house or building forms part of a street within the meaning of the 24 & 25 Vict. c. 61, s. 28 (Local Government Act Amendment Act) is a question of fact for a jury.*

*Seemle, that the word "street" in the above section applies only to a row of houses in some degree continuous and proximate, having an apparent continuous line, and not to a set of detached houses at irregular distances and not in a continuous line.*

Case reserved for the opinion of this court by Erle, C.J.

At the Assizes and general gaol delivery holden at Winchester in and for the county of Southampton, in July last, George Fullford and Frederick George Fullford were tried before me on an indictment framed on the 28th section of the 24 & 25 Vict. c. 61.

The indictment charged that they, after the passing of the Local Government Act (1858) Amendment Act 1861, at the parish of Fareham in the said county, and within the district of a certain local board of health there, to wit, the local board of health for the district of Fareham, in the county aforesaid, unlawfully and injuriously did bring forward a certain house there situate and being in the occupation of the said G. Fullford, and then forming part of a certain street there, to wit, West-street, and numbered 17 in the said street, beyond the front wall of the house and building on either side of the said house of the said G. Fullford, to wit, fifteen feet beyond the front wall of the house and building on the west side of the said house of the said G. Fullford, and four feet beyond the front part of the house and building on the east side of the said house of the said G. Fullford, without the previous consent of the said local board of health.

Other counts charged the defts., in like manner, with bringing forward a certain building forming part of West-street, and numbered 17, and with building an addition to a house and to a building forming part of West-street and numbered 17, beyond the front of the house and building on either side thereof, without such consent.

The facts of the case were as follows:—

By an Order in Council, dated 5th Sept. 1849, and published in the *London Gazette* of Sept. 18, 1849, the Public Health Act (sects. 50 and 96 excepted) was ordered to be applied to "the entire area, places and parts of places comprised within the boundaries at present fixed as the boundaries of the parish of Fareham," and such area, places and parts of places were constituted a district for the purposes of the said Act.

The defts. are father and son. The former, a builder, purchased, some years ago, a piece of land situate on the north side of the West-street of the town of Fareham, on which he erected a dwelling-house, in which he has since resided with his family; and what is now called the West-street is a public highway, and forms a portion of a turnpike-road

C. CAS. R.]

REG. v. GEORGE FULLFORD AND FREDERICK GEORGE FULLFORD.

[C CAS. R.]

originally made under the provisions of a local Act, 50 Geo. 3, c. 14, but is now maintained and regulated by a subsequent local Act of 1 Will. 4, c. 61, both of which Acts are declared to be public Acts.

The said house was so erected as to leave an intervening space between it and the public highway of the said street, such intervening space being used as an ornamental garden in front of the said house, and being about sixteen feet deep on the east side, and twelve feet deep on the west side of the said house, and being separated from the highway of the said street by a dwarf wall and iron palisades, outside which is a footway and then a carriage road, which together form the highway of the street aforesaid.

The said house of the deft. G. Fullford, at the time alleged in the indictment, had a house on either side of it; that on the east side being in course of erection, and extending several feet beyond the house of the said G. Fullford, and each of which last-mentioned houses also had an intervening space or garden between it and the highway of the street aforesaid.

It was agreed by the counsel on both sides that the plan produced at the trial on the part of the prosecution, and the model furnished on the part of the defts. might be referred to for the purpose of more particularly delineating the relative position of the said before-mentioned houses and public highway.

In the month of Oct. 1862 the defts. proposed to erect an addition to and in front of the said house to be used as a shop; and on the 31st Oct. 1862 the deft. Fredk. G. Fullford delivered to Thomas Buckham, the surveyor to the Fareham local board of health, a plan of the proposed work, and also an application in writing to the local board of health, in order that he might lay it before the said local board.

The following is a copy of such application :

Meadow-house, Fareham, Oct. 31.

Gentlemen,—I have this day forwarded to your surveyor Mr. Buckham the plan and specification of a shop which I propose building in the West-street, Fareham. I also beg to inform you that the work was commenced previous to the publication of the notice which you have recently issued, but is now stopped until the decision of the board is made known as to the distance the building is to be erected from the street.

(Signed) F. G. FULLFORD.

The following is the notice so referred to which had been previously printed and issued by the said Local Board of Health:

Notice.

Whereas by the Local Government Act (1858) Amendment Act 1861, sect. 28, it is enacted as follows:

It shall not be lawful, at any time or times hereafter, within the district of our local board of health, to bring forward any house or building, forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front of such house or building, on either side of the same as aforesaid, without the previous consent of such local board.

Now we, the Local Board of Health for the district of Fareham, in the county of Southampton, do hereby give you notice, that any person offending against the above-named provisions of the said Act will be proceeded against as the law directs.

Fareham, 18th Oct. 1862.

ALFRED DRIVER, Clerk.

The said plan of the said F. G. Fullford showed that the proposed erection was intended to cover the whole of the intervening space between the house of the said G. Fullford and the said street or highway, except an interval of nine inches immediately against the footway forming part of the said highway, and that it was to extend eight feet beyond the front of the house on the east side thereof nearest to the said highway. But in truth no part of the said erection was built nearer to the said highway than 4ft. 4in.

The said application so made by the said F. G. Fullford was taken into consideration by

the local board of health on the then next following day, and a resolution was come to by the said board, which was communicated to the said defts. by the following letter:

Fareham, 1st Nov. 1862.

Sir,—I am directed by the Fareham Local Board of Health to inform you that the plan of a shop intended to be erected by you in the West-street has been laid before them, and that with regard to the boundary they require you to keep the line of street which will be pointed out to you by the surveyor.—I am, Sir, &c.,

ALFRED DRIVER, Clerk.

Mr. F. G. Fullford.

On the same day (the 1st Nov.) the said Thomas Buckham, by direction of the said local board, went to the said house of the said G. Fullford, and there saw the two defts. G. Fullford and F. G. Fullford, who were then personally working at the said proposed erection; and the said T. Buckham pointed out on the ground there the exact line within which the said defts. were required by the said local board to keep the said erection; that is to say, the extreme of the front wall (being that of the door porch) of the house, on the east side of the said proposed erection, and which was many feet beyond the front wall of the house on the west side of the said proposed erection.

The defts. subsequently built the addition to the said house, as shown on the said plan and model, being beyond the line of front so pointed out by the said T. Buckham, and contrary to the aforesaid directions, and against the consent of the said local board of health, and the said shop, which has an internal communication with the said dwelling-house, was opened for business about Christmas 1862, and has since been used and occupied as a grocer's shop, in connection with the said dwelling-house of the said G. Fullford, by the said F. G. Fullford.

Later in the said month of Nov. 1862, notice was given to the defts. by direction of the said local board of health calling upon them to remove so much of the said erection as projected beyond the line prescribed to them by their said surveyor; and the defts. not having done so, on the 27th Jan. following another notice was given to the said defts. by the direction of the said local board that an indictment would be preferred against them at the next Assizes for infringing the provisions of the Local Government Act (1858) Amendment Act 1861, by making the said erection without the consent of the said local board of health, and at the said Spring Assizes for the said county an indictment was accordingly preferred, and a true bill found by the grand jury against the said defts.

The town of Fareham is a market-town, containing, according to the last census, a population of 6000 inhabitants. It lies on the main road between the towns of Portsmouth and Southampton, and is crossed by two turnpike-roads, which constitute the public highways of the four principal streets of the said town, of which West-street is one.

Under the order in council before mentioned a system of drainage and water supply has been introduced into the said town, and the Public Health Act has otherwise been put into full operation therein.

The turnpike-roads before mentioned are repaired by the turnpike trustees; that forming the West-street or highway in question under the before-mentioned Acts of the 50 Geo. 3, c. 14, and 1 Will. 4, c. 61; but the local board of health *de facto* exercise jurisdiction over them so far as requisite for effectuating the general purposes of the Public Health Act, and over all the private property abutting on the said roads as part of the district of the said local board, but the defts. dispute their right so to do.

C. CAS. R.] REG. v. GEORGE FULLFORD AND FREDERICK GEORGE FULLFORD. [C. CAS. R.]

The public sewerage and water pipes are carried under West-street throughout its whole extent, and all the houses in the said street (the defts.' house included) are in connection therewith. The street is also lighted with public gas lamps. The words "West-street" are conspicuously painted on the houses at each end thereof, and the houses in the said street on both sides thereof are numbered. The said street has a raised footway on either side thereof, as shown on the model. The footway on the north side of the said street on which the defts.' house is situate, varies in width from nine to fourteen feet in different parts thereof, and is flagged about one-third of its whole extent, and has a curb-stone for two-thirds of its whole length, but immediately opposite to the defts.' house for some distance on either side, and in some other parts of the street, it has at present neither curb or flag-stone. The said street contains a Market Hall, Trinity Church, two dissenting chapels, an institution hall and charity school. All excepting Trinity Church are nearly a quarter of a mile distant from defts.' premises.

Upon the above facts I directed the jury to find the defts. guilty and they were convicted; and I respited the judgments and admitted the defts. to bail, and reserved for the consideration of this Court the question whether the erection of the said shop and building by the defts. under the circumstances above mentioned comes within the prohibition contained in the 28th section of the statute 24 & 25 Vict. c. 61, upon which the indictment was framed.

WILLIAM ERLE.

The *Solicitor-General* for the defts.—The shop front was built on what was formerly a garden inclosed by a wall, and was about four feet from the footway. The 24 & 25 Vict. c. 61, s. 28, enacts that "it shall not be lawful within the district of any local board to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front of such house or building on either side of the same, as aforesaid, without the previous consent of such local board. First, this was not a street. In the Public Health Act 1848, incorporated with the 24 & 25 Vict. c. 61, a street is defined by sect. 2,—“the word ‘street’ shall apply to and include any highway (not being a turnpike-road), &c.” In this case the road is a turnpike-road, and it was intended to exclude such roads from the jurisdiction of the local boards, and to leave them under the jurisdiction of the turnpike trustees. And that this was intended, is further shown by 21 & 22 Vict. c. 98, s. 41, which empowers local boards to enter into agreements with turnpike trustees as to the repair, &c. of roads and streets within their districts. [ERLE, C. J.—The definition of “street” in the 11 & 12 Vict. c. 63, has relation to sect. 69 of that Act, which vests the property in the streets, &c. in the local boards, and to show that it was not intended to take the property in turnpike-roads out of the turnpike trustees.] In the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), s. 68, the phrase “house or building projecting beyond the regular line of street” is used. This is not a street, because the houses have gardens in front of them, and the houses are not all at an equal distance from the road. What is to regulate the length of the gardens in front of houses so as to form a street? If houses with gardens of 20 feet only are in a street, why not houses with gardens of 100 yards in front of them? Again, the houses on the same side of the way are detached, each standing on its own land. [MELLON, J.—Some houses like these have ground in front belonging to them, unfenced from the public way, on which the public

can go; others have the ground in front fenced off, and on which the public cannot go. Is the same rule of construction to apply to both? It is clear the clause applies to houses only which do not come close up to the roadway. BLACKBURN, J.—It is difficult to say that Devonshire-house, in Piccadilly, forms part of the street.] This was originally a country road vested in trustees, and now the houses do not adjoin, but are detached at irregular distances. [POLLOCK, C. B.—How could you apply the term “street” to such houses as Lord Wharncliffe’s, in Curzon-street, Mayfair; or Mr. Holford’s, in Park-lane? The projection in front of Sir John Soane’s Museum, Lincoln’s-inn-fields, was maintained, although it was said to be contrary to the provisions of the Metropolitan Building Act.] Independently of the statute, the defts. had a right to build on their own land, as they have done, and the words of the statute should be much more stringent than they are to take away such right.

Coleridge, Q.C. for the prosecutors.—I agree that it is only by the cogent words of some statute that a party is to be prevented from dealing with his own property as he pleases. In this case the defts. are prevented from doing so by the 24 & 25 Vict. c. 61, s. 28, which prevents them bringing forward their house or shop beyond the front wall of the house or building on either side thereof. That does not mean the houses or buildings on either side “in a line therewith.” Unless this place is not a street, the defts. have infringed the statute. The real question is, is this a street, or does the defts.’ house form part of a street? [MARTIN, B.—Is this a question of fact or law?] It is a question of law. It is called West-street; but it is conceded the name is not conclusive. It is the ordinary access from the town to the railway-station. This is a highway in a town, and the object of the statute was to compel uniformity of line of buildings in towns. The meaning of the word street, as given in Johnson’s, Webster’s, and Richardson’s dictionaries was quoted.

POLLOCK, C. B.—We are all of opinion that the question whether this was a street or not was a question of fact for the jury, which has not been determined by them, and therefore that this conviction cannot be sustained. I believe that all of us are not agreed as to whether this was a street or not. I and some of my brothers think that it was not. Speaking for myself only, in my opinion, and as far as it is a matter of law on which it is necessary to give a direction to the jury, this set of detached houses, all of which were not in a continuous line, and had not an apparent continuous line, was not a street within the meaning of the Act in question.

ERLE, C. J.—I am of the same opinion. The question is, what is the meaning of the word “street” in sect. 28 of 24 & 25 Vict. c. 61? I think the word “street” was meant to apply only to a row of houses in some degree continuous and proximate to one another, and I ought to have left the question to the jury, telling them that if in their opinion the houses had not that degree of contiguity and proximity that was necessary to constitute a street, they ought to have acquitted the defts.

MARTIN, B.—I am of opinion this was of necessity a question for the jury. In this case I am quite satisfied that this was not a street within the meaning of the Act of Parliament. It was a question of fact for the jury to determine on the best direction that the judge could give to the jury under the circumstances. In this case there is really nothing to guide them to the conclusion that it was a street.

The name is not conclusive, for the old Watling-street in many parts had no houses. The question not having been left to the jury I concur in thinking that the conviction cannot be sustained. I should rather have left the case to the jury, with the intimation that this was not a street.

BLACKBURN, J.—I am of the same opinion. I agree that this was a question of fact, whether, within the meaning of the 24 & 25 Vict. c. 61, s. 28, this house formed part of a street. Whether the houses and buildings on one side of a road are so continuous as to form a continuous road is a question of fact. In the present case I incline to think that they did, but still that was a question for the jury, on which they might have found either way consistently with the evidence.

MELLOR, J.—I am of the same opinion. I agree with my brother Blackburn, that if on the question of whether this was a street having been submitted to the jury they had found either way, I should not have been disposed to disturb the finding. The question really is, whether these houses were so near as to form a continuous row of buildings, and the question was really one for the jury, whether they formed a street or not.

*Conviction quashed.*

(Before POLLOCK, C.B., MARTIN, B., BYLES, BLACKBURN and MELLOR, J.J.)

REG. v. JAMES LEE AND ANOTHER.

*False pretences—Indictment—Particularity—Evidence.*

*The indictment charged that prisoners falsely pretended that two loads of soot which the prisoners then delivered weighed 1 ton 17 cwt., whereas they weighed but 1 ton 18 cwt., by means of which false pretence the prisoners obtained 8s.*

*The evidence was that a contract existed between prosecutor and prisoners for soot, which prosecutor was to buy at the rate of 38s. per ton. Deliveries were made from time to time, and payment was made according to the quantities so pretended to be delivered. The prisoners put broken bricks and slack among the soot in their cart, and went to a public weighing machine, and got the whole weighed and a ticket of such weight given. Afterwards the bricks and slack were removed and the cart with the soot in it taken to the prosecutors and the soot delivered and the tickets presented and payment made by the prosecutor according to the weights specified in the tickets:*

*Held, that the indictment was sufficiently specific in form, and that the prisoners were indictable for obtaining money by false pretences.*

Case reserved for the opinion of this court at the last Nottinghamshire Michaelmas Sessions.

The two prisoners were convicted of obtaining money under false pretences.

The indictment charged in the first count that the prisoners on the 20th Aug. at Oxtou did falsely pretend to one Joseph Burgess Thurman that two loads of soot which the prisoners then delivered to the said J. B. Thurman did together weigh 1 ton and 17 cwt., whereas in fact the said two loads of soot did not weigh together 1 ton and 17 cwt., but only weighed 1 ton 18 cwt., the said prisoners well knowing the said pretence to be false, by means of which false pretence the said prisoners obtained from the said J. B. Thurman 8s. with intent to defraud.

The second count charged, that the prisoners on the 20th Aug. at Oxtou did falsely pretend to one J. B. Thurman that three loads of soot, one of which said loads of soot the prisoners delivered to the said J. B. Thurman on the 17th

Aug., and the remaining two loads of which soot the prisoners delivered to the said J. B. Thurman on the 20th Aug. aforesaid, did together weigh 2 tons 11 cwt. 2 qrs., whereas, in fact, the said three loads of soot did not weigh together 2 tons 11 cwt. 2 qrs., but only weighed 1 ton 9 cwt., the said prisoners well knowing the said pretence to be false, by means of which false pretence the said prisoners obtained from the said J. B. Thurman 2l. 1s. with intent to defraud.

The prosecutor was a farmer. The prisoners were chimney sweepers, of whom the prosecutor had agreed to purchase soot at the rate of 1l. 18s. per ton.

On the 17th Aug. the prisoner Lee delivered to the prosecutor a cart load of soot, and at the same time presented to the prosecutor a ticket of the alleged weight of the soot (14 cwt. 2 qrs.).

The soot was weighed and a ticket obtained at a public weighing machine, seven or eight miles distant from the prosecutor's residence.

Prosecutor paid Lee 1l. 7s. 6d. for that soot, believing there was 14 cwt. 2 qrs., as stated on the ticket.

On the 20th Aug. both prisoners delivered to the prosecutor two loads of soot, and gave to the prosecutor two tickets of the alleged weight of such two loads.

The soot was weighed, and the tickets obtained at the same weighing machine as before; the weight of one load was stated on the ticket to be 17 cwt. 2 qrs., and the weight of the other load was stated on the other ticket to be 1 ton 1 qr., and the prisoner Lee said those were the weights of the two loads.

The prosecutor then paid the prisoners for the two loads of soot according to the weights stated in the two tickets, believing those weights to be correct.

The two loads of soot were then put to the first load of soot bought on the 17th Aug., the prosecutor not then having suspicion of any fraud having been committed, but in a few hours afterwards, in consequence of information received by the prosecutor, the three loads of soot were weighed by him, and the three loads together were found to contain only 1 ton 9 cwt., being 1 ton 2 cwt. 2 qrs. less than the weight represented by the prisoners to be contained in the three loads, and 8 cwt. less than the weight represented to be contained in the two loads last delivered.

The price of 1 ton 9 cwt. would have been only 2l. 17s. The price of the three loads, at the weight pretended by the prisoners, was 4l. 18s., and that sum was actually paid by the prosecutor to the prisoners. The price of the two loads last delivered at the weight pretended by the prisoners was 8l. 10s. 6d., which sum was paid by Mr. Thurman to the prisoners on the 20th Aug.

The three tickets were produced by the prosecution during the trial, and put in evidence.

It was proved on the trial that three loads of what appeared to be soot were weighed by the prisoners at the machine mentioned in the tickets, and that the weights represented on the tickets were the weights of the three loads at the time they were weighed.

It was also proved that, between the time of weighing the last two loads of soot at the machine and the delivery of the soot to the prosecutor, the prisoners had, during the transit, removed from the carts in which what appeared to be soot was conveyed, three bags full of broken bricks and wet coal slack, weighing upwards of 4 cwt., and which was in the carts when the loads were weighed; and that, between the weighing machine and prosec-

C. CAS. R.]

REG. v. LANGMEAD.

[C. CAS. R.]

cutor's premises was a distance of several miles; so that therefore the prisoners had ample opportunity of removing other soot from the cart without being observed.

Upon their arrest the prisoner Lee said, in allusion to the bags of bricks and coal slack, "We were taking those bags to a man's garden at Carrington, and we forgot to leave them;" but no evidence was offered in support of this statement, nor, except as aforesaid, was any explanation given of the deficiency between the soot delivered and the weight mentioned on the tickets.

The prisoner's counsel objected to the indictment that it did not sufficiently set forth the false pretence: that it ought to have set forth the fact that the soot was weighed and tickets were given that it ought to have set forth the contents of the tickets, and then ought to have alleged that the false pretence was the production of the tickets. Prisoner's counsel also objected that it was not an offence under the statute to cheat by false representation of the weight of the soot.

The Court overruled the objections, and held that it was an offence within the statute, that the false pretence was sufficiently set forth in the indictment, and that the tickets were only matters of evidence, and that it was not necessary to set them out in the indictment.

The jury found the prisoners guilty, but the prisoner's counsel requested a case for the court above. The Sessions respited judgment and discharged the prisoners upon their own recognisances.

The questions left for the consideration of the Court for Crown Cases Reserved are—first, is the false representation of the weight of the soot a false pretence within the statute? and if so, secondly, is that pretence sufficiently set forth in the indictment? BELPER, Chairman.

*Yeatman* for the prisoner.—The conviction cannot be sustained. First, the indictment is insufficient for not alleging that the ticket was used as a false pretence. It must be shown what the false pretences are by which the property is obtained: (*Rex v. Mason*, 2 T. R. 581.) So in *Rex v. Munoz*, 2 Stra. 1127, it was held necessary to specify the false tokens in the indictment by which the property was obtained. The ticket was the inducement to the prosecutor to part with his money. [MELLOR, J.—The ticket is only the means of proof—the false assertion is the same.] Secondly, assuming the indictment good, no offence was proved. This was an ordinary case of buying and selling, in which the seller gave short weight. That is not indictable: (*Reg. v. Eagleton*, 6 Cox C. C. 559.) [MARTIN, B.—Not so. At the time of the delivery of the soot a ticket is presented, which truly specifies what was the weight of the cart at the weighing machine, but then that was made up partly by broken bricks and slack, and the prisoners pretended that it was all soot, and the ticket was used to vouch that false pretence.] (*Rex v. Reed*, 7 C. & P. 848, was then cited.) [BLACKBURN, J.—That was overruled by *Reg. v. Sherwood*, 7 Cox C. C. 270, from which the present case cannot be distinguished.] In this case the prosecutor got a quantity of soot in respect of his contract, but not all the weight that he was entitled to. This is not a case of false pretences such as was contemplated by the statute.

*Cave*, for the prosecutor, was not called upon to argue.

POLLOCK, C. B.—We are all of the same opinion that the indictment is good, and that the evidence supports the indictment. The objection to the indictment is not well founded. The indictment states the offence in the words of the statute, and it

is not necessary to state more than the general nature of the offence as it is here stated. The case of *Reg. v. Sherwood* is in point. As to mere false representations in buying and selling, and in the course of bargaining, it was not the object of the Legislature to make them the subject of indictment for false pretences. But in this case, though a bargain was made in the first instance, yet by a subsequent device the buyer was imposed on by the seller as to the quantity of soot delivered, and that was the subject of indictment. The conviction will therefore be affirmed.

MARTIN, B.—I am of the same opinion. There can be no doubt in this case on the second count of the indictment, which states precisely what the circumstances were. It is true that the weight of the soot was vouched by a ticket, but that was used only to confirm the prisoner's statement, while in reality it was merely a lie, with the circumstance of a ticket been used as a voucher that that was the weight of the soot, but in fact it was made up with bricks. It was not necessary to mention the ticket in the indictment, for that was merely evidence of the false pretence by which the money was obtained. This is a clear case

The rest of the Court concurring,

Conviction affirmed.

(Before POLLOCK, C. B., MARTIN, B., BYLES, BLACKBURN and MELLOR, JJ.)

REG. v. LANGMEAD.

*Indictment—Larceny and receiving—Recent possession—Evidence.*

*It is a presumption of fact, and not an implication of law from evidence of recent possession of stolen property unaccounted for, whether the offence of stealing, or of feloniously receiving, has been committed.*

*Where an indictment contains counts for larceny and receiving, unless the evidence excludes the probability of one or the other offence having been committed, the case should be left to the jury on both counts.*

Case reserved for the opinion of this court at the General Quarter Sessions of the peace, held at the Castle of Exeter, in and for the county of Devon, on the 28rd Feb. 1864.

James Langmead was indicted and tried for:

1st count. Stealing at Belstone, on the 22nd Dec. 1863, four wether sheep, two ewes, and six sheep, of the goods and chattels of George Glanfield.

2nd count. Feloniously receiving the said sheep, knowing them to have been stolen.

The following is the material part of the evidence taken at the trial:—

George Glanfield, farmer, at Belstone.—Has a right of common on Belstone-common. Had sixty-one sheep on the common in the month of December last. About a fortnight before Christmas-day I saw all my sheep but two on the common. About Thursday or Friday after Christmas-day I went to see my sheep, and found all except thirteen. On the 3rd Feb. I went to Collypriest, Mr. Bond's farm; saw twenty-one sheep there of the Dartmoor breed. I examined them and was certain there were four of mine there. I went again on the following Tuesday. Examined the flock again, and then found six of my sheep, two ewes and four wethers (including the four).

John French, servant.—Living with Mr. Langmead. He kept a car just before Christmas. He has two sons, one about twelve, the other about eight. One morning in Christmas week he told me to get the car. I got the car and went with my master and his two sons as far as Sticklepath. Went through Mr. Beddaway's court to get to the road, and came out in the road about two miles from Okehampton, about one-mile and a-half from Sticklepath. When we came to the turnpike-road we went on to the head of Sticklepath, and then I went back again. We did not go into the village; I went within about a gunshot.

Elizabeth Willis.—I live at Sticklepath. The house I occupy joins the high road. I was out of my bed and saw a flock of



C. CAS. R.]

REG. v. LANGMEAD.

[C. CAS. R.]

sheep going through the village, driven by two boys. I cannot say who they were. My impression was that they were Mr. Langmead's boys. It was before Christmas, and bright moonlight. It was early in the morning; I cannot tell at all what time.

Cross-examined.—It is a common thing for sheep to be driven through Sticklepath. I cannot say whether it was a month before Christmas.

John Hunt.—In employment of Mr. William Smith, cattle dealer.—On the 23rd Dec. I went to the King William Inn, about a mile from Exeter, at seven o'clock in the morning, in consequence of directions given by my master. I saw that no sheep had passed, and then I went on to the Okehampton-road half-a-mile, and there I met a boy with a flock of sheep—twenty-one. I spoke to the boy, and having spoken to him I drove the sheep back to the inn and went into the public-house. I first saw prisoner outside the public-house; another boy was with him. Both boys had breakfast. One of the boys is here now (points him out in court). That is the boy that drove the sheep. I put the sheep into a lane by the roadside, and then went into the inn. The sheep seemed weary with travelling. I know Sticklepath; that must be seventeen or eighteen miles from Exeter. Prisoner said, before he went into Little John's Cross Inn, he should like to see what keep or food the sheep had. After breakfast I went to a field, into which Mr. Smith directed the sheep to be put. The prisoner went with me. It lies a mile towards Exwick. I told prisoner he was to meet my master at the Swan Inn, at St. Thomas's, in the evening. When I went to the field I turned the sheep in. The prisoner and the two boys went with me.

John Lewis, innkeeper, King William Inn, at Little John's Cross.—Knows the prisoner; has known him for some time. He came to my house at eight o'clock on the 23rd with his youngest boy in a car. He put the horse in the stable, and ordered breakfast for himself and two boys. "I want breakfast for myself and two boys." After he had arrived there about ten minutes or a quarter of an hour, the second boy came. He said he had sheep coming along the road, and he wished to stop them in the yard till he got keep for them. I refused, because I thought they would trespass on my garden. Prisoner said they were much tired; they would soon lay down. He had his breakfast with his two boys, and then left the house.

William Smith, cattle dealer.—Recollects receiving a letter from the prisoner on the 22nd Dec. I have missed it. Mr. Langmead wrote me he should have some sheep coming on; he would be early at Little John's Cross, at the King William Inn. He said, if I could not be there to deal for them, I was to send some person to show where to put the sheep in my field. I was going somewhere, and could not be there that morning, and sent Hunt. Between six and seven in the evening, on the 23rd, I went to the Swan Inn, at St. Thomas's, and there saw prisoner. I believe I said, "Where are the sheep?" to Mr. Langmead. He said, "They are up in your field. What shall you charge me for the keep of them?" I spoke short. I said, "Nothing at all. If you don't sell them you can keep them." I said, "What—have you sold them?" Prisoner said, "No; I have had a very good offer for them." I went with him to my field. I did not count the sheep. Prisoner said there were twenty-one. He said there were two ewes, and I took for granted the remaining sheep were wethers. He said, "You shall be vethem for 38l. 10s." We returned to the house, and I gave him the money. He told me he had bought a portion of them.

Alfred Bond.—Resides at Collypriest farm, Tiverton. On the 8th Jan. I purchased sheep of Mr. Wm. Smith. Purchased twenty-one. Sent them home to the farm. They were Dartmoor sheep, redded over the backs and sides. In the beginning of February, police constable Harris came. I told him where to go to find the sheep. Some days after, on a Tuesday, Harris, the prosecutor, Boddaway, and Endacott came. They did not take the sheep. They remained in my possession till after I had been to Northawton. Then I gave them to Harris.

The prisoner's counsel at the close of the evidence for the prosecution submitted to the court that there was not sufficient evidence to go to the jury, but the Court decided that there was, and after reading through the evidence by the Chairman, the whole case was left to the jury.

The jury found the prisoner guilty of feloniously receiving the sheep, knowing them to have been stolen.

Whereupon the counsel for the prisoner objected that there was no evidence before the court to support the second count, and that the jury should have been directed that they could not find the prisoner guilty on that count, for (he contended) the evidence proved no more than recent possession by the prisoner after the loss, unaccounted for, and that although a presumption of guilt might legally be inferred from recent possession unaccounted for alone, if the offence of which the jury found the

prisoner guilty had been theft, yet that guilt could not be inferred from recent possession unaccounted for alone, in considering whether the prisoner was guilty of feloniously receiving the sheep, knowing them to have been stolen.

The Court were of opinion that there was sufficient evidence to support the verdict, but at the request of the prisoner's counsel they granted a case on the following question,

Whether upon the whole case the jury should have been directed that they could not lawfully find the prisoner guilty upon the second count.

The prisoner was sentenced to four years' penal servitude.

Execution of the sentence was respited until the judgment of this Court shall have been certified to the clerk of the peace. The prisoner is now in gaol.

B. ANDREWS, Chairman.

Curter for the prisoner.—There was no evidence that ought to have been left to the jury on the count for receiving. Recent possession of stolen property is not evidence of feloniously receiving: if it proves anything it is evidence of stealing. [MELLOX, J.—The evidence of Elizabeth Wills, that she saw the sheep driven by two boys, and that her impression was that they were the prisoner's boys, surely was some evidence (whatever its value may be is another question) for the jury upon the count for receiving.] Recent possession raises the presumption that the prisoner stole them rather than that he received them. The evidence of Elizabeth Wills came to nothing, for she could not say when it was that she saw the sheep driven by two boys, and that it might have been a month before Christmas. It is necessary to infer more conditions in the case of receiving than of stealing—in the latter case you must infer (1) that the things were stolen by some one else; (2) that the prisoner received them; (3) that they are the same things; and (4) a receiving with guilty knowledge. Mere recent possession does not in this case enable you to infer all those things. In 2 Russ. on Crimes, 247, it is said: "Upon an indictment for receiving stolen goods there should be some evidence to show that the goods were in fact stolen by some other person, and recent possession of the stolen property is not alone sufficient to support such an indictment, as such possession is evidence of stealing and not of receiving."

Reg. v. Denaley, 6 C. & P. 399;

Reg. v. Oddy, 2 Denn. C. C.

Allison's Principles of the Law of Scotland was also referred to.

POLLOCK, C. B.—We are all satisfied that the chairman could not have withdrawn the case from the jury on the count for feloniously receiving the sheep, or have given them a direction that there was no evidence of feloniously receiving by the prisoner. The distinction between the presumption as to felonious receiving and stealing is not a matter of law. No doubt, upon the evidence, no other person than the prisoner appears distinctly to enter into the transaction, and all that appears is that the prisoner was found very recently in possession of the stolen sheep. That *prima facie* is evidence of stealing rather than of receiving, but in no case can it be said to be exclusively such, unless the party is found so recently in possession of stolen property, and under such circumstances as to exclude the probability of receiving: as where a party is stopped coming out of a room with a gold watch which has been taken from the room; but if he has left the room so long as to render it probable that he may have received it from some one else, then it may be evidence either of stealing or of feloniously receiving. In the present case, I think that the



C. CAS. R.]

REG. v. MARY SENIOR—REG. v. FRETWELL.

[C. CAS. R.]

evidence of receiving was more cogent than that of stealing. It is very likely that the prisoner sent the two boys to drive the sheep, and that they had innocently taken them from some one else who had stolen them from the common.

MARTIN, B.—I am of the same opinion. The question is, if the indictment had contained a count for feloniously receiving only, could the chairman have stopped the case from going to the jury? I think clearly not. It is utterly impossible to say that there was not some evidence from which the jury might have inferred that the prisoner's two sons stole the sheep, and that the father received them. No doubt, the jury, believing it to be the more lenient course to find the verdict of feloniously receiving, acted accordingly.

BYLES, J.—I am of the same opinion. There are several grounds on which this verdict may be sustained. The prisoner might have been guilty of receiving the sheep if the two boys had stolen them. That was a possible case on the evidence. Again, he might have sent the two boys as innocent agents to get them from another person who had stolen them. Thirdly, the two boys may be looked upon as guilty agents in receiving, and the prisoner treated as an accessory before the fact, which would render him liable to be tried for a substantive felony. This is like the case of a burglary in which a woman is concerned who is found dealing with the property stolen, in which case it is for the jury to determine in what character she is criminally liable.

BLACKBURN, J.—I am of the same opinion. As a proposition of law there is no presumption that recent possession points more to stealing than receiving. If a party is in possession of stolen property recently after the stealing, it lies on him to give an account of his possession, and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly; but it depends on the surrounding circumstances whether he is guilty of receiving or stealing. Whenever the circumstances are such as render it more likely that he did not steal the property, the presumption is that he received it. In the present case I believe that the jury have drawn the right conclusion.

MELLOR, J.—I am of the same opinion. In this case I think that there was evidence on which the jury might have come very fairly to either conclusion of stealing or of receiving.

Conviction affirmed.

(Before POLLOCK, C.B., MARTIN, B., BYLES, BLACKBURN and MELLOR, JJ.)

REG. v. MARY SENIOR.

*Perjury—Jurisdiction—Sunday-beer trading—Prohibited hours—11 & 12 Vict. c. 49.*

*To an indictment for perjury on the hearing of an information before justices under the 11 & 12 Vict. c. 49, for keeping open an inn for the sale of beer to persons not being travellers, before half-past twelve o'clock on Sunday afternoon, it was objected by counsel that the justices had no jurisdiction, and that the 11 & 12 Vict. c. 49 was repealed, and for this Whiteley v. Heaton, 27 L. J. 217, M. C., was cited:*

*Held, on the authority of Harris v. Jenns, 3 L. T. Rep. N. S. 408, that the 11 & 12 Vict. c. 49 was not repealed, and therefore that the justices had jurisdiction.*

Case reserved for the opinion of this court by E. F. Price, Esq., Q.C., sitting as Commissioner at the Yorkshire Lent Assizes 1864.

This case was tried before me, sitting as Commissioner for Byles, J., at the last York Assizes.

The prisoner was indicted for wilful and corrupt perjury alleged to have been committed upon the hearing of an information before justices sitting at petty sessions.

The information was laid against one Thomas Sellers under the statute 11 & 12 Vict. c. 49, s. 1, of which the following is a copy:

"Borough of Wakefield, in the West Riding of Yorkshire.

"The information of James McDonnold, of Wakefield, in the West Riding of the county of York, chief constable, taken before the undersigned, one of Her Majesty's justices of the peace in and for the said borough, in the West Riding of the county of York, the 18th Feb. 1864.

"That Thomas Sellers, on Sunday, the 7th Feb. inst., at the borough of Wakefield, in the said Riding, was licensed to keep his house as an inn there, and did open his house there for the sale of beer therein to persons not being travellers, before half-past twelve o'clock in the afternoon, contrary to the statute in that case made and provided.

"JAMES McDONNOLD.

"Taken before me, Samuel Holdsworth."

At the close of the case for the prosecution it was objected by Mr. Campbell Foster, for the prisoner, that there was no jurisdiction in the justices to hear the information under the statute above named; and he further contended that the statute 18 & 19 Vict. c. 118, was the only statute now in force limiting the hours during which public-houses, beer-houses, &c. should be open for the sale of liquor, and that this latter statute had, in effect, repealed the 11 & 12 Vict. c. 49, under which the information was laid, and that it is no offence to sell beer, &c. during any part of the forenoon of Sunday. Mr. Foster relied on the case of *Whiteley v. Heaton*, 27 L. J. 217, M. C.

I overruled the objection and left the case to the jury, who convicted the prisoner, and she was sentenced to three months' imprisonment, but allowed to be on bail until the opinion of the Court for Crown Cases Reserved could be obtained.

I reserved a case for the opinion of the judges as to whether my ruling was right that the 11 & 12 Vict. c. 49 is still in force and that it is an offence to keep open a public-house for the sale of liquor during the hours prohibited by sect. 1 of the latter statute, and therefore that the jurisdiction in the magistrates to hear the information was sufficiently established.

E. F. PRICE.

No counsel were instructed on either side.

MARTIN, B.—The court has been referred to the case of *Harris v. Jenns*, 30 L. J. 183, M. C.; 3 L. T. Rep. N. S. 408, in which it was pointed out that my brother Bramwell, B. could not have intended what he is reported to have said in *Whiteley v. Heaton*, viz., that the 11 & 12 Vict. c. 49, was repealed by the 17 & 18 Vict. c. 79. *Harris v. Jenns* decides that the 11 & 12 Vict. c. 49 is still in force, and therefore the justices had jurisdiction to hear the information in this case, and the conviction is good.

Conviction affirmed.

Saturday, April 30, 1864.

(Before POLLOCK, C. B., BLACKBURN, KEATING and MELLOR, JJ., and PIGOTT, B.)

REG. v. FRETWELL.

*Felony—Shooting into a crowd—Unlawful wounding—24 & 25 Vict. c. 100, s. 18.*

*A person who fires a pistol at a group of persons, not aiming at any one in particular, but intending generally to do grievous bodily harm, and severely wounds one of the group, may be indicted and convicted for feloniously shooting and wounding the person injured with intent to do grievous bodily harm.*

Case reserved for the opinion of this court by Byles, J.

The prisoner was indicted for feloniously shooting at Hirats Lawton with intent to do grievous bodily harm to Hirats Lawton, and tried before me at the last York Assizes.

The prisoner had been assaulted and annoyed by several other young men, among whom was the prosecutor. Immediately afterwards these young men were standing together in a group of about fifteen persons. The prisoner drew a pistol from his pocket and fired into the group. The prosecutor received some severe shot wounds in his neck and chin.

The jury found that the prisoner did not aim at the prosecutor, or at any one else in particular, but that he fired into the group, intending generally to do grievous bodily harm, and so unlawfully wounded.

Judgment was postponed, and the prisoner remains in custody, the question being

Whether, on this finding, the prisoner be guilty of the felony charged in the indictment, or of the misdemeanour only? (See *Reg. v. Smith*, 1 Dears. C. C. 559; 7 Cox. C. C. 5 (a), and the cases cited.)

J. B. BYLES.

No counsel appeared on either side.

By the COURT.—The prisoner might very properly be convicted of the felony.

Conviction affirmed.

#### REG. v. HENSHAW AND CLARK.

##### *Indictment—False pretence—Statement of.*

*An indictment for obtaining money by false pretences alleged that prisoners pretended to P., who lived at T.'s and acted as T.'s representative, that C. had come from London to the residence of H., and that P. was to give C. 10s., and that T. was going to allow C. 10s. a-week for the benefit of his health:*

*Held, that the indictment did not state with sufficient certainty a false pretence of an existing fact.*

Case reserved for the opinion of this court by the Recorder of Brighton.

At the General Quarter Sessions of the peace for the borough of Brighton, holden on the 19th March 1864, Lewis Henshaw and John Clark were tried before me upon the following indictment:

Borough of Brighton, to wit.—The jurors for our Lady the Queen, upon their oath present, that Lewis Henshaw and John Clark, on the 14th day of Jan. 1864, unlawfully, knowingly and designedly did falsely pretend to one Henrietta Pond, who then lived at one Madame Temple's, and acted as her representative, that the said J. Clark had come down from London, to the residence of the said L. Henshaw, and that the said H. Pond was to give him 10s., and that the said Madame Temple was going to allow the said J. Clark 10s. a-week for the benefit of his health. By means of which false pretence the said L. Henshaw and J. Clark did then attempt unlawfully to obtain from the said H. Pond the sum of 10s. with intent to defraud. Whereas in truth and in fact the said H. Pond was not to give the said J. Clark the sum of 10s. or any other sum of money, and whereas in truth and in fact the said Madame Temple was not going to allow the said J. Clark the sum of 10s. a-week, or any other sum of money, for the benefit of his health, as they the said L. Henshaw and J. Clark well knew at the time when they did so falsely pretend as aforesaid, against the form of the statute in such case made and provided.

(a) *Reg. v. Smith*.—If A. intending to murder B. shoots at and wounds C., supposing him to be B., he is guilty of wounding C. with intent to murder him, for he intends to kill the person at whom he shoots.

The facts of the case, so far as they are material to the point reserved, were as follows:

On the 15th Jan. last, in the evening, the two prisoners went together to the shop of Madame Temple in Brighton; she has also a shop in London. After Henshaw, in the presence and hearing of Clark, had made a statement to one of Madame Temple's assistants, he requested to see the one of the assistants who kept the accounts. H. Pond being the person by whom the accounts of Madame Temple's Brighton establishment are kept, then came forward.

Her evidence was, that Henshaw, in the presence and hearing of Clark, said: "This young man (meaning Clark) has come down from London; that he (meaning Clark) had been in the Brompton Hospital with a bag leg; that he (meaning Clark) had seen Madame Temple in London; that Madame Temple said that I (H. Pond) was to give him (meaning Clark) 10s. a-week while he was at Brighton for the benefit of his health. I refused to do so, saying that if Madame Temple wished me to do it she would send me a letter the next morning. Once or twice Henshaw said, "You do not intend to give the 10s." Henshaw said to Clark, "Was that what Madame Temple said?" Clark said "Yes." Henshaw then said that he would write to Madame Temple, and the prisoners went away together.

Madame Temple was called, and denied ever having seen, or having any knowledge of either of the prisoners. The counsel for the prisoners objected that the indictment alleged no false pretence of an existing fact, and negated no false pretence of an existing fact, all the facts alleged and negated being future.

I held that the false pretence that the said H. Pond was to give him 10s. was a sufficient false pretence of an existing fact to support the indictment, and that the second false pretence, even if not of an existing fact, might therefore be taken into consideration in conjunction with the first false pretence, but reserved the point for the consideration of the Court of Criminal Appeal.

The jury found both prisoners guilty, and they were sentenced by me to four calendar months' imprisonment, with hard labour, and were committed to the House of Correction at Lewes in execution of that sentence.

The question for the opinion of the Court of Criminal Appeal is, whether upon this indictment the said conviction was right.

JOHN LOCKE,

Recorder of Brighton.

*Conolly* for the prosecution.—The indictment shows sufficiently a false statement of an existing fact. [POLLOCK, C. B.—What is the existing fact alleged?] That Madame Temple had said that Pond was to give Clark 10s. a-week whilst he was at Brighton. [POLLOCK, C. B.—That is not so laid; the averment is that Pond was to give him 10s., and that Madame Temple was going to allow him 10s. a week. Now if I say that I am a member of Parliament and am not, that is a false pretence; but if I say I expect to be made a peer, that is no false pretence.] In one sense the act to be done must always be future, for the result of the false pretence, the obtaining of the money, is necessarily so. The averment that Pond was to give Clark 10s. is the statement of an existing fact. [PROCTOR, B.—Does it not require the words "by her authority" to make the statement sufficient? BLACKBURN, J.—The case of *Reg. v. Archer*, Dears. C. C. 449; 6 Cox C. C. 515, is the nearest in your favour. Here the prisoners do pretend that Clark was in some way connected with Madam Temple.] The case of *Reg. v. Fry*, 1 Dears. & B. 449, 7 Cox C. C. 394, was then cited. Here the substance of the thing is

Q. B.]

REG. v. WILKINSON.

[Q. B.]

a pretended conversation with Madame Temple, which never took place.

No counsel appeared for the prisoner.

**POLLOCK, C.B.**—The majority of the Court are of opinion that the indictment does not state with sufficient certainty any false pretence within the rule that requires that an existing fact shall be alleged as the ground of the false pretence. Very likely some speculation may be formed from this indictment as to what the false pretence was, but the majority of the court do not think that it is stated with sufficient certainty.

**BLACKBURN, J.**—I agree with the Lord Chief Baron that the false pretence should be stated with sufficient certainty by which the money was attempted to be obtained. Speaking for myself only, I should say when it is alleged, as here, "that Madam Temple was going to allow John Clarke 10s. a-week," that is to be construed and understood in the sense and meaning that Madam Temple had expressed such an intention at a previous time, and that Pond was to give 10s. on her account, and therefore that it is a sufficient statement of a false pretence of an existing fact. If the count had stated the facts according to the evidence there would have been no doubt that it would then have been a sufficient false pretence. Although I doubt, I concur in the judgment of the court, and do not require the case to be argued before the fifteen judges.

**PIGOTT, B.**—I entertain considerable doubt whether there is a statement in the indictment of a false pretence of an existing fact.

**MELLOR, J.**—Upon the whole, I agree with the Lord Chief Baron, that the false pretence is not, according to the rules of criminal pleading, alleged with sufficient certainty.

**KEATING, J.**—I agree that the statement in the indictment is susceptible of the construction put upon it by my brother Blackburn, but I do not think that the indictment states it with convenient certainty.

**POLLOCK, C. B.**—In consequence of what has fallen from my brother Blackburn, I wish to add that, if the averment is susceptible of the meaning he has put upon it, it ought to have been left to the jury to say whether the words made use of by the prisoner did really mean that which would make it a criminal offence, and that the judge ought not to take upon himself to say that they meant that.

*Conviction quashed.*

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Wednesday, April 27.

REG. v. WILKINSON.

*Alcohol licence*—9 Geo. 4, c. 61—*Class of houses to which licence extends.*

*Under the 9 Geo. 4, c. 61 (an Act to regulate the granting of licences to keepers of inns, alehouses and victualling houses in England), justices have no power to grant a licence to sell exciseable liquors with the condition attached that they are not to be drunk or consumed on the premises, or to any other class of houses than inns, hotels, alehouses and victualling houses wherein the liquors may be drunk or consumed upon the premises.*

Special case stated by the Devonshire Court of Quarter Sessions on appeal by five persons against the refusal of the Licensing Justices of the Paignton division to renew their licences to sell exciseable

liquors to be drunk and consumed on their respective premises at Torquay under the 9 Geo. 4, c. 61.

None of the houses occupied by the apps. were used for the accommodation of man and beast in the usual way in which inns or hotels are used. The apps. supplied wines and spirits in small quantities, varying from a quart bottle to half-a-pint, to persons who came and asked for them, but never allowed them to be consumed on their premises. Indeed all the apps. have been for some years past required by the licensing justices, as a condition for the renewal of their licences, not to allow any wines or spirits to be consumed on their premises.

The justices now declined to renew the licences on the sole ground that the apps., not being hotel or innkeepers, or keepers of victualling houses, were not persons to whom licences could be granted under the 9 Geo. 4, c. 61, adding that the 24 & 25 Vict. c. 21, s. 2 (commonly called the Bottle Act) had defined the limit to which wine merchants such as the apps. were allowed to sell wines and spirits by retail.

The Court of Quarter Sessions confirmed the decision of the licensing justices, subject to the opinion of this court as to the above construction of the 9 Geo. 4, c. 61.

*Bere for the apps.*—The question desired to be ascertained is, whether such licences can be granted under the 9 Geo. 4, c. 61 (an Act to regulate the granting of licences to keepers of inns, alehouses and victualling houses in England). By the interpretation clause, "inn, alehouse, or victualling house, shall be deemed to include all houses in which shall be sold by retail any exciseable liquor to be drunk or consumed on the premises." By the 24 & 25 Vict. c. 21, s. 2, what is called the bottle licence was created, that is, power to sell spirits in any quantity by retail not less than one reputed quart bottle, not to be drunk or consumed on the premises. It was contended that the justices had power, under the 9 Geo. 4, c. 61, to grant the licences applied for by the apps:

*Modlen v. Snowball*, 31 L. J. 44, Ch.

**COCKBURN, C. J.**—The case is too clear for argument. The Act 9 Geo. 4, c. 61, s. 1, expressly says that it shall be lawful for the justices to grant licences for the purposes aforesaid, to such persons as they shall deem proper; that is, to persons keeping, or about to keep, inns, alehouses and victualling houses.

**BLACKBURN, J.**—It comes to this: the Act gives justices a discretionary power to grant licences to inns, alehouses and victualling houses, and it appears that the justices, thinking the number of inns, hotels and alehouses already licensed sufficient, have adopted the practice of granting licences with the condition attached that there is to be no exciseable liquor drunk upon the premises, and the question is, is that correct? The essence of the statute is, that the party licensed shall keep an inn, alehouse, or victualling house, and the power to grant licences is not extended to places where liquors are not to be drunk or consumed on the premises.

**MELLOR, J.**—The justices have a discretion to grant licences under the 9 Geo. 4, c. 61, which they have never exercised in the apps.' favour, as to the general form of licence, but only in the limited way stated in the case, which is clearly contrary to law.

**SHEE, J.**—Except hotels, inns, alehouses and victualling houses, no others are to be licensed under the 9 Geo. 4, c. 61.

*Judgment for the resps.*

Q. B.]

REG. v. GUARDIANS OF THE POOR OF THE ISLE OF WIGHT.

[Q. B.]

## REG. v. THE GUARDIANS OF THE POOR OF THE ISLE OF WIGHT.

*Settlement by apprenticeship—Indenture—Incorporated union—Execution by common seal—8 & 4 Will. 4, c. 63, s. 2.*

*By a local Act (16 Geo. 3, c. 58) the directors and acting guardians of the poor, or any five of them, were to bind out pauper apprentices. In pursuance thereof, an indenture of apprenticeship was executed, which purported to be between the guardians of the poor of the one part, and the apprentice's mistress of the other part; and in the operative part it witnessed "that the directors and acting guardians, by virtue of the Act, did put, place and bind the pauper as apprentice." The covenants by the mistress were made with the guardians, and by one of them she bound herself not to assign over the apprentice without the consent of the said directors and acting guardians. In witness thereof the guardians caused the common seal of the union to be put to the indenture; and the indenture was subscribed by two justices:*

*Held, that by the 8 & 4 Will. 4, c. 63, s. 2 (a), the indenture was rendered valid.*

Case for the opinion of this Court from the Middlesex Court of Quarter Sessions (Michaelmas 1862).

The Court of Quarter Sessions, on appeal, confirmed an order of justices, dated July 22, 1862, adjudging the place of the last legal settlement of Samuel Jennings, a lunatic pauper in the Hanwell Asylum, to be in the parish of Newchurch, in the Isle of Wight Incorporation and Union, and ordering the guardians and directors of the poor of the Isle of Wight Incorporation and Union to pay to the parish officers of St. Margaret's, Westminster, the sums of 8*l.* 7*s.* for expenses of examination before justices and conveyance of the lunatic to the asylum, and 26*l.* 10*s.* for maintenance in the asylum, and the further sum of 14*s.* weekly to the treasurer of the asylum from the 29th July 1862.

The material grounds of adjudication were as follows:—

That the lunatic is not legally settled in our said parish, but hath his last legal settlement in the parish of Newchurch, in the Isle of Wight Incorporation and Union, in the county of Southampton. That the said Samuel Jennings is the lawful

son of Thomas Jennings and Sarah his wife. That the said Sarah Jennings, in or about the year 1808, her name being then Sarah Pye, was, by indenture, duly bound apprentice to a Mrs. Thomas, a boarding-house keeper, who then resided in the town of Ryde, in the parish of Newchurch, in the Isle of Wight Incorporation and Union, in the county of Southampton, for a period of three years, to learn the art or employment of a domestic servant, and she fully served her said mistress as such apprentice for a period of two years, and during the whole of that time she resided and slept in the house of her said mistress, and that at the end of her said service of two years the said indentures were cancelled. That the said Sarah Jennings was born in the parish of Whitwell, in the Isle of Wight, in or about the year 1794.

The grounds of appeal were as follows:—

That the said Sarah, the wife of Thomas Jennings, formerly Sarah Pye, was not by indenture duly bound apprentice to a Mrs. Thomas, a boarding-house keeper, who then resided in the town of Ryde, for a period of three years.

That the said Sarah Jennings was not born in the parish of Whitwell, in the Isle of Wight.

That the said Samuel Jennings is not legally settled in the said parish of Newchurch, or in any parish in the Isle of Wight.

At the trial of the appeal the respse commenced their case by endeavouring to prove the settlement by apprenticeship, and for that purpose put in evidence the indenture hereinafter mentioned and proved the identity of the Sarah Pye therein mentioned with the mother of the pauper lunatic.

The indenture was as follows:—

This indenture, made the 10th day of Oct. A.D. 1808, between the Guardians of the Poor within the Isle of Wight, in the county of Southampton, of the one part, and Eleanor Thomas, of the parish of Newchurch, in the Isle of Wight aforesaid, of the other part: Witnesseth that the directors and acting guardians of the poor within the Isle of Wight aforesaid, by virtue of the Act 16 Geo. 3, entitled "An Act to continue the corporation of the guardians of the poor within the Isle of Wight, and to confirm," &c. and by and with the consent of two of His Majesty's justices of the peace within the said county of Southampton, whose names are hereunto subscribed, acting in and for the division of the Isle of Wight aforesaid, have put, placed and bound, and by these presents do put, place and bind Sarah Pye, a poor girl whose parents are not able to maintain her, of the age of fifteen years or thereabouts, apprentice to the said Eleanor Thomas, with her to dwell and serve from the date hereof until she shall arrive at the age of eighteen years, during all which time the said apprentice her mistress faithfully shall serve in all lawful business, according to her power, skill and ability, and honestly, orderly and obediently in all things demean and behave herself towards her mistress and all hers during the said term. And the said E. Thomas, for herself, her executors, administrators and assigns, doth covenant, promise and agree to and with the said guardians of the poor and their successors that she the said E. Thomas, her executors, administrators and assigns, the said apprentice in the art of a housewife shall teach and instruct, or cause to be taught and instructed, and shall and will, during all the term aforesaid, find, provide and allow unto and for the said apprentice sufficient meat, drink, apparel, lodging, washing, physic in time of sickness, and all other necessaries during the said term, and so provide for the said apprentice that she be not anyways a charge to the said guardians of the poor within the said Isle of Wight, or their successors; but of and from all charges shall and will save and defend the said guardians of the poor harmless and indemnified during the said term. Provided always, that the said last-mentioned covenant on the part of the said E. Thomas, her executors and administrators, to be done and performed, shall continue and be in force for no longer time than three months next after the death of the said E. Thomas in case the said E. Thomas shall happen to die during the continuance of the said apprenticeship, according to the Act of 23 Geo. 3, entitled "An Act, &c." And also shall and will, at the end of the said term, provide, allow and deliver unto the said apprentice double apparel of all sorts, good and new. And, further, that she the said E. Thomas shall not nor will at any time during the said term assign or turn over the said apprentice to any person or persons whomsoever without the licence and consent of the said directors and acting guardians or their successors first had and obtained in writing for that purpose. In witness whereof to one part of these indentures, to remain with the said E. Thomas, the said guardians of the poor have caused their common seal to be set; to the other part thereof, to

(a) 8 & 4 Will. 4, c. 63, s. 2: "And whereas, by divers Acts of Parliament heretofore made and passed, the directors, guardians, acting guardians, or other officers of incorporated hundreds, parishes and other districts, are by the said Acts of Parliament respectively authorised to bind poor children apprentices in the manner by the said Acts of Parliament respectively prescribed and directed; and whereas the said directors, guardians, acting guardians and other officers have bound out poor children apprentices by indentures, to which the said directors, guardians, acting guardians and other officers have been, by their description as directors, guardians, acting guardians, or other officers of such incorporated hundreds, parishes and other districts, respectively made parties of the one part, or to which they have by their said descriptions respectively been binding parties, and which indentures have been executed by the said directors, guardians, acting guardians and other officers, by affixing thereto the seal of the corporation of which they are directors, guardians, acting guardians and officers respectively, and in no other manner; and whereas doubts have been entertained as to the effect and validity of indentures so executed, and it is desirable to remove such doubts, be it declared and enacted that, from and after the passing of this Act, in all cases where any indentures for the binding out poor children apprentices have been heretofore or shall be hereafter executed by any directors, guardians, acting guardians, or other officers of any hundreds, parishes, or other districts now incorporated, or hereafter to be incorporated, under and by virtue of any Act of Parliament, by affixing thereto the seal of the corporation of which they are or shall be directors, guardians, acting guardians, or other officers respectively, such execution of the said indentures respectively shall be deemed and taken to be a good, valid and effectual execution of the said indentures respectively by the said directors, guardians, acting guardians, or other officers of such incorporated hundred, parishes and other districts respectively."

[Q. B.]

*Ex parte HUTSWORTH.*

[Q. B.]

remain with the said guardians of the poor, the said E. Thomas hath set her hand and seal the day and year above written.

We, whose names are hereunto subscribed, two of His Majesty's justices of the peace for the county of Southampton, acting in and for the division of the Isle of Wight, do hereby consent to the placing out and binding of the above said apprentice according to the true intent and meaning of the above indenture.

J. DELGARD.  
J. BARWIS.

It was objected, on the part of the apprs., that the said indenture was invalid in point of law, and for the determination of this question the following facts are material:

By 16 Geo. 8, c. 53, it was enacted, that the corporation created by a certain Act of Parliament therein recited by the name of "The Guardians of the Poor within the Isle of Wight," should for ever in part and in name be one body politic and corporate in law to all intents and purposes, and should have perpetual succession and a common seal, and should be called "The Guardians of the Poor within the Isle of Wight."

The statute then provided, that on and after the last Saturday in June 1776, all and every person and persons possessed of certain qualifications, the nature and amount of which are immaterial, should be and were thereby declared to be members of the said corporation, and guardians of the poor within the said island.

After some further provisions, not material, the statute provided for the annual election of twenty-four guardians, to be called directors of the poor within the Isle of Wight, and thirty-six persons qualified as guardians who were to be acting as guardians for the year.

The attention of the court will be directed to sect. 55 of the Act, being that under which the indenture professed to be made, which is as follows:—

And be it further enacted that it shall and may be lawful to and for the directors and acting guardians, or any five of them, whereof two at least to be directors, to bind any poor children to be apprentices for any term not exceeding their respective ages of twenty-one years, to any persons willing to receive such children, whether such persons be living within or out of the said Isle of Wight; and the said directors and acting guardians shall have authority to order the treasurer out of the moneys in his hands to pay such reasonable sum or sums of money at the time of binding to the intended master or mistress of such child or children as the said directors and acting guardians can agree for with the said master or mistress.

Under these circumstances it was contended on the part of the apprs. that the indenture was void as not being made between the proper parties, inasmuch as the power to bind apprentices is by the statute vested, not in the corporation, but in the directors and acting guardians in their individual capacity, and that the indenture being made and executed by the corporation was not the indenture of two directors and three guardians. On the part of the resps. it was contended that the indenture was properly executed under the local Act, and they also contended that the defect, if any, was cured by the statute 3 & 4 Will. 4, c. 63, s. 32.

The Court decided that the indenture was invalid. The resps. then endeavoured to prove the birth-settlement.

The Court found as a fact that the said Sarah Pye was born in some parish within the Isle of Wight, although in what parish did not appear, but inasmuch as all the parishes within the Isle of Wight contribute to a common fund, out of which alone the expenses of maintaining the poor are paid, and such contribution is irrespective of the expenses incurred on behalf of each parish, the Court confirmed the order, being of opinion that the Isle of Wight was in law a parish or place maintaining its own poor, as defined by the interpretation clause of the 16 & 17 Vict. c. 97, s. 182.

The questions for the opinion of the Court were:—1st. Was the indenture above set forth a good and valid indenture in point of law. 2nd. Was the fact

of the pauper's mother being born in some part of the Isle of Wight sufficient to support this order of adjudication.

If the Court should decide either question in the affirmative, the said order of adjudication and the order of sessions are to be confirmed. If both in the negative the said orders are to be quashed.

*D. D. Keane, Q. C. (Poland with him)* in support of the order of sessions.—First, with regard to the validity of indenture. By sect. 55 of the Act, the directors and acting guardians, or any five of them, are to bind out the apprentices. Now, although the indenture in question purports to be made between the guardians of the one part and Eleanor Thomas (the mistress of the apprentice) of the other part; yet in the operative part the directors and acting guardians are described as the parties actually binding out the pauper apprentice. The acting guardians are included in the general term "guardians of the poor," by whom the indenture purports to have been made. Again, this is a case within the 3 & 4 Will. 4, c. 63, s. 2, and the common seal of the corporation being attached, the indenture is valid:

*Rex v. Haughley*, 4 B. & Ad. 650.

It became unnecessary to argue the second point, as to the birth-settlement in Newchurch, as by the decision a settlement by apprenticeship was deemed to have been acquired.

*Barrow* for the app.—The indenture is invalid.—It was necessary for the parish officers to pursue the terms of their Act strictly in binding out apprentices: (*Reg. v. Derby*, 13 East, 143.) If this had been the deed of the directors and acting guardians, and they had affixed the common seal, it would have been sufficient. But they have not done so. The 3 & 4 Will. 4, c. 63, s. 2, only applies where the right parties are the parties to the deed, but they have executed their power in a wrong way. [COCKBURN, C. J.—In the deed it is expressly said that the directors and acting guardians bind out the apprentices.]

COCKBURN, C. J.—I have no doubt whatever on this point. This is the very case the Act was intended to cure, viz., where the incorporating Act requires that certain parish officers, directors, or guardians shall be parties to the binding out of pauper apprentices, and those parties have considered that they were to act in the name of the incorporation, which course of proceeding was held in *Rex v. Haughley* to be improper in such case. The 3 & 4 Will. 4, c. 63 was passed to cure that defect. That Act seems to have contemplated the possibility of the very case that has now occurred, where the instrument professes to be made between the corporation and the apprentice's mistress; yet the directors and acting guardians in the operative part are made to intervene, and described as the parties who place and bind out the apprentice. They are, in fact, the binding parties.

The rest of the COURT concurring,

*Order of Sessions confirmed.*

*Thursday, April 28, 1864.*

*Ex parte HUTSWORTH.*

*Church-rate—Objection to its legality—Jurisdiction of justices.*

*H. was summoned for the nonpayment of a church-rate, and he objected to the jurisdiction of the justices, inasmuch as he disputed the validity of such rate, upon the grounds that the validity of the preceding rate was then in litigation in the Ecclesiastical Court, that the rate was unequal, and that a sum of 200*l.* had*

Q. B.] SUTTON v. SPECTACLE MAKERS COMPANY—REG. v. MIDDLE LEVEL COMMISSIONERS. [Q. B.]

been included in it as costs of the churchwardens in the pending suit in the Ecclesiastical Court. The justices having made an order,  
*Held, that they had no jurisdiction.*

J. Brown showed cause against a rule obtained by *Merewether* for a writ of *certiorari* to remove into this court an order of justices of Tamworth for the payment of a church-rate. It appeared that in Oct. 1861 a church-rate had been made, for the non-payment of which Mr. Hutsworth had been summoned before the justices of Tamworth, upon which occasion he objected that the rate was invalid on the grounds of its being unequal, and being for illegal items. Upon this, the justices dismissed the complaint, whereupon the churchwardens instituted a suit against Mr. Hutsworth in the Ecclesiastical Court, in which suit the same objections were raised, and which (at this date) is still pending, awaiting the judgment of Dr. Lushington. In July 1863 another church-rate was made, which is the subject of the present rule. Mr. Hutsworth having refused to pay the same, he was summoned before the justices of Tamworth, when he raised the same objections as before, and also alleged that such objections were now under the consideration of the Ecclesiastical Court; and moreover, that the churchwardens had included in the present rate the sum of 200*l.* as and for their expenses of the pending suit in such court. It was answered that the valuation complained of in the former case was now altered, for that a new assessment had been made under the 25 & 26 Vict. c. 103 (Union Assessments Committee Act), and which was the basis of the church-rate; and that, as Mr. Hutsworth had not appealed against it, he must be taken to have acquiesced. The justices thereupon made an order for payment.

It was now contended that, Mr. Hutsworth's objections being made *bonâ fide*, and being reasonable in themselves, the justices had no jurisdiction to make the order.

*Merewether*, who showed cause in the first instance, contended that the objections raised were untenable; that as regards the including of the item of 200*l.* as expenses of the lawsuit, the churchwardens were bound to have included them, as they could not make a retrospective rate. [BLACKBURN, J.—But it is surely a reasonable objection on the part of a parishioner that he is called upon to pay costs before it is determined whether or not they are to fall upon the parish. It may be that ultimately the costs will fall upon the churchwardens personally.] They must pay as they go; they must have money to pay the legal costs as they are incurred.

COCKBURN, C. J.—This rule must be made absolute. There is no reason to doubt that the objections taken to the validity of the rate were *bonâ fide*, and it was not unreasonable, under the circumstances, that these objections should have been made.

BLACKBURN, MELLOR and SHEE, JJ. concurred.  
*Rule absolute.*

Friday, April 29, 1864.

SUTTON v. THE SPECTACLE MAKERS COMPANY.

Corporation—Retainer of attorney—Contract without common seal.

A municipal corporation is not liable for the costs of an attorney conducting on their behalf an opposition to a Bill in Parliament affecting their privileges, unless the retainer is under the common seal.

Special case.

This action was brought by a solicitor in London to recover a bill of costs from the defts., one of the livery companies of London, constituted by Royal Charter of Charles II., having a common seal, and

being governed by a master, two wardens and eight assistants.

In 1852 the corporation of the city of London promoted a Bill in Parliament for "regulating elections within the city of London and extending the municipal franchise therein." At a meeting of various city companies it was proposed on their behalf to oppose such Bill; and the clerk of the defts.' company was said to have acted on their behalf, and to have assented to a joint opposition to be conducted by the plt. Accordingly the opposition was conducted by the plt., and all the work in respect of which this action was brought concluded in 1852. The defts. had paid what they contended was their proper quota of the expense, and this action was really instituted to try if they were liable for anything more, as plt. contended they were.

*Mellish* (Holl with him) for the plt.—It is conceded that it is not easy to distinguish this case from *Arnold v. Mayor of Poole*, 4 M. & G. 860. In *Haigh v. North Bierley Union*, 1 E. B. & E. 873, a corporation was held liable for the expense of investigating the accounts of the clerk of the union, although the employment of the accountant was not under seal.

*Lush* (Borill and Raymond with him) was not called upon.

BLACKBURN, J.—Without deciding whether there was or was not a retainer in point of fact, I think our judgment should be for the defts. on the ground that there was no retainer under the common seal of the defts.' corporation. A corporation cannot as a general rule bind itself to a contract except by its common seal. This case is not within any of the exceptions of that rule. The case of *Haigh v. North Bierley Union* goes further than any other on this point, but that is not applicable to the present case.

MELLOR and SHEE, JJ. concurred.

*Judgment for the defts.*

Attorneys for the plt., Sutton and Ommaney.  
 Attorney for defts., W. H. Palmer.

Saturday, April 30, 1864.

REG. v. THE MIDDLE LEVEL COMMISSIONERS.

Bridge—Duty of commissioners to re-erect a bridge under a local Act—Dimensions of.

By a local Act certain commissioners were constituted to protect (inter alia) the banks of the river Ouse, and by another local Act certain commissioners were constituted, under the title of the Middle Level Commissioners, with powers over a large district of land, and who under such powers had built a sluice bridge from bank to bank over the said river Ouse. The tide having broken in and washed away such sluice bridge and 110 feet of the embankment adjoining, a local Act (25 & 26 Vict. c. 188) was passed, enacting that the said Middle Level Commissioners "shall, with all convenient dispatch after the passing of this Act, at their own cost, erect a new bridge, or otherwise provide and make and for ever maintain a good and sufficient continuous road or haling path over and along or near to that part of the west bank of the river Ouse, where recently stood the sluice bridge and roadway made by the said commissioners," &c. The Middle Level Commissioners were ready to build a sluice bridge of the dimensions of the old one, if there were any embankments to which to attach it, but declined to make one to connect itself with the embankment in its present unrestored condition:

*Held, that the words of the statute limit the duty of the commissioners to the making of a bridge of the limits of the former bridge.*

[Q. B.]

Ex parte PATER.

[Q. B.]

This was a demurrer to a *mandamus* commanding the Middle Level Commissioners to construct a bridge over the river Ouse.

It appeared that the banks of the river Ouse are under the control and management of a body of commissioners constituted under a local Act of Parliament, and that the Middle Level Commissioners were another body of commissioners likewise constituted under a local Act, with powers over a large district of land, and who, under such powers, had built a sluice bridge from bank to bank over the said river Ouse. The tide having broken in and washed away such sluice bridge and a considerable portion of the bank at each end, a local Act was passed (the 25 & 26 Vict. c. 188), enacting (*inter alia*) that the said Middle Level Commissioners "shall, with all convenient dispatch after the passing of this Act, at their own cost erect a new bridge, or otherwise provide and for ever make and maintain a good and sufficient continuous road or halving path over and along or near to that part of the west bank of the river Ouse where recently stood the sluice bridge and roadway made by the said commissioners, and referred to in the 155th section of the said Middle Level Act." The river Ouse commissioners had not restored the bank to its condition before the breaking in of the tide, such bank being washed away to the extent of 110 feet, nor were such commissioners parties to the present proceedings. The Middle Level Commissioners were ready to construct a bridge of the dimensions of the former bridge, which, however, in consequence of the washing away of the embankment upon which it rested, could not be erected, and they disputed their liability to build any more extensive structure, or to restore the embankment.

Mellish, Q.C. (Phear with him) now appeared for the Crown, and contended that the Middle Level Commissioners were bound, under the terms of the local Act, to restore the bridge in an efficient state for use, and that it should be made so as to reach the existing banks, otherwise the provisions of the Act would be wholly nugatory.

Sir F. Kelly, Q.C. (Metcalfe with him) argued that the Middle Level Commissioners were bound only to erect such a bridge as before existed, and that the Act imposes no new liability upon them, and that they are ready to make a new bridge as soon as there is an embankment to which it can be attached.

COCKBURN, C.J.—It is certainly very much to be deplored that upon a matter so very important the language of the statute should be so ambiguous; but it seems to me that the words limit the duty of the commissioners to the making of a bridge of the limits provided by the former Act. The words are "over and along or near to that part of the west bank of the river Ouse where recently stood the sluice bridge and roadway made by the said commissioners, and referred to in the 155th section of the said Middle Level Act." Now, if the Legislature had intended that the present breach should be spanned, nothing would have been easier than to have enacted it. This perhaps may have been a *casus omissus*, but we cannot supply the omission.

*Judgment for the deft.*

Monday, May 9, 1864.

Ex parte PATER.

*Contempt—Licence of counsel—Jurisdiction of Quarter Sessions.*

*A Court of Quarter Sessions is competent to punish for contempt. But if it treated as a contempt that which it had no reasonable ground for so treating, this court will interpose.*

*Counsel has a right to, and may with propriety, com-*

*plain of acts having the appearance of partiality done by one of the jurymen; but to do so in violent and abusive language, or in a violent manner, and for the purpose of insulting the juror, and in spite of the prohibition of the court, is a contempt.*

Mr. Pater was a barrister-at-law practising at the Middlesex Quarter Sessions. During his defence of a prisoner he objected to some questions put to a witness by the counsel for the prosecution, on which the foreman of the jury made the observation, "We know what this is for." Afterwards, when he was cross-examining the same witness, the foreman of the jury again interrupted, saying, "You have no right to insinuate that the witness is swearing falsely." Mr. Payne, who was presiding as deputy-assistant judge, did not interrupt or rebuke the jurymen for his interference. In his address to the jury, Mr. Pater used these words: "I thank God that there are twelve jurymen, for if it rested with one, and that one the foreman, there could be no doubt of the result; he ought to be removed from the box and another juror put in his place." The affidavit of Mr. Payne stated that this was spoken in a loud, threatening and insulting tone and manner, and with violent gestures, and that, apprehensive of retaliation by the foreman, Mr. Payne requested him to withdraw the expressions used, but that Mr. Pater refused and repeated them in a loud and offensive tone. At the close of the case, he was again asked to withdraw the expressions used, but, still refusing, the Assistant-Judge was called in and a fine of 20*l.* was inflicted upon Mr. Pater for the alleged contempt.

A rule *nisi* had been granted on a former day to bring up the order to be quashed.

The affidavit of Mr. Payne in answer had been filed.

Bovill, Q. C. and Welsby now showed cause, and having read the affidavit of Mr. Payne, he said that the question was of great importance to the independence of the Bar, but still more so to the administration of justice. Happily in the Superior Courts such occurrences never arose. One the earliest and most deeply implanted sentiments in the English mind and character was one of deep respect for the sanctity of courts of justice; and certainly in the Superior Courts such scenes never took place, and it was very seldom that there was any occasion for the interposition of the judges, and whenever such occasions did arise, the least intimation from the bench was sufficient, and was sure to be at once acquiesced in. It was due to Mr. Pater to notice that in his affidavit he denied any intention to offer any contempt to the court; but when called upon at the time to explain or apologise he refused to do so.

COCKBURN, C. J.—There could be no doubt that counsel had a right to appeal to the jury not to be unduly influenced by the opinion of any of their number, and if any of them had expressed themselves strongly against his client he had a perfect right to appeal to the rest. It not unfrequently happened that when a judge intimated his opinion to be adverse to one of the parties and the counsel appealed to the jury against that opinion, and reminded them that they were the judges of matters of fact; and so long as this was said in a becoming manner, no judge would take exception to it. But it is otherwise when the mode of making the observation was offensive, and if ambiguous, and admitting of an offensive interpretation, it ought to be explained; and, in this instance, the other observation about removing the foreman from the box might serve to illustrate the spirit in which the words were spoken for which the fine was inflicted.

Bovill said that a great deal must, of course,



[Q. B.]

Ex parte PATER.

[Q. B.]

depend on tone and manner, as to which only those who were present could judge; and it was for the court, who adjudged the contempt, alone to determine whether what was said amounted to contempt. For this he cited *Reg. v. Davison*, 4 B. & A., where the Lord Chief Justice had fined a party defending himself on a charge of libel for observations deemed offensive and amounting to a contempt. It was true that was the case of a Superior Court; but in this respect the Court of Quarter Sessions was in the same position, that it could fine for a contempt of court; and what was a contempt it was for that court itself to determine, subject, no doubt, in some degree, to the supervision of this court to see if there were any grounds for it, but not by way of appeal. It must be taken, he admitted, that Mr. Pater was fined for no other words than these: "I thank God there are twelve jurymen, for if it rested only with the foreman there would be no doubt of the result." But then the meaning of the words it was for the court to decide. Important as were the privileges of the Bar, the administration of justice and the protection of those engaged in it were still more important. Barristers had often been termed by great judges "ministers of justice," and they owed a duty, not merely to their clients, but to the court, and this doctrine had been acted upon in many ways. And if a barrister unfortunately so forgot himself as to use words in a tone and manner which produced on the mind of the presiding judge the impression that a contempt of court had been committed, it was within the province of the court (if a court of record) to fine him for that contempt, after due opportunity afforded him for explanation or apology.

*Denman*, Q. C. (with him *McMahon* and *Kenealey*) in support of the rule.—It was very important to bear in mind that the first occasion of offence had not been given by Mr. Pater—no, nor even the second; for, first, the jury had most improperly interrupted him, and then the judge had altogether omitted to check or control them.

*Mellor*, J. observed that certainly the observations of the jurors were most improper and impertinent.

*Denman* said, so it appeared to him. The jury had no business to interfere with counsel. That was the province of the presiding judge.

*Cockburn*, C. J. remarked that sometimes the observations of jurors were useful, but then they ought to be addressed to the judge.

*Denman*.—Just so; and surely, after the judge had countenanced in this case this most improper interference of a juror, it was most unjustifiable to fine counsel merely for remonstrating against it.

*Cockburn*, C. J.—Much may depend upon tone and manner.

*Denman*.—But no tone or manner can extend or enlarge the import of words beyond the sense and meaning of which they are naturally capable.

*Cockburn*, C. J. said the court were bound to protect the jury.

*Denman*.—Most certainly, but not from what is admitted to be a just remonstrance; for if the interruptions of the jurors were improper, and the judge did not check them, counsel had a right to remonstrate.

*Cockburn*, C. J. said certainly the words themselves were not exceptionable, but the question was, with what meaning they were used.

*Denman* said that must depend upon the words themselves. The arbitrary judges who, in the times of the Stuarts, fined jurors or witnesses, tried to

eke out the alleged offences by such epithets as "loud," "offensive," or "insulting." But they were vague and unmeaning phrases. "Loud!" Why, judges sometimes were so. "Offensive!" Why, most people found remonstrances offensive when they were in fault. "Insulting!" That was to be judged of by the words used. And the words used here had no such meaning, and were not reasonably or fairly capable of it. To allow a barrister to be fined for contempt for words admitted to be in themselves unexceptionable, merely because the judge chose to fancy them uttered with an offensive meaning, would be a most dangerous precedent. Why, our ablest and most illustrious advocates would have been liable to be fined, either in our own times or times gone by, over and over again for similar cause. Had their Lordships forgotten the instance, cited by Lord Campbell, from the celebrated case of *The Dean of St. Asaph*, in which Mr. Erskine was counsel? The jury had returned a verdict, "Guilty of publishing only," upon which Buller, J. said:

You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment?

Juror.—Certainly.

*Erskine*.—Is the word "only" to stand part of the verdict?

Juror.—Certainly.

*Erskine*.—Then I insist it shall be recorded.

BULLER, J.—Then the verdict must be misunderstood. Let me understand the jury.

*Erskine*.—The jury do understand their verdict.

BULLER, J.—Sir, I will not be interrupted.

*Erskine*.—I stand here as an advocate for a brother citizen, and I desire that the word "only" may be recorded.

BULLER, J.—Sit down, Sir; remember your duty, or I shall be obliged to proceed in another manner.

*Erskine*.—Your Lordship may proceed in what manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct.

Commenting upon this, Lord Campbell proceeds to observe: "The learned judge took no notice of this reply, and, quailing under the rebuke of his pupil, did not repeat the menace of commitment. This noble stand for the independence of the bar would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's-inn-hall. We are to admire the decency and propriety of his demeanour during the struggle, no less than its spirit, and the felicitous precision with which he noted out the requisite and justifiable portion of defiance. The example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England."

*Cockburn*, C. J.—The true answer to that case is, that Buller, J. was in the wrong and Mr. Erskine in the right.

*Denman*.—So here. It was obvious the juror was in the wrong, and Mr. Payne, the judge, was in the wrong for not checking him, and so Mr. Pater was in the right. Nor were there wanting similar instances in our own times, and even among some of those who were now on the bench. The Lord Chief Justice, when at the bar, had not shrunk from warmly remonstrating with a judge for some observation which showed a disposition to prejudge the case; and two or three years ago Mr. Serjeant Shée, now on the bench, took a similar course in a case in which a juror showed a strong feeling against his client, and the learned judge who presided fully approved that course. In the present instance the judge silently sanctioned the improper conduct of the juror, and then, when the counsel remonstrated, fined him for contempt. Such a precedent would be most dangerous, and would afford to arbitrary judges and Courts of Quarter Sessions all over the country a very easy method of silencing a spirited counsel.

*Cockburn*, C. J. delivered judgment, that the rule for a *certiorari* to quash the order should be



Q. B.]

SHEPARD AND OTHERS v. CHURCHWARDENS, &amp;c. OF BRADFORD.

[C. B.]

discharged, and that consequently the fine should stand. He said that it was beyond a doubt that the Court of Quarter Sessions had inherent in it the power to punish for contempt of court, as being a court of record. Nor was there any question that this court had authority to prevent any excess or usurpation of jurisdiction by the Court of Quarter Sessions. And if the Court of Quarter Sessions treated as a contempt that which it had no reasonable ground for so treating, this court would interpose to prevent it from so acting, and protect the party thus dealt with, and against whom the power to commit or fine for contempt had thus been improperly exercised. Then arose the question whether in this case the jurisdiction had been improperly exercised without any reasonable ground. Now, as regarded that question, this court could not take upon itself the functions of a court of appeal from the decision of the Court of Quarter Sessions. All that they could do was to see that the Court of Quarter Sessions had jurisdiction in the matter complained of. And in the case of *Carus Wilson*, who had been committed for contempt by a colonial court, the Royal Court of Jersey, Lord Denman thus laid down the law: "Here a contempt is supposed to have been committed. It is unfortunate when the court has to act both as party and as judge; but the judge has to decide whether it has been treated with contempt; and we cannot decide that he has come to a wrong conclusion. The court may be insulted by the most innocent words uttered in a contemptuous tone, and so the words here might or might not be contemptuous according to the manner in which they were spoken; and if the words might be contemptuous, there was ample occasion for the decision of the court, with which no other court can meddle. Every court in such a case is to form its own judgment, and must always feel itself most unwilling to interfere in this way. Indeed, the practice has been discontinued for centuries." It is clear that on these principles we must say that there was evidence here on which the court could reasonably come to the conclusion that a contempt had been committed; and that is all we have to determine—we have no appellate jurisdiction in the matter. There can be no doubt that the words themselves were words which counsel might well have uttered in the honest discharge of his duty; and however harsh and unpleasant they might have appeared, that would have been no ground for a committal for contempt. But if used for the purpose of insulting the juror, then they were used, not in the exercise, but the abuse, of the privilege of counsel, and then they would amount to a contempt of court, for which the counsel might properly be punished. And there is evidence that they were so used, for when that sense was imputed to them, he did not disavow it, but repeated the words, and I think it must be taken that he repeated them in the sense thus imputed to them, and which he did not disclaim. Unfortunately, there had been a previous altercation between the counsel and the foreman, and I must say I deeply regret that the foreman was allowed to make the observations he did without any observation from the court. It would certainly have been far better if the judge had told the foreman that anything he had to say he must address to the court, and not get into a personal altercation with counsel. I repeat, that I regret extremely that this course was not pursued. There had, however, been this altercation, and in the course of it the counsel said the foreman ought to be removed from the box—an observation of a very unpleasant character, and which may serve to give a sense and meaning to the other words used, and for which the fine was inflicted. The question is, whether these words were to be understood

merely as an appeal to the other jurors against the prejudice of the foreman, or as conveying an offensive imputation upon the foreman. Mr. Payne at the time suggested that the latter might be the meaning, and Mr. Pater did not explain and disclaim it; and when afterwards called upon to explain or apologise, he refused to do either, but persisted in adhering to what he had said, notwithstanding the construction put upon it. No doubt, when a man has said nothing which can be excepted to, he is not bound to apologise or retract; but when the words he has used are ambiguous, surely he may well explain. Are we, under these circumstances, to say that the court came to a conclusion so utterly wrong and unreasonable as that we can say that they had no jurisdiction to make this order? I think we cannot say so. I deeply regret the unfortunate result. No man can have a higher sense than I have of the importance of the rights and privileges of counsel in the discharge of their arduous and important duties. I quite agree that they have not those privileges for themselves, but for the whole community, and I should be the last man in the world to limit or to restrain them. But, on the other hand, we are bound to protect the jurymen in the discharge of their duties, and if, looking to the whole of the circumstances, we see evidence from which it might fairly be concluded that there was an intention to insult, we cannot interpose to prevent the consequences from a desire to uphold the privileges of the Bar. Deeply, therefore, as I regret the result, I am bound to say that we should not be justified in making this rule absolute to quash the order.

### COURT OF COMMON BENCH.

Reported by W. MAYN and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Monday, May 2, 1864.

SHEPARD AND OTHERS (apps.) v. THE CHURCHWARDENS, &c. OF BRADFORD (resps.)

*Poor-rate—Reformatory—Right to begin.*

*A reformatory established under 17 & 18 Vict. c. 86, is not liable to be rated for the poor-rate.*

*In the Court of C. P., differing from the Courts of Q. B. and Ex., the app. has the right to begin.*

The following special case was stated for the opinion of the court under the 12 & 13 Vict. c. 45, s. 11:—

#### CASE.

The resps., by a rate made for the relief of the poor of the said parish of Bradford, on the 8rd July 1863, have assessed the apps. under the name of the Reformatory Committee at Limpley Stoke, in the sum of 2*l*. 16*s*. 3*d*., and the apps. have duly given notice of appeal, of which the following are set forth as the grounds of such appeal:

1. That the said premises are not liable to be rated.
2. That we are not liable to be rated in respect of the said premises.
3. That we are not beneficial occupiers of the said premises.
4. That we make no profit of the said premises.
5. That all the funds arising from the said premises are applied to public and charitable uses in common with such premises.
6. That the said premises are a reformatory school for the better training of juvenile offenders under an Act passed in a session of Parliament holden in the 17th and 18th years of Her Majesty, entitled "An Act for the better care and reformation of youthful offenders in Great Britain," and duly certified according to law.

C. B.]

SHEPARD AND OTHERS v. CHURCHWARDENS, &amp;c. OF BRADFORD.

[C. B.]

And the said apps. and resps. have agreed that the facts of the case shall be stated for the opinion of the court pursuant to the 11th section of the 12 & 18 Vict. c. 45, and an order of this court has been made accordingly, with the consent of the said parties.

The facts are, that the premises in respect of which the said rate is made are a reformatory school for young female offenders, instituted in pursuance of the 17 & 18 Vict. c. 86, and other statutes in that behalf made and duly certified according to the law as such, and for no other purpose.

The apps. are the managing committee of that institution. They do not reside on the premises, but the matron and other officers of the reformatory do reside there.

The reformatory in question, with a piece of land attached, is rented by the apps. at the annual rent of 74*l.*, but none of them reside there. It is situated in the parish of Bradford in the county of Wilts, and is capable of accommodating fifty girls, although there never has been so large a number of inmates. Offenders from all parts of the kingdom may be and are sent to this reformatory, though it was intended for the counties of Wilts, Somerset and Gloucester, and three beds are always retained for girls from the borough of Bath, but of the forty-three now under detention four only are from these counties, and one from the borough of Bath. On admission, entrance fees are payable, which are paid into the general fund of and applied towards the maintenance of the institution, and these fees for the year 1862 amounted to 22*l.* 12*s.* In many instances also the parents are obliged under statutes 18 & 19 Vict. c. 87, and 20 & 21 Vict. c. 55, to contribute towards the maintenance of their children whilst in the reformatory, which payments are however deducted from the amount allowed by Government. The payments during the year 1862 amounted to 25*l.* 2*s.* 8*d.* The girls are instructed in reading, writing, cyphering and religious knowledge, and are also engaged in various industrial occupations. They make up their own clothes, do the washing and other work of the house, help in cooking, and some of the gardening. Mangling, washing and needlework, not only of the reformatory, but for private families, are done on the premises, and during the year 1863, as appears by the report of the committee, the sum of 28*l.* 5*s.* 9*d.* was credited to the funds of the institution as the value of the washing and needlework done by the girls, nearly the whole of which work was performed during the last four months of the year, since which time extensive alterations have been made in the premises which will enable mangling and washing to be carried on much more extensively. Such work is stated to be done on reasonable terms, and the committee (the apps.) express a hope of ultimately making the reformatory self-supporting, with the aid received from Government.

All the funds derived from work done on the premises are applied towards the maintenance of the institution, or for rewards to the inmates for proficiency and good conduct. The remainder of the income of the reformatory for the year 1862 (such income amounting to 920*l.* 16*s.* 1*d.*) was made up of donations, subscriptions, Government grant, and sundries, the whole of which was applied solely to the maintenance of the reformatory, or placed in banks to meet contingencies of the present year, and which has since been expended on the maintenance of the institution.

The question for the opinion of the court is, Is the reformatory in question liable to be rated for the relief of the poor?

Keane, Q.C. for the resps.—The question is, are these premises liable to be rated for the poor? The

case of *Reg. v. Temple*, 2 E. & B. 160, referred to in the case of *Reg. v. Stapleton*, 9 L. T. Rep. N. S. 322, is closely analogous to the present case. This is not a public institution, and is distinguishable from a gaol:

*Reg. v. Licensed Victuallers' Society*, 1 B. & S. 71; *Anonymous*, 2 Salk. 527.

ERLE, C. J.—In this court the app. begins.

Saunders for the app.—In *Justices of Bedfordshire v. St. Pauls, Bedford*, 7 Ex. 650, it was held that the resp. was entitled to begin, as the affirmation was upon him.

WILLES, J.—The practice in this court is otherwise.

BYLES, J. (to Keane, Q.C.)—As you have gone so far you must continue.

Keane, Q.C.—What difference is there between this case and *R. v. Temple*?

ERLE, C. J.—There there was a profit.

Keane, Q.C.—So here there is some profit.

BYLES, J.—To whom does it go?

Keane.—To the support of the reformatory.

BYLES, J.—Are there any children here except those under criminal sentence?

Keane.—No.

BYLES, J.—Then how does this differ from a gaol?

Keane.—There is no compulsion on any one to establish a reformatory, and the person who does so may give it up at any time; he supports it in part and the Government in part; but in a prison there is an imperative duty and necessity to support the prisoners. Gaols are a part of the State system; reformatories are not, but the charity of private individuals in a particular direction, assisted by Government aid.

KEATING, J.—Could the committee release any of the prisoners before their sentence was out?

Keane.—I think not; but if they became insolvent they could say, "You must take the children away." This is not a continuous but a voluntary duty, which they are not compelled to perform longer than they please:

17 & 18 Vict. c. 86;

20 & 21 Vict. c. 55.

ERLE, C. J. referred to the *Dartmoor Prison case*, *Gambier v. Overseers of Lydford*, 8 Ex. & B. 346. Lord Campbell was always of opinion that benevolent persons should not by their benevolence increase the burden of their neighbours.

Keane.—Just so. This is a place that carries on a species of trade, and a profit is made, and the trustees by their servants are the occupiers.

T. W. Saunders for the apps.—The principle is, that if the institution is entirely of a benevolent character, and there is no beneficial occupation, there is no liability to be rated:

*Reg. v. Waldo*, Cald. 858;

*Reg. v. St. George the Martyr, Southwark*, 13 L. J. 129, M. C.

This is a public institution (in fact a prison), and, though a profit may be made, there is no beneficial occupation in any one:

*Reg. v. Wilson*, 12 Ad. & E. 94;

*Reg. v. Stapleton*, 9 L. T. Rep. N. S. 322;

*Reg. v. Shepherd*, 1 Q. B. 170.

Private individuals cannot send persons to a reformatory, and though persons cannot be compelled to institute reformatories, when instituted they are prisons.

ERLE, C. J.—I have considered the effect of the 17 & 18 Vict. c. 86, and it appears to me that a reformatory is as much occupied for public purposes as a county gaol. I do not think that the distinc-

C. B.]

VESTRY OF ST. GEORGE'S, HANOVER-SQUARE v. SPARROW.

[C. B.]

tion as to the age of the prisoners has any effect as to the liability to be rated. A gaol is excepted from being rated, and, as I read the Act, a reformatory is a gaol for a particular class of offenders; it is used for the same purposes as a gaol, and therefore is not liable to be rated.

WILLES, J. concurred.

BYLES, J.—I am of the same opinion. These persons are occupiers in the strict legal sense of the term, they are entitled to bring trespass; but it has been held under the statute of Elizabeth (43 Eliz. c. 2), that persons in order to be rated must be in the beneficial occupation. Then there is an exception of buildings used for public purposes; thus the Horse Guards, the Admiralty, a place for holding a County Court, places of public worship and county gaols, have been held to be exempt. The persons here confined are confined under a judicial sentence, and there is a public obligation to keep them till their sentence has expired. It may here be observed that this is not a gaol for one county only, but for several. It is not necessary to consider whether this is a charity, as the case of *Reg. v. Stapleton* has distinguished between public and private charities; and some of the cases go further than that one, and on some of them severe observations have been made, and perhaps rightly. This, however, is essentially a charity for public purposes, and on this principle *St. Bartholomew's Hospital* has been held to be exempt: (*Reg. v. St. Bartholomew's Hospital*, 4 Burr. 2435.) The statute 3 & 4 Will. 4, c. 30, now exempts places of worship in all cases; but it had been held before that, where there was no letting of pews, as they were places where all the public might resort for public purposes, they were not liable to be rated. This is a place for carrying out the general purposes of the country for the punishment and reformation of juvenile offenders, and, in my opinion, comes within the category of ordinary gaols, and therefore is not liable to be rated.

KRAATING, J.—I am of the same opinion. This is substantially a prison, and it is not necessary to consider its probable duration; while so occupied it is occupied as a prison.

*Judgment for the apps. without costs.*

Friday, April 22, 1864.

VESTRY OF ST. GEORGE'S, HANOVER-SQUARE (apps.)  
v. SPARROW (resp.).

*Metropolitan Local Management, 25 & 26 Vict. c. 102*  
—Erections beyond the general line of buildings.

Where the deft. was summoned under the 75th section of the *Metropolis Local Management Act* for unlawfully erecting a structure without the consent of the Board of Works, it was

Held, that it was for the magistrate to decide whether the structure complained of was an "erection," "building," or "structure," within the meaning of the Act, and also that the certificate of the architect that such erection was beyond the general line of buildings was not final.

This was a summons under the *Metropolitan Local Management Act* (25 & 26 Vict. c. 102), s. 75, charging that the deft. on the 1st July 1863, in the parish of St. George, Hanover-square, Middlesex, within the metropolitan police district, did unlawfully erect a certain erection, to wit, a conservatory, without the consent in writing of the Metropolitan Board of Works, beyond the general line of buildings in a certain street called Half-moon-street, in the parish, county and district, the distance of such line of building not exceeding fifty feet from the highway, contrary to the statute, &c.

[MAG. CAS.—VOL. III.]

Half-moon-street is about forty feet wide, containing twenty-three houses on the east side, and twenty-four on the west, built at different times, before the 17 Vict., at different heights and levels as suited the respective builders; the deft.'s house No. 1, on the east side, is the corner house next to Piccadilly, that part of the shop front which faces Half-moon-street projects three feet beyond the front wall of the house at the first floor, forming a ledge on the top extending three feet three inches in width from that wall. This shop front existed in its present state before the 17 & 18 Vict. c. 128.

In April 1863 the deft. took out the window with its frame from the room on the first floor of his house looking into Half-moon-street, and substituted for it a case or thing principally composed of glass set in light iron framing about the same height as the old window, and four feet six inches wide, and projecting two feet six inches from the house wall and resting on the above-mentioned shop front, its extreme edge being nine inches nearer the house than the extreme edge of the shop front.

This case or thing of glass and iron is the matter complained of as an "erection" and forms the only window of the said room. The district surveyor of the parish approved of it as being of incombustible materials within the *Metropolitan Building Acts*.

At the hearing before me, the district surveyor stated that this was a "projecting window." The surveyor employed by the parish for thirty years called it a "projection," and not a "projecting window," but said that a bow window would be a "projecting window." The superintendent of the Metropolitan Board of Works styled it a "conservatory" (as in the summons).

The deft. did not obtain the consent of the Metropolitan Board of Works for the above alteration of his house, but got that of the inhabitants of the four houses next his own, lower down from Piccadilly, before putting up the glass and iron in question.

Evidence was given that there was nothing in this thing of glass and iron unsightly or obstructing light or air, or inconsistent with the general character of either side of the street. On the same (east) side of the house No. 5 has a bow window on the first and second floors, projecting from the house wall in like manner, but further into the street. Several balconies project from other houses on the same (east) side, at different levels and distances of projection from the house walls. The last house on the east side has a shop front projecting in the same manner as at No. 1. All these projections are legal, having been erected before the 17 Vict.

Contradictory evidence was given on the point whether the glass and iron in question was in point of fact beyond or within the general line of buildings on the east side of Half-moon-street. The superintending architect of the Metropolitan Board of Works proved his certificate in writing, that "the main front of the buildings forming the row of houses aforesaid" is the "general line of buildings in the said row" as shown in the plan annexed to his certificate and signed by him. He also stated before me that the glass and iron in question called by him a "conservatory" was beyond the general line of building; the word "general" being now substituted for "regular," on which word as occurring in the 18 & 19 Vict. c. 120, s. 143, now repealed, the decision in *Teas v. Freebody* took place, 4 C. P. Rep. 228.

In support of the summons it was argued that the above-mentioned certificate was final and precluded further inquiry by the magistrate. This was denied by the deft., as such a construction would prevent all corrections of even self-evident errors in such certificate or plan. It was also said that not

C. B.]

FITZGERALD v. FITZPATRICK.

[V.C. K.]

only was the glass and iron in question within the extreme edge of the shop front, and within the true "general" line of building in the said row of houses forming the east side of Half-moon-street, but that it was also in point of fact within the line laid down in the first plan by the said superintending architect as the "general line of buildings" in that row of houses.

After viewing the *locus in quo*, I called to mind that the summons did not charge this case or thing of glass and iron as a projecting window under sect. 119 of the first Metropolitan Act, 17 & 18 Vict. c. 120, nor as a "projection" under the Metropolitan Building Act (18 & 19 Vict. c. 122), s. 21; nor as a "thing affixed to or projecting from a building, wall or other structure" under the same Act, 18 & 19 Vict. c. 122, schedule, part III., "Dangerous structures;" nor as contrary to any unrepealed section of 57 Geo. 3, c. 29, called "Michael Angelo Taylor's Act," and decided that the thing in question, called by some a "conservatory," by others a "projecting window," and by others a "projection," was not an erection within the intent and meaning of sect. 75 of the Metropolitan Local Management Act, 25 & 26 Vict., upon which the summons proceeded, having regard to the words "building or structure" next preceding it in that section, and to the above-mentioned statutes still in force, and I dismissed the summons accordingly.

I doubted whether "the general line of building" certified by the superintending architect could in point of law be questioned before me. Subject to that doubt I was of opinion that, having regard to the peculiar irregularities of the shop fronts, bow windows, verandahs and balconies projecting as above stated from the house walls on the east side of Half Moon-street, as well as on the west side and legally so projecting, having been there before the 17 Vict., the true general line of buildings might not be along the main walls of the houses in the row. I also thought that in point of fact the extreme edge of the thing of glass and iron in question was not only within the extreme edge of the legally existing shop front, but also within the line certified by the superintending architect as the "general line," but I did not dismiss the summons upon either of these grounds, but on that already stated.

The questions for the opinion of the court are:

1. Whether in point of law the thing of glass and iron in question placed as above described must be held to be an erection within sect. 75 of 25 & 26 Vict. c. 102.

2. If the said glass and iron be such an "erection," whether the line certified and decided by the superintending architect of the Metropolitan Board of Works as the "general line of building" does in point of law preclude all further inquiry, whether it is the true general line in each particular street or row or not.

3. If my decision is reversed the parties seek that the summons shall stand, and this case be remitted to me to make such order as under the guidance of this honourable court shall seem fit.

If my decision is confirmed the deft. seeks that it be confirmed with costs to be taxed by the master.

The decision of the superintending architect was, that the main fronts of the buildings forming the row of houses aforesaid is the general line of buildings in such row. (Signed —.)

Brett, Q.C. (Stretten with him), for the apps., contended that, as the 75th section of the Act enacted that the architect of the Metropolitan Board of Works was to determine what was the general line, he was thereby constituted the arbitrator of the whole building, and his decision was final. He referred to *Teas v. Freebody*, 4 C.B., N.S., as to the line being a strictly mathematical line, but a substantially regular line.

Keane, Q.C., for the resp., was stopped by the Court.

ERLE, C.J.—I am of opinion that our judgment should be for the resp. The first question is, whether it is compulsory on the magistrate in point of law to hold the thing in question to be an erection, he being of opinion that it was not. It is impossible to hold as a rule of law that, because there is a certain quantity of materials, the magistrate must hold it to be within the statute. I do not think that it was. It cannot be the bounden duty of any one by law to hold so much glass and materials within the statute. Then he puts the question, "whether, if the glass and iron be such an erection, the line certified and decided by the superintending architect of the Metropolitan Board of Works as the general line of building does, in point of law, preclude all further inquiry whether it is the true general line in each particular street or row or not." I think that such was not the intention of the statute. I cannot believe without very strong words that the decision of the superintending architect is to stand good for every case, past all appeal or inquiry: a whole street, involving millions of money, might be affected by it. It seems very improbable that this should be so. I think that it would protect anybody, if he had permission from the architect, from being proceeded against by the Metropolitan Board of Works. I think that when the parties came to demolish it, it would be time for the magistrate to be called in aid. Then a party may go into the merits and ask for protection, "Am I liable to have these things cast upon me?" The magistrate, if satisfied that it is right, must order a demolition; but I believe that the result of the complaint would be for the magistrate to ascertain whether the statute had been in substance transgressed.

WILLES, J.—I am of the same opinion. I give no opinion as to whether this was an "erection" within the meaning of the Act, as the magistrate has found that it was not. Upon the other ground I agree with the judgment of the Lord Chief Justice. The section is an extremely penal one. It makes it the duty of the magistrate to direct the demolition of the building or erection, the expenses to be borne by the owner or occupier. The 75th section says, that no building, structure, or erection shall, without the consent of the Metropolitan Board of Works, be erected beyond the general line of buildings, such general line to be decided by the superintending architect to the Metropolitan Board of Works for the time being. This section does not show that the architect is to decide whether the erection is within the general line; if it did, the magistrate would only have to decide whether the consent of the Metropolitan Board of Works had been given. What the magistrate has to do is to have clear proof that the "erection" is within the line; and in this case it appears that he did not consider that fact had been proved, and I am of opinion that his opinion was correct.

BYLES and KEATING, JJ. concurred.

#### V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, Esqrs., Barristers-at-Law.

Tuesday, May 3, 1864.

FITZGERALD v. FITZPATRICK.

Chapel of ease—District chapelry—Pew rents—Marriages, &c.—Fees—Appointment of clerk and sexton—Order in Council—Trust-deed.

A chapel was erected by subscription, and vested in trustees, the expressed intention in the deed of trust being that the chapel should, when completed, be used

V.C. K.]

FITZGERALD v. FITZPATRICK.

[V.C. K.]

as a chapel of ease dependent upon the parish church. By an Order in Council, a portion of the parish was subsequently assigned to the chapel as a district chapel, but there was reserved to the then vicar of the parish the right to receive, during his life, all fees in respect of marriages, baptisms, &c., solemnised or performed in the said chapel. After the vicar's death, his successor laid claim to the exclusive cure of souls within the district chapel, and to receive pew rents, appoint a clerk, sexton, &c., in respect thereof. The pl. admitted at the bar the validity of the Order in Council:

*Held*, that the district chapel was constituted a benefice, and the incumbent a beneficed clergyman, by virtue of the Order in Council and the Acts of Parliament which the order referred to, and that therefore the vicar and churchwardens of the original parish had no right to receive pew rents or appoint officers in respect of the district chapel.

*Held also*, that the trusts of the deed were set aside by the Order in Council.

This suit was instituted by the vicar and churchwardens of St. Paul's, Bedford, against the incumbent and churchwardens of the chapel or church of the Holy Trinity, at Bedford, and the questions which were raised were, whether an Order in Council declaring that marriages, baptisms, burials, &c. might be solemnised in the said chapel or church of the Holy Trinity, was valid, and also whether the pl. the Rev. William George Fitzgerald, as vicar of the mother church, was entitled to the exclusive cure of souls within the district assigned by the Order in Council to the said chapel or church, and to publish banns of matrimony, and solemnise marriages in the said chapel, and receive fees, pew rents, &c., &c. in respect thereof. There was also a question whether the trust-deed of the chapel was still in force.

The parish of St. Paul's, in the town of Bedford, in the diocese of Ely, is an ancient parish with a vicarage with cure of souls, and in 1840 the Rev. James Donne was the vicar, and John, Baron Carteret, was the patron of the vicarage.

By an indenture dated the 28th Sept. 1840 a piece of land situate in that parish (which piece of land by a previous deed dated in August in the same year had become vested in certain persons, their heirs and assigns), intended for the site of a new chapel, and such intended new chapel, were declared to be held upon certain trusts, which were in effect to permit the chapel to be built and consecrated, and used as a chapel of ease dependent upon the parish church of the parish of St. Paul, Bedford. The trusts of this deed are more particularly referred to in the V. C.'s judgment. The deed was duly enrolled in the Court of Ch. in 1841.

The chapel was built and consecrated in June 1841, by the name of the Chapel of the Holy Trinity, Bedford. The sentence of consecration recited that it had been represented to the bishop that the population of the parish of St. Paul had greatly increased, and that the church had become inadequate for their accommodation, and that it was therefore determined to erect a chapel of ease to the parish church, the necessary funds for that purpose having been provided in part by the Incorporated Society for the Enlargement, Building and Repairing of Churches and Chapels, and the residue by private subscription. The chapel received in the same year an augmentation from Queen Anne's Bounty.

On the 26th Oct. 1860 an Order in Council was made which, in consequence of a representation by the Ecclesiastical Commissioners, assigned to the Church of the Holy Trinity a certain part of the parish of St. Paul, Bedford, to be named the District Chapelry of the Holy Trinity, Bedford. It also

provided that banns of marriage, marriages, baptisms, churchings and burials should be solemnised and performed at the church of the Holy Trinity, and that the fees should be paid and belong to the minister of the same church for the time being, excepting that so long as the Rev. James Donne continued vicar of St. Paul's all such fees should be paid to him by the incumbent of the Holy Trinity; and it was ordered that such proposed assignment and arrangement should be carried into effect agreeably to the provisions of 59 Geo. 3, c. 184, 2 & 3 Vict. c. 49, and 19 & 20 Vict. c. 55. The order was duly advertised and registered.

The Rev. James Donne died on the 17th Jan. 1861, whereby there became an avoidance of the vicarage and parish church, and the pl. the Rev. W. G. Fitzgerald, who had become patron thereof, presented himself to the bishop and was duly instituted and inducted to the vicarage. The deft. the Rev. Richard William Fitzpatrick was at that time the perpetual curate of the Chapel of the Holy Trinity, having been licensed thereto on the 11th May 1858.

Mr. Fitzpatrick, after the death of Mr. Donne, published banns of marriage and solemnised marriages, and also received Easter offerings and ecclesiastical dues, and claimed the right to retain them, and to be entitled to appoint a clerk and sexton, though such moneys were received and such appointments were made by the Rev. Mr. Donne with the consent of the churchwardens up to the time of his death. Mr. Fitzpatrick also claimed to be entitled to a proper stipend for his services out of the pew rents. The annual income arising from the permanent endowment of the chapel amounted only to the sum of 80*l*.

The defts., Messrs. Sheppee and Cotton, were the churchwardens of the Chapel of the Holy Trinity, having been appointed by Mr. Fitzpatrick and the inhabitants of the district under the 6 & 7 Vict. c. 37, and 19 & 20 Vict. c. 104. They refused to allow the plts. to let the pews or sittings in the Chapel of the Holy Trinity, or to collect the rents, or in any way to intermeddle therewith. A notice in writing, dated the 3rd April 1862, was served on behalf of Mr. Fitzgerald, upon the defts., requiring them to abstain from collecting or receiving such pew rents, and to account for and pay over what they had received, and hand over books and papers, which the defts. refused to do.

In 1854 a cemetery had been provided for the parishes of St. Cuthbert, St. John, St. Mary and St. Peter Martin, Bedford. It was situate in the parish of St. Peter, and was provided out of rates levied on the ratepayers of the said several parishes, including the ratepayers of the district of the Holy Trinity. Mr. Fitzpatrick had received and retained, for his own benefit, the surplice and other fees which were paid in respect of the interment of persons removed from the district of the Holy Trinity to this cemetery.

Stephens, Q.C. and Traill, for the plts., argued that the Ecclesiastical Commissioners had no power to deal with pew rents except as to a chapel built under 1 & 2 Will. 4, c. 38 (the Church Patronage Act), and that that Act did not apply to the present case, as the population was under 2000, nor did the endowment amount to 1000*l*. The trust-deed of the chapel remained in force, and was not superseded by 6 & 7 Vict. c. 37, or 19 & 20 Vict. c. 104. They would admit the Order in Council to be valid. They cited

*Tuckniss v. Alexander*, 8 L. T. Rep. N. S. 821;

*Abley v. Dale*, 11 C. B. 378;

58 Geo. 3, c. 45, ss. 62-64, 76-79;

59 Geo. 3, c. 184, ss. 6, 26, 27;

1 & 2 Will. 4, c. 38;

7 & 8 Vict. c. 94.

V.C. K.]

FITZGERALD v. FITZPATRICK.

[V.C. K.]

*Baily, Q. C. and Surragé*, for the defts., contended that the chapel was no longer a chapel of ease, and that the trusts of the deed were put an end to by the Order in Council and the provisions of the Act of Parliament. Moreover, the collection of pew rents was altogether illegal. They cited

*Wyllie v. Mott*, 1 Hag. Eccl. Rep. 28;

*Comyn's Dig.* tit. "Eglise," B.;

*Gough v. Jones*, 7 L. T. Rep. N. S. 566;

1 & 2 Vict. c. 49.

*Wickens*, for the Crown, took no part in the argument, as the Order in Council was admitted to be valid.

*Stephens* in reply.

THE VICE-CHANCELLOR.—The questions to be determined by the court have been very much narrowed and brought within a limited space. They are merely these: First, whether the incumbent of St. Paul's has a right to the pew rents from the pews in this chapel; and secondly, whether the incumbent and churchwardens of St. Paul's have the right of nominating the clerk, sexton, or any other officer or officers who have to perform certain functions in the due and solemn performance of divine service? The other question which has been raised by the bill, as to whether the Order in Council dedicating this chapel to the new district is valid, has been abandoned; and I must assume now that the Order in Council, by which this district is created, and by which this chapel was dedicated as a place of worship for that district, is perfectly valid and good. This chapel was built in the following manner. Certain persons in the parish seem to have been desirous of extending church accommodation, which was insufficient for the number of inhabitants; and accordingly by means partly of private subscription and partly, not by a grant from the commissioners, but by a gift from the incorporated society, the chapel was built upon a piece of ground which no doubt had been purchased or given for the purpose. This piece of ground was, by an indenture dated the 28th Sept. 1840, vested in certain trustees upon the trusts which should be declared by a deed of trust of even date. By the deed of trust of even date the trustees were to stand possessed of and interested in the piece of ground upon trust to permit and suffer the chapel which was then in course of being built upon that ground to be erected, and to permit and suffer the same to be used, occupied and enjoyed as a chapel of ease subject to and dependent upon the parish church of the parish of St. Paul, Bedford, for the celebration of divine service, the administration of the Holy Communion, and the performance of the office of burial, but it was provided that no banns of matrimony should be published, or marriages solemnised, or baptisms or churchings had, by any person whatever in the chapel. Then the next clause is also material: "And upon this further trust, to permit and suffer the vicar for the time being of the parish church of St. Paul, Bedford, or his curate or curates for the time being, by his direction, such curate or curates being a licensed curate or curates of the parish of St. Paul, Bedford, and not specially appointed to the chapel, to officiate as the minister or ministers of the chapel, according to the rites and ceremonies of the said united Church of England. And upon this further trust, to permit the vicar and churchwardens for the time being of the said parish to let the pews and seats of the said chapel." Then there were to be certain free seats: "And upon this further trust, to permit the churchwardens for the time being of the said parish to receive the rents of the pews and seats so to be let as aforesaid." Then there is a clause as to vaults and catacombs, which I think is not material to the present question, and it then proceeds thus:

"And it is declared and agreed that it shall be lawful for the vicar and churchwardens for the time being of the said parish from time to time to appoint a clerk, pew openers, and all other officers or servants necessary or proper for the due performance of divine service in the chapel." Then it is further declared and agreed, that the rents and profits so to be received by the churchwardens for the time being of the parish (that is to say the pew rents) should be paid and applied thus—in the first place, in payment and discharge of the costs and expenses attending the celebration of divine service in the chapel, and in necessary repairs and insurance of the chapel, except the vaults or catacombs, and in payment of the salaries of the clerk, pew openers, officers, or servants serving in the chapel, and after payment and discharge thereof, the surplus of such rents and profits should be paid over or accounted for to the vicar for the time being of the said parish half-yearly, and the receipt in writing of the trustees was to be a good discharge. Now, I think it is perfectly clear that the intention of the parties, so far as it was in their power, was to make this chapel a chapel of ease. They expressly declare that the trust is to be to suffer the same to be used, occupied and enjoyed as a chapel of ease, subject to and dependent upon the parish church, and it is to be served, not by any curate or minister specially appointed to serve that church, but by the licensed curate or curates of the parish of St. Paul's; *quatenus in illis*, they designed it to be a chapel of ease, entirely dependent upon the mother church—that is, the Church of St. Paul, Bedford. It has been argued that, if there be a chapel of ease, the freehold of that chapel must necessarily be vested in the incumbent, and not in any trustees or other persons. Here, by the deed of conveyance, the freehold is conveyed to, and by this deed of trust it is contemplated to remain in, the trustees appointed by the parties who were instrumental in causing the church to be erected. It is contended that, if it be a chapel of ease, the freehold must be vested in the incumbent, and that, unless it be so vested in the incumbent, it is not a chapel of ease. Upon that point I do not mean to express any opinion, because, assuming the law to be either way (and I have not had any authority cited on either side to establish the proposition or to rebut it), and supposing it was not properly a chapel of ease of the parish, still the persons who executed this deed, or who were parties to it, intended it to be, so far as it was possible for them to make it so without vesting the freehold in the incumbent, to all intents and purposes a chapel of ease. They at least intended that it should have all the attributes of a chapel of ease, even if, in the eye of the law, it was not actually constituted such. It has further been argued that, if it be a chapel of ease, then all the rules of law which apply to a parish church (that is, with reference to the illegality of letting pews) would necessarily apply to this chapel of ease. Upon that point, again, I do not express any opinion, and I abstain from doing so because cases have not been cited as authorities sufficient for me to draw a conclusion one way or the other. If it were necessary, I would investigate the subject, but it appears to me unnecessary, for the purposes for which I have to decide, to come to any conclusion upon that abstract point. Whether this be, properly speaking, a chapel of ease with reference to the freehold not being vested in the incumbent, or whether, in the case of an actual chapel of ease, there be or be not the same law prevailing with regard to the letting the pews as is applicable to the case of letting pews in a parish church, it appears to me not necessary to determine. But whichever way we may suppose the law to be, we have at all events this fact, that the parties

V.C. K.]

Re WHITTINGHAM'S TRUSTS.

[V.C. W.]

intended to make this, as far as lay in their power, a chapel of ease entirely dependent upon and served by the curates of the parish church. I assume that during a long course of years, while Dr. Donne was the incumbent of St. Paul's, the pews were let in this chapel, and that Dr. Donne received those pew rents subject only to such deductions as were necessary for the payment of the clerk, sexton, &c., and other expenses necessary for the due performance of divine service, so that, as far as related to any benefits resulting from the chapel, whether they were lawful or unlawful according to the strict laws relating to chapels of ease, the chapel was at all events treated as belonging to the parish church, in the sense that the incumbent received any profits resulting from it, and the incumbent of the parish also served the chapel by means of his own curates. In this state of things comes the Order in Council, which I am to assume to be perfectly valid, effectual and binding. [The V. C. then referred to the Order in Council.] What was the effect of this Order in Council, assuming, as it is admitted I am to assume, it to be a perfectly valid order? In due pursuance of the Acts of Parliament there was constituted a district chapelry, and the chapel in question, which had been a chapel of ease, or had been intended and dealt with as a chapel of ease of the parish of St. Paul, should be the church of the district chapelry of the Holy Trinity. Taking then the two Acts, namely, 59 Geo. 3, c. 184, and 2 & 3 Vict. c. 49 together, the effect of them is that a district chapelry to a church is so constituted that it becomes not only a district chapelry but a benefice, for the Act of Victoria repeals that clause in the Act of 59 Geo. 3 which prohibits it from becoming a benefice, and on the contrary says that it is to become a benefice. Therefore, the incumbent of the Church of the Holy Trinity, Bedford, becomes the incumbent of a benefice, he is a beneficed clergyman; and *prima facie*, unless there be anything to control in the Act of Parliament, he would be entitled to be in exactly the same position as any other beneficed clergyman; he has not a rectory or a vicarage, but he would be entitled to stand in the same position as any other incumbent. It appears to me that the effect of the order is, to withdraw this chapel from all the trusts, purposes and objects to which, up to the time of the Order in Council, it had been dedicated, and to dedicate it to the new purposes which are prescribed by the Act of Parliament, namely, to become the church of a district chapelry and a benefice. The effect is to withdraw it from all the purposes, including the trusts, of the deed. If indeed there were no power in the Crown to deprive the incumbent of St. Paul, Bedford, or any person, of certain rights and privileges given to them by deed, then that would be a ground for questioning the validity and force of the Order in Council; but it must now be taken to be perfectly good, valid and effectual. Finding, then, that the effect of the Acts of Parliament and the Order in Council taken together, is to constitute a benefice, and the chapel in question the church of that benefice, and the incumbent of that church to be a beneficed clergyman, and a clergyman standing in the position in which any other beneficed clergyman of a similar district chapelry would stand, it appears to me that it follows as a matter of course that, by force of the Acts of Parliament and the Order in Council, all prior purposes to which the chapel was before dedicated have ceased, that is, ceased so far as they are inconsistent with the rights of a beneficed clergyman, and that if there be (upon which I say nothing) any power or any right to impose pew rents upon persons who frequent the church, that right to receive the rents from such pews cannot remain in

the incumbent of St. Paul's, but that, if there be the right to impose them, those pew rents must belong to the incumbent of the new benefice that it thus created. It must be understood that I decide nothing with respect to the question whether the deft. is entitled to receive any pew rents. He may or may not be. It may be that it is quite illegal to impose pew rents in this church under its present constitution, having regard to the purpose to which it is now dedicated; but, supposing it to be so, the question whether the deft. has any right to receive them is not the question which I have to determine; but the question is, whether the plt. has the right to receive them? It appears to me, for the reasons I have mentioned, that the plt. is not entitled to receive the pew rents. Then with regard to the other point which seems almost to stand upon the same footing, or rather a stronger footing, it must follow as a matter of necessity that the right of the minister and churchwardens to appoint the officers, the clerk, the sexton, and the pew openers in a benefice with which they now have nothing to do, would be perfectly monstrous; and the same reason that leads me to the conclusion that the pew rents no longer belong to the incumbent of St. Paul's, leads me also to the conclusion that the right to appoint the officers no longer belongs to him, and I am therefore of opinion that the bill must be dismissed.

*The bill was ordered to be dismissed without costs, by consent, the Attorney-General's costs being provided for.*

Solicitors: *Hilbard, Dale and Stretton; Rivington; Solicitor to the Treasury.*

### V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,  
Barristers-at-Law.

April 25 and May 4, 1864.

Re WHITTINGHAM'S TRUSTS.

*Husband and wife—Reversionary legacy—Joint assignment—Desertion—Protection order—21 & 22 Vict. c. 108, s. 8—Right to legacy.*

*A married woman, entitled to a legacy in reversion, joined with her husband in charging it by way of assignment.*

*She was deserted by her husband and obtained a protection order under the 21 & 22 Vict. c. 108, which was expressed to extend only to property acquired by her industry, and that to which she was entitled as executrix or administratrix:*

*Held, that, notwithstanding the form of the order, her reversionary interest is impliedly protected by force of the Act.*

*Order made for carrying the legacy to a separate account in her name, and for payment of the income to her.*

The petitioner, C. Evans, was a married woman, who was deserted by her husband about ten years ago, and was left with a child now about thirteen years old. She was, under the will of Charles Whittingham, entitled in reversion, expectant on her mother's death, to a share of a sum of 1700*l.* Consols, and of the testator's residuary estate.

The fund was now in court and amounted to about 1500*l.*

There was no settlement on or after her marriage, and in 1852 she joined with her husband in assigning her reversion by way of mortgage; the husband soon after became bankrupt and the reversion was sold by his assignees.

The tenant for life of the fund died on the 31st Jan. 1863. On the 27th Aug. in the same year the petitioner obtained a magistrate's protection order, which was to the following effect: "That all money or property



acquired by the lawful industry of the petitioner since the 10th Feb. 1863 (being the day on which it was found that she was deserted by her husband), or which she might thereafter acquire, and all property which she had become possessed of, or to which she might become entitled as executrix, administratrix, or trustee since the same date, should be protected," and such money, &c. should be protected against any claim of her husband, "his creditors, and any person claiming under him;" and that such property should belong to the petitioner as if she were a *feme sole*.

The Act 20 & 21 Vict. c. 35, s. 21, empowers metropolitan magistrates or justices of the peace in petty sessions to make an order in the case of a married woman deserted by her husband, "protecting her earnings and property acquired" since the desertion, upon satisfactory proof that the wife is maintaining herself "by her own industry or property."

By 21 & 22 Vict. c. 108, s. 6, the Judge Ordinary of the Divorce Court may make an order, in similar cases, "to protect any money or property in England" which the wife "may have acquired or may acquire by her own lawful industry, and any property she may have become, or may become possessed of" after the desertion; with a reference to the powers given by the 21st section of the former Act.

Section 7 extends the force of all orders for protection to property vested in a wife as executrix or administratrix.

Section 8 declares that property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion should be deemed to be included in the protecting order.

*Giffard, Q. C.* and *F. Walford*, now applied in the terms of the prayer of the petition, to have the fund carried to a separate account, and the income paid to the petitioner. They referred to *Re Rainesdon's Trusts*, 4 Drew. 446.

*W. W. Cooper and Jessel*, for several parties entitled to charges on the fund, argued that the justices in making the order had expressly limited it, so that it should not include this reversionary interest, and that they had power under the Act so to limit it; this was an interest over which the husband, before the desertion, had an absolute right of disposition, subject to the wife's equity to a settlement; she had joined with him in the assignment, and to that extent waived her right. The Act could not be intended to apply to a case of this sort, for, supposing the trustees of the fund had, after the desertion took place, but before the protection order was made, paid over the fund to assignees for value, the wife might then have obtained the order and compelled the trustees to pay over again.

*A. C. Walford* for the trustees.

*Giffard*, in reply, submitted that the order was wrong in form; the justices had assumed a jurisdiction to limit its operation so as to exclude property, which was expressly included in all such orders by the Act.

The VICE-CHANCELLOR said, that it certainly seemed to him that the order of the justices was wrong in form; but that point was of much importance, and the case must stand over for judgment as to the mode of disposing of the *corpus* of the fund. He should order the income to be paid to the petitioner at once.

*May 4.*—The VICE-CHANCELLOR said, that upon consideration he could come to no other conclusion than that this legacy came within the scope of the protecting order. Upon the form of the order it might no doubt be argued that this reversion was

excluded from its operation; there was however no express exception, and he was not therefore called upon to consider whether an order of such a limited character was good, but it was open to him to hold that the force of sect. 8 was such as to bring within the general terms of a magistrate's order such a reversionary interest as this. There was, in his opinion, an inconvenience in making an order in this form; it formed, in fact, part of the title of the petitioner to this legacy, and was, on the face of it, open to objection. He thought the order on this petition might be in the terms of the prayer, to carry the fund to a separate account, the income to be paid to the petitioner for her life.

Solicitors for the petitioner, *Walford*; for the other parties, *T. Taylor*, Cleobury.

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 30, 1864.

(Before POLLOCK, C.B., KEATING, BLACKBURN AND MELLOR, JJ., AND PIGOTT, B.)

REG. v. PARKER AND SMITH.

*Indictment—Night poaching—Commencement of prosecution—Evidence—Information.*

*On the trial of an indictment for night poaching, under the 9 Geo. 4, c. 69, ss. 4, 9, it is not sufficient to produce the warrant only under which the prisoners were apprehended, to prove that the proceedings were commenced within twelve months of the commission of the offence; but the information in writing should also be produced.*

Case reserved for the opinion of this court by Pigott, B.

The prisoners were indicted for night poaching to the number of three or more, being armed with offensive weapons, under the 9 Geo. 4, c. 69, s. 9.

The indictment was in the following form, viz.:

Gloucestershire.—The Jurors for our Lady the Queen, upon their oath present, that Henry Parker and Thomas Smith, and certain other persons to the Jurors aforesaid unknown, being to the number of three and more, together, on the 26th Jan. 1864, with force and arms, at the parish of Temple Grinting, in the county of Gloucester, by night (that is to say), about the hour of eleven in the night of the 26th Jan. in the year aforesaid, unlawfully together did enter into, and then and there were in certain land there situate, in the occupation of Isabella Talbot and another, with the intent and for the purpose of then and there by night, as aforesaid, illegally taking and destroying game and rabbits there, the said Henry Parker and Thomas Smith, and the said other persons being then and there by night as aforesaid, and at the time when they were so together, entered and were in the said land as aforesaid, armed with guns and bludgeons, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

The second count did not materially vary.

The evidence showed that the offence was, in fact, committed on the 26th Jan. 1861, and to prove that proceedings were commenced within the time required by the 4th section of the statute, viz., twelve months from the time of the offence, the warrant under which the prisoners were apprehended was put in evidence, dated Feb. 5th, 1861. The following is a copy of the same:

To the constables of the Gloucestershire Constabulary Force and to all other peace officers of the said county of Gloucester. Whereas, information hath this day been laid before the undersigned, one of Her Majesty's justices of the peace in and for the said county of Gloucester, by Richard Fluck, of Temple Grinting, in the said county, gamekeeper, for that Thomas Smith and Henry Parker, of Chipping Campden, labourers, on the 26th Jan. 1861, at Temple Grinting aforesaid, together with divers other persons unknown, to the number of three or more, together, about the hour of eleven in the night of the same day, three being then respectively armed with a gun, did then, together, unlawfully enter a certain close of land then in the occupations of the Misses Isabella and Jane Elizabeth Talbot, there situate, and were then by night as aforesaid, and armed as aforesaid, in the



C. CAS. R.]

REG. v. HEYWOOD AND OTHERS.

[C. CAS. R.]

said land, for the purpose therein of taking and destroying game contrary to law; and oath being now made before me, substantiating the matter of such information: these are, therefore, to command you in Her Majesty's name forthwith to apprehend the said Thos. Smith and Henry Parker, and bring them before some one or more of Her Majesty's justices of the peace in and for the said county, to answer to the said information, and to be further dealt with according to law. Given under my hand and seal, the 5th Feb. 1861, at Ladley-castle, in the said county. JOHN C. DENT. (L.S.)

It was proved that Mr. John Dent was, when he signed the warrant, a magistrate of the county.

No information was given in evidence, and the respective arrests took place, of Smith on the 27th Nov. 1862, and of Parker on the 14th Jan. 1864.

The counsel for the prisoners objected—

First, that the warrant without the information was no legal evidence that proceedings were commenced within twelve months, as required by the statute; and secondly, that the present indictment was defective for not containing an allegation that such proceedings were in fact taken.

I overruled both objections, but reserved the points for the Court of Criminal Appeal.

The prisoners were convicted and sentenced.

If the Court should be of opinion that the warrant without the information is not sufficient evidence of the commencement of the proceedings, or that the indictment is defective for the cause above stated, in either case a verdict of not guilty is to be entered.

G. PIGOTT.

*Harrington* for the prisoners.—It is submitted that this conviction cannot be sustained, on two grounds: first, because the indictment is bad upon the face of it; and secondly, because there was no sufficient evidence of the commencement of the prosecution within twelve months after the commission of the offence. The 9 Geo. 4, c. 69, s. 4, enacts that the prosecution for every offence punishable upon indictment or otherwise than upon summary conviction by virtue of that Act, shall be commenced within twelve calendar months after the commission of such offence. And sect. 9 enacts that any persons to the number of three or more by night unlawfully entering on any land for the purpose of taking game or rabbits, any of such persons being armed with any gun, &c., shall be guilty of a misdemeanor. Now the record of this indictment, when properly drawn up, will show that the proceedings were not commenced within twelve months after the offence, for it will appear thereon that the offence was committed on the 26th Jan. 1861, and that the indictment was not preferred and found until the Lent Assizes 1864. The court will take notice of the dates in the indictment. If A. be indicted of murder or manslaughter, as well the day and place of the stroke or other act done inducing death, as of the death, must be expressed: (2 Hale P. C. 179.)

[MELLOR, J.—It was formerly necessary to show that the offence of murder was complete.] So in this case it is contended that it is necessary to show on the face of the indictment that the proceedings were commenced within a year. In the cases of *Reg. v. Brooks*, 2 Car. & K. 402, 2 Cox. C. C. 436, and *Reg. v. Austin*, 1 C. & K. 621, the question arose upon the facts, and it does not appear what the forms of the indictments were. [BLACKBURN, J.—This question is singularly like the Statute of Limitations, which has never been negatived in stating the cause of action in the declaration.] In *Reg. v. Lookup*, 3 Burr. 1901, where an indictment stated the offence to have been committed in the time of the late King, and concluded against the peace of the now King, it was held insufficient on a writ of error. [MELLOR, J.—In the last edition of Archbold's Crim. Plead. this seems to be treated not as a matter of averment in the indictment, but of proof upon the evidence. BLACKBURN, J.—Ever since the 8 & 9 Will. 3, c. 26, it has never been the practice to allege in pro-

secutions for coining the offence to have been committed within three months.] As to the second objection, that there was no proper evidence of the commencement of the prosecution within twelve months. In *Wallace's* case, East P. C. 186, it appears to have been held by the judges that the information and proceeding before the magistrate was the commencement of the proceedings in coining cases. In all the reported cases the prisoners were in custody, and had been apprehended within twelve months of the time of the trial. The mere issuing of a warrant for the apprehension of the prisoners is not a commencement of the prosecution within the meaning of this statute without apprehending them and bringing them before the magistrates:

*Reg. v. Hull*, 2 Foa. & Fin. 16;

*Reg. v. Smith*, 1 L. & C. 181; 5 L. T. Rep. N. S. 761.

The form of the warrant in this case shows that there must have been a previous information in writing, and that information should have been produced to show the commencement of the proceedings. [PIGOTT, B.—You contend that the warrant is merely secondary evidence of the information?] Yes. Paley on Convictions, by Macnamara, is to the same effect. The case of

*Reg. v. Massey*, 32 L. J. 21, M. C.; 7 L. T. Rep. N. S. 891, was then cited.

No counsel was instructed for the prosecution.

POLLOCK, C. B.—We are all of opinion that it was necessary to sustain the prosecution to give the information in evidence, and that therefore this conviction fails.

Conviction quashed.

REG. v. HEYWOOD AND OTHERS.

*Pleading—Indictment for three larcenies—24 & 25 Vict. c. 96, s. 5.*

*An indictment against a prisoner for three larcenies from the same prosecutor contained no averment that they were committed within a period of six months:*

*Held, nevertheless, that the indictment was good.*

Case reserved for the opinion of this court by the Recorder of Bolton (Lancashire).

At the Court of Quarter Sessions of the Peace for the borough of Bolton, in the county palatine of Lancaster, holden by me as Recorder of the said borough on the 31st March 1864, James Heywood, John Wood, Isaac Broughton, George Robinson and Edward Kippax were tried before me on the indictment set forth below, and the jury by their verdict found J. Heywood and J. Wood guilty of stealing, and J. Broughton and G. Robinson guilty of feloniously receiving, and Edward Kippax not guilty, after a trial which lasted two days.

Borough of Bolton to wit.—The jurors for our Lady the Queen upon their oath present, that James Heywood on the 1st Sept. 1863, at the borough aforesaid, and within the jurisdiction of this court, was servant to Augustus Warrens and another, and that the said J. Heywood afterwards, and whilst he was such servant to the said A. Warrens and another, to wit, on the day and year aforesaid, 600 pounds weight of cotton wett, 400 pounds weight of cotton twist, and 1000 pounds weight of cotton, of and belonging to the said A. Warrens and another, his said masters, then and there being found, then and there feloniously did steal, take and carry away, against the form of the statute, &c.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood and J. Wood, J. Broughton, G. Robinson and E. Kippax on the day and year aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600 pounds weight of cotton wett, 400 pounds weight of cotton twist, and 1000 pounds weight of cotton, of the property of the said A. Warrens and another, then and there being found, feloniously did steal, take and carry away.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson, and E. Kippax, afterwards, to wit, on the same day and year aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600lbs. weight of cotton wett, 400lbs. weight of cotton twist, and 1000lbs.

weight of cotton, of the property of the said A. Warrens and another, before then feloniously stolen, taken and carried away, feloniously did receive and have, they, the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, then and there well knowing the said property last aforesaid to have been feloniously stolen, taken and carried away, against the form of the statute, &c.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood on the 2nd Nov. in the year aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, was servant to the said A. Warrens and another, and that the said J. Heywood afterwards, and whilst he was such servant to the said A. Warrens and another, to wit, on the day and year last aforesaid, 600lbs. weight of cotton wett, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of and belonging to the said A. Warrens and another, his said masters, then and there feloniously did steal, take and carry away, against the form of the statute, &c.

Fifth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, on the day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600lbs. weight of cotton wett, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of the property of the said A. Warrens and another, then and there being found, feloniously did steal, take and carry away.

Sixth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, afterwards, to wit, on the same day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600lbs. weight of cotton wett, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of the property of the said A. Warrens and another, before then feloniously stolen, taken, and carried away feloniously did receive and have, they, the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, then and there well knowing the said property last aforesaid to have been feloniously stolen, taken and carried away, against the form of the statute, &c.

Seventh count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, on the 24th Dec. in the year aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, was servant to the said A. Warrens and another, and that the said J. Heywood afterwards, and whilst he was such servant to the said A. Warrens and another, to wit, on the day and year last aforesaid, 600lbs. weight of cotton wett, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of and belonging to the said A. Warrens and another, his said masters, then and there feloniously did steal, take and carry away, against the form of the statute, &c.

Eighth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, on the day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600lbs. weight of cotton wett, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of the property of the said A. Warrens and another, then and there being found, feloniously did steal, take and carry away.

Ninth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, afterwards, to wit on the same day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600lbs. weight of cotton wett, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of the property of the said A. Warrens and another, before then feloniously stolen, taken, and carried away, feloniously did receive and have, they the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, then and there well knowing the said property last aforesaid to have been feloniously stolen, taken and carried away, against the form of the statute, &c.

Before the prisoners pleaded, their counsel applied to the court to quash the indictment, on the ground that there was no allegation in the counts charging the second and third larcenies, that they were respectively committed within six months after the commission of the larceny charged in the first count, and after hearing the counsel on both sides, I refused the application.

The counsel for the prosecution then applied to me to amend the indictment by introducing the words, the omission of which had formed the ground of the former objection.

I did not think that it was such an amendment as the statute enabled me to make, but said that, if I was satisfied that I had the power to do so, I should direct such amendment to be made.

The questions for the opinion of the Court of Criminal Appeal are, first, whether I was empowered by the statute to make the amendment applied for, and if the court should be of opinion

that I had that power, then that amendment is to be taken as having been made.

But if the court should be of opinion that I had no power to make that amendment, then the second question for the opinion of the court is, whether the indictment, as it now stands, and on which the prisoners were tried, is sufficient to sustain the verdict so found by the jury, and whether, on that finding, judgment may now be given.

R. B. ARMSTRONG, Recorder of Bolton.

A. *Wills* for the prosecution.—The indictment is good. It is clear upon the authorities that several felonies may be joined in the same indictment, and that it is for the judge to exercise his discretion in calling on the prosecutor to elect for which he will proceed; or to quash some of the counts. And what has been done by the recent Act, 24 & 25 Vict. c. 96, s. 5, which enacts that three larcenies committed against the same person within six months may be included in the same indictment against the same prisoner, is to take away the discretion formerly exercised by the judge in such a case. In 2 Hale P. C. 173, "If there be one offender and several capital offences committed by him, they may be all contained in one indictment, as burglary and larceny. Larcenies committed of several things, though at several times and from several persons, may be joined in one indictment." And Lord Ellenborough ruled, in *Rex v. Jones*, 2 Camp. 132: "In point of law there is no objection to a man being tried on one indictment for several offences of the same sort. It is usual in felonies for the judge in his discretion to call upon the counsel for the prosecution to select one felony and confine themselves to that; but this practice has never been extended to misdemeanors." And Buller, J. said, in *Young v. The King*, 3 T. R. 105: "In misdemeanors, *Rex v. Benfield*, 2 Burr. 989, shows that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration, but even in such cases it is no objection upon writ of error. On the face of an indictment every count imports to be for a different offence, and is charged as at different times. And it does not appear on the record whether the offences are or are not distinct. But if it appear before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence or prejudice him in his challenge of the jury, for he might object to a jurymen's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. But if the case has gone to the length of a verdict it is no objection in arrest of judgment. If it were it would overturn every indictment which contains several counts." In *Rex v. Kershaw*, 1 Lewin C. C. 218, the indictment contained two distinct felonies. [MELLOR, J.—The practice has always been, where several felonies were included in one indictment, to put the prosecutor to elect for which one he will proceed, to prevent the prisoner being embarrassed in his defence. But all reason for such election is now taken away by the recent statute, where three larcenies only are charged. POLLOCK, C. B.—Strictly speaking, the whole presentment of the grand jury from the first to the last indictment, constitutes but one indictment against all the prisoners. The objection to trying a prisoner on several felonies at once is rather an objection in the breast of the judge than a matter of criminal pleading. Formerly it was not the practice to allow counts for larceny and

[BAIL.]

REG. v. THE GUARDIANS OF THE NEWPORT UNION—REG. v. BRICKHALL.

[BAIL.]

receiving in the same indictment, but that was altered by statute.] In Starkie's Crim. Plead. 39, it is said, "If several felonies be charged against a prisoner in the same indictment, it is no objection either upon demurrer or in arrest of judgment." See also 2 East P. C. 779.

\* No counsel appeared for the prisoner.

POLLOCK, C.B.—We are all of opinion that the indictment is good. At any rate it is now too late to allow the objection.

BLACKBURN, J.—At the same time we do not wish to sanction such a departure from the usual mode of criminal pleading.

*Conviction affirmed.*

### BAIL COURT.

Reported by T. H. JAMES, Esq., Barrister-at-Law.

Thursday, May 5, 1864.

(Before CROMPTON and SHEP, JJ.)

REG. v. THE GUARDIANS OF THE NEWPORT UNION.

*Notice of appeal against order of maintenance—Criminal Lunatic—4 & 5 Will. 4, c. 76.*

*Notice of appeal against an order for the maintenance of a criminal lunatic may be signed by the clerk to the board of guardians, the apps.; and it is not too late if it be received fourteen days before the following sessions, although more than twenty-one days have elapsed since the order was made.*

This was a rule calling upon the justices of Warwickshire to show cause why a *mandamus* should not issue to them, ordering them to hear an appeal against an order of settlement and maintenance of one BRASS, a criminal lunatic. The order was made upon the defts. on the 3rd Dec. 1863, and the notice of appeal posted on the 24th Dec. directed to the clerk of the peace (made resp. by statute), but not received by him until the 26th.

Motion was made to respite the appeal at the following Epiphany sessions, which was opposed upon the ground that the notice of appeal was invalid, as being too late. This objection the justices held good, and refused to respite the appeal.

Adams showed cause.—Sect. 2 of the 3 & 4 Vict. c. 54 (the Criminal Lunatic Act), enacts that the justice shall inquire into the settlement of a criminal lunatic, and make orders on the parish for maintenance, &c., or on the guardians of the union; if the parish, &c. is under the management of a board of guardians established by the Poor Law Commissioners. The first point is, that the notice of appeal was improperly signed by the clerk to the guardians. It is submitted that he cannot give such notice. It need not be signed by the guardians themselves, but may be signed by an attorney acting in their behalf: (12 & 13 Vict. c. 45, s. 1.) [CROMPTON, J.—If the clerk to the board of guardians signs, surely the presumption is that he signs on their behalf].

Manley Smith.—This objection was not taken at sessions, or his authority could have been easily proved. [MELLOR, J.—The presumption of authority is even greater in the case of the clerk to the guardians than in that of an attorney. The second point is, that notice of appeal was not given in due time. Sect. 5 of 3 & 4 Vict. c. 54, enacts that the overseers or guardians may appeal against the order of the justices. [MELLOR, J.—The Act requires a "reasonable notice" to be given.] The Poor-law Amendment Act, 4 & 5 Will. 4, c. 76, s. 79, enacts,

No poor person shall be removed under any order of removal from any parish or workhouse, by reason of his being chargeable to, or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved,

shall have been sent by post or otherwise, by the overseers or guardians of the parish obtaining such order, to the overseers of the parish to whom such parish shall be directed: provided that, if notice of appeal against such order of removal shall be received by the overseers or guardians of the parish from which such person is directed in such order to be removed within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or, in case such appeal shall be duly prosecuted, until after the final determination of such appeal.

In this case twenty-one days had elapsed before notice of appeal was even sent, and twenty-three days before it was received. [MELLOR, J.—The question of "reasonable notice" was not discussed at sessions; how then can we refuse a *mandamus* in order that the question may be discussed?] 12 & 13 Vict. c. 45, s. 2 enacts that none of the provisions contained in it relating to notices of appeal shall be construed to affect or alter the law as to notice of appeal against a summary conviction, or against an order of removal, or against an order under any statute relating to pauper lunatics. But it is submitted that this case is not within the statute, for it is not an order of removal, nor is it under a statute relating to pauper lunatics. [CROMPTON, J.—Is he not a pauper lunatic, as well as a criminal lunatic?] By 16 & 17 Vict. c. 97, s. 133, no provisions of this Act apply to the 3 & 4 Vict. c. 56:

*Reg. v. The Justices of Glamorganshire, 13 Q. B. 561.*

Manley Smith was not called on.

CROMPTON, J.—I am of opinion that this case is governed by that of *Reg. v. The Justices of Glamorganshire*, and that we must hold that the notice was in time. As to the second point, the clerk to the guardian is, in point of fact, an attorney, and signs as clerk. That, in my judgment, is sufficient. The rule will therefore be made absolute.

MELLOR, J.—I am of the same opinion. No authority has been cited which shows that the clerk to the guardians must sign as attorney.

*Rule absolute.*

REG. v. BRICKHALL.

*Conviction—Assault upon a constable—Common assault—Municipal Corporation Act—24 & 25 Vict. c. 100.*

*The deft. was summoned, under the Municipal Corporation Act, for assaulting a constable in the execution of his duty. The magistrates dismissed the summons, but convicted him, under the 24 & 25 Vict. c. 100, for a common assault:*

*Held, that the conviction was bad, as being under a different statute from that under which the summons was issued.*

The deft. was summoned before the justices for the borough of Shaftesbury, Dorset, under the Municipal Corporation Act, for assaulting a police-constable in the execution of his duty. The justices dismissed the summons, but fined him for a common assault, and, in default of payment, he was imprisoned.

T. W. Saunders having obtained a rule *nisi* for a *certiorari* to quash the conviction, upon the ground that the justices had no jurisdiction, upon a charge of assaulting a constable in the execution of his duty, to convict of a common assault, now supported it. The Municipal Corporation Act does not entitle justices to fine for an assault not charged in the summons:

*Martin v. Bridges, Ell. & Ell. 778; 28 L.J. 179, M.C.; Soden v. Craig, 7 L.T. Rep. N.S. 824.*

[CROMPTON, J.—If the deft. had been summoned for a common assault, he could not have been fined for one of an aggravated nature. But is the converse true?] Yes; and it is very remarkable that a

[BAIL.]

*Ex parte* THE OVERSEERS OF PUDDING NORTON—REG. v. INGHAM.

[Q. B.]

heavier punishment is attached to what is nominally a more trivial offence. For a common assault justices may imprison for six months, while for assaulting a police-constable they can but fine the deft. 5*l*. They must have acted under the Municipal Corporation Act, or they could not have convicted summarily—they must have committed for trial. The deft. came prepared to meet one charge, viz. that of assaulting a constable in the execution of his duty. He may have thought it sufficient to prove that the prosecutor was not a constable, and for various reasons, have refrained from bringing witnesses to prove that he was justified in committing a common assault. [MELLOR, J.—If he had pleaded guilty to the charge, his punishment would have been in reality less than it is.] Precisely so. [MELLOR, J.—The difficulty is, that the justices had jurisdiction to convict summarily of a common assault, but they should have dismissed the first summons and convicted the deft. upon another].

H. T. Cole showed cause. Under the 24 & 25 Vict. c. 100, the punishment for an assault is six months' imprisonment, and under the Municipal Corporation Act, a fine of 5*l*. A certificate, barring any further proceedings, may be given under either statute alike. Sect. 42 of the 24 & 25 Vict. c. 100, enacts: that for an unlawful assault by any person committed upon any other person, the justices may impose a fine not exceeding 5*l*. "Any other person" may include a constable, and the words, "officer in discharge of his duty," are mere aggravation. [MELLOR, J.—If the justices had said nothing, the conviction would be good. I do not see how you can distinguish *Martin v. Bridges* from this.] Sect. 72 of Municipal Corporation Act takes away *certiorari*. It is submitted that a case ought to have been granted.

*Wilkinson v. Dutton*, 32 L. J. M. C. 152; 8 L. T. Rep. N. S. 276.

MELLOR, J.—The real objection is, that the summons is under one statute and the conviction under another.

CROMPTON, J.—Where there is a written charge it must be adhered to. The conviction in this case was without the jurisdiction of the justices. They dismissed the summons as far as the aggravated assault was concerned, and convicted of a common assault. I think that the case of *Martin v. Bridges* is exactly in point. The justices have power to convict of a common assault under the 24 & 25 Vict., c. 100, and the *certiorari* would be taken away were the conviction under the Municipal Corporation Act. As it is, the rule must be made absolute.

MELLOR, J.—I am of the same opinion. There are two statutes affecting the offence of assaulting a constable while engaged in the execution of his duty. The one is the Municipal Corporation Act; but under this Act, justices have no power to deal with other offences; the other is the general statute, which imposes a term of two months' imprisonment or fine of 5*l*; but there can be no summary conviction under that statute. It is perfectly clear that the justices have summoned under one statute and convicted under another. This they cannot do, therefore the rule must be made absolute for a *certiorari*, which is not taken away because they have exceeded their jurisdiction.

*Rule absolute.*

Friday, May 6, 1864.

*Ex parte* THE OVERSEERS OF PUDDING NORTON.

Overseer—"Householder"—*Certiorari*—Sessions.

A., being the tenant of a cottage as part of his service, was appointed an overseer of a parish.

On motion for a *certiorari* to quash the order of appointment:

Held, that it was a case for an appeal to the sessions, not for a *certiorari*.

Quere, is the appointment good?

Mellish, Q.C. moved for a rule calling upon the Justices of Norfolk to show cause why a *certiorari* should not issue to remove an order appointing two overseers of the parish of Pudding-Norton, upon the ground that one of the overseers was not a substantial householder. He cited *Reg. v. Cousins*, 9 L. T. Rep. N. S. 686. his was not an extra-parochial place. The overseer, whose appointment was objected to, paid no rent, but inhabited a cottage as part of his service. [CROMPTON, J.—Why could you not appeal to sessions? I never heard of a case where, an order was quashed, because an overseer was not a householder.] The reason of this application to quash the order is, that the guardians have made a rate, and although there are no poor, yet, as the parish is included in a union, the inhabitants are liable to the union charges:

4 Burn's Justices, 38, 29th edit.

CROMPTON, J.—A man may be a "householder," although he is a tenant only, and this, as part of his service; if a burglary were committed, the property would be rightly laid in him. But this is an application that ought to be made to sessions. I rather think that the appointment is good.

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs., Barristers-at-Law.

April 27 and May 4, 1864.

REG. v. INGHAM.

Coroner's inquest—Inquisition—Statement of cause and manner of death—View of the body by the jurors.

In an inquisition of murder or manslaughter it is not necessary to set forth the manner in which, or the means by which, the death of the deceased was caused.

Although it is necessary that all the coroner's jury should view the body at the first sitting of the inquest, it is not necessary that they should all view it together and in the presence of the coroner.

Temple, Q.C. on a former day obtained a rule to quash an inquisition of one of the coroners of Yorkshire, of manslaughter against Mr. John Arthur Ingham, for the killing of one Sarah Greenwood.

The rule was obtained upon the grounds, first, that the inquisition did not set out the mode and cause of death; and secondly, that one of the jurors, when he viewed the body, did so in the absence of the coroner and the rest of the jury.

Cleasby, Q.C. (Welsby with him) showed cause, and contended, first, that inquisitions are upon the same footing as indictments, and need not therefore set out the mode and manner of death; and that as the juror in fact viewed the body, it was not essential that he should have done so in the company of the coroner and the other persons.

Temple, Q.C. (Maule with him) contended that the injunction was bad on both grounds. The following cases and statutes were cited:

2 Inst. 387;

*Reg. v. Ferrand*, 3 B. & Ald. 260;

Sewell on Coroners, 161;

Q. B.]

*Ex parte* SHARPE.

[Q. B.]

Co. on Lit. s. 194, p. 126;  
 Hawk. P. C. c. 25, p. 287;  
 4 Inst. c. 29, p. 271;  
 Ell. Bl. & Ell. 183;  
 11 Hen. 4; 2 & 3 Ed. 6, c. 24, s. 2;  
 1 & 2 Ph. & M. c. 13, s. 5;  
 6 & 7 Vict. c. 88;  
 14 & 15 Vict. c. 100;  
 19 & 20 Vict. c. 16;  
 24 & 25 Vict. c. 100, ss. 6, 80.

The arguments sufficiently appear in the following judgments:—

COCKBURN, C. J.—I am of opinion that this rule should be discharged. The question is whether the 6th section of the 24 & 25 Vict. c. 100, which provides that in any indictment for murder it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, applies to coroners' inquisitions? and I am of opinion that it does. I take it to be clear, upon a review of the older authorities, that the term "indictment" was understood by them and by the Legislature to comprehend "inquisition." The earliest statute is that of the 11 Hen. 4, the effect of which is considered by all the judges in *Whitpole's* case in Cro. Car., and it was held that the word "indictment" used in the statute included an "inquisition." So in 2 & 3 Edw. 6, c. 24, we find that the word "indictment" is applied to that which is found either by the jurors of the coroner or of the county. So also in the 1 & 2 Ph. & M. c. 13, the term "inquisition" is applied to the case of a finding by any jury. So far, the statutes show that the Legislature uses the term "indictment" whether as applicable to a grand jury or a coroner's jury. Lord Coke, too, uses it in the same sense. I think, therefore, that it is sufficiently shown, both by the Legislature and the great authority of Lord Coke, that an inquisition is included in the term "indictment." When we look at the later legislation, we find a great desire manifested to get rid of technicalities. In the 14 & 15 Vict. c. 100, with reference to this very subject of doing away with technical objections, we find the provisions as to indictments applying equally to inquisitions. By the 4th section, it is enacted that, in any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; and by sect. 30 it is enacted that the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment. And thus the law remained until the recent statute of the 24 & 25 Vict. c. 100, the 6th section of which enacts that, in any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but unfortunately the former statute being repealed, the latter statute omitted to include the word "inquisition," and it was argued that the Legislature intended to restore the distinction between indictments and inquisitions. But I cannot think that there is anything in that objection. The operation of the 14 & 15 Vict. had not been found to have been inconvenient, and there was no reason therefore why technical matters should have been restored. I cannot see the force of Mr. Temple's objection that the Legislature should have gone back to the former technicalities. I cannot imagine that it was the intention of the Legislature to have restored them, and so throw difficulties in the way of the administration of justice. I cannot suppose that, after ten years, it should have been thought necessary by the Legislature to interfere to restore the law to what it was before the 14 & 15 Vict. without any reason whatever being assigned for so doing. With regard to the second point, that one of the jurors viewed

the body after the other jurors had seen it, that is cured by sect. 2 of the 6 & 7 Vict. c. 88, which enacts that no inquisition found upon or by any coroner's inquest shall be quashed "because the coroner and the jury did not all view the body at the same instant, provided they all viewed the body at the first sitting of the inquest." So that, although it is necessary that all the jurors should view the body, it is not necessary that they should all view it at the same time. It is certainly not necessary for the proper administration of justice that all should view at the same time. I think the language of the statute quite large enough to comprehend this case, and therefore that this objection fails also.

BLACKBURN, J. delivered a similar opinion.

SHEE, J. concurred.

*Rule discharged.*

Attorney for the deft., *Crocker.*

Attorney for the prosecution, *Edwards.*

Thursday, May 5, 1864.

*Ex parte* SHARPE.

*Husband and wife—Protecting order of wife's earnings—Rescinding—20 & 21 Vict. c. 85, s. 21.*

*Justices and police magistrates have no power under the Divorce Act 1857 to discharge an order protecting a wife's earnings and property acquired after desertion by her husband, not made by themselves.*

Rule nisi, calling on Mr. Arnold, one of the metropolitan police magistrates, to hear and determine the application of John Sharpe, to discharge an order made in favour of Mary Elizabeth Sharpe, his wife, under 20 & 21 Vict. c. 85, s. 21 (Divorce Act 1857), by Mr. Paynter, a magistrate of the Westminster Police-court, since deceased, for protecting her earnings and property acquired since her husband's desertion of her.

The order was made in 1858, and Mr. Paynter died in April 1863. The application to discharge the order was made by the husband to Mr. Arnold, in Sept. 1863, who refused to rescind the order, on the ground that he had no jurisdiction, the power to do so being confined, as he thought, by the statute to the magistrate making the order.

An application was then made to the Divorce Court, in Feb. 1864, to discharge the order, and the Judge Ordinary held that he had no jurisdiction in the matter, but thought that the police magistrate had. Thereupon the application was renewed before Mr. Arnold, who again held that he had no jurisdiction over a protection order made by another magistrate. In consequence thereof the present rule was obtained.

*Prentice* showed cause.—Under the words of the stat. 20 & 21 Vict. c. 96, s. 21, "it shall be lawful for the husband and any creditor, or other person claiming under him, to apply to the court or to the magistrate or justices by whom such order was made, for the discharge thereof," Mr. Arnold has no jurisdiction to interfere with the order made by Mr. Paynter. The words "magistrates" and "justices" are personal, and the clause gives to courts a general jurisdiction over the orders made by such courts, and to magistrates and justices jurisdiction only over their own orders.

*Pearce* in support of the rule.—By the stats. 10 Geo. 4, c. 44, s. 4, and 2 & 3 Vict. c. 47, s. 75, the police magistrates of the metropolis form one body acting for the metropolitan district, and it is submitted that the powers given to them may be exercised by any one of their body, and the order might be discharged by Mr. Arnold, should he after hearing the facts think that it ought to be so.

Q. B.]

GELL v. THE MAYOR, &amp;C. OF BIRMINGHAM—REG. v. TIVNAN AND OTHERS.

[Q. B.]

COCKBURN, C. J.—This rule must be discharged. The Act is clear, that a party seeking to discharge a protection order must go to the magistrate by whom it was made. A distinction is drawn between the court and magistrates; the words "by whom such order was made" apply to those which immediately precede them, viz., to the magistrate or justices; and the word "whom" is not properly applicable to a court. But for hearing that the learned Judge Ordinary held that he had no jurisdiction, I should have thought otherwise; but we have not to decide that. It may be that this is *casus omissus*.

BLACKBURN and SHEE, JJ. concurred.

Rule discharged.

GELL v. THE MAYOR, &C. OF BIRMINGHAM.

Burial board—Fees of parish clerks and sextons—  
15 & 16 Vict. c. 85—16 & 17 Vict. c. 134.

*Under the 15 & 16 Vict. c. 85, and the 16 & 17 Vict. c. 134 (the Burial Acts), parish clerks and sextons are entitled to perform, when necessary, the same functions and duties, and receive fees therefore in respect of the burials of parishioners and inhabitants of the parishes of which they are clerks and sextons, in the new burial-grounds provided by burial boards under those Acts, and the burial boards cannot deprive them of such fees by appointing other persons to do their duties.*

This action was brought to try the right of the parish clerks and sextons of Birmingham to recover certain fees.

The plt. (parish clerk and sexton of St. Philip's parish) claimed to recover compensation from the defts., the Town Council acting as the Burial Board of the borough of Birmingham, under the 17 & 18 Vict. c. 87, s. 2, and 15 & 16 Vict. c. 85, s. 24, for their having prevented him from performing duties and functions which he claims to perform, and from receiving fees in respect of certain interments in the consecrated portion of the burial-ground of the defts., opened by them in 1868 for the borough. The ground is common to the several parishes, and no specific portion is assigned to any of the parishes. Burials have taken place therein of deceased inhabitants of St. Philip's parish.

Previous to the opening of the ground the plt. and his predecessors were accustomed to perform certain duties in and about interments, and to receive fees therefore. (These were all set out in the case.)

The 15 & 16 Vict. c. 85, s. 82, enacts that

Every incumbent or minister of the parish or each of the parishes (as the case may be), for which the burial-ground is provided, shall by himself and his curate or such duly qualified persons as such incumbent or minister may authorise, perform the duties and have all the same rights and authorities for the performance of religious service in the burial, in such burial-ground or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received. And the clerk and sexton of such parish, or of each of such parishes, shall (when necessary) perform and exercise the same duties and functions in respect of the burial of the remains of parishioners or inhabitants of the parishes of which he is clerk or sexton in such burial-ground or the consecrated portion thereof, and shall be entitled to receive the same fees on such burials as he has previously performed and exercised and received as if such burial-ground were the burial-ground of the respective parish of such incumbent or minister, clerk and sexton respectively. And the parishioners and inhabitants of such parish, or of each of such parishes, shall have the same rights of sepulchre in such burial-ground as they respectively would have had in the burial-ground or burial-grounds in and for their respective parishes, subject nevertheless to the provisions herein contained.

The defts. employed persons to perform the functions of clerk and sexton in their new burial-ground, although the plt. had, previous to the opening of the burial-ground, given them notice that

he claimed to perform those functions and receive the fees in respect of the burials of parishioners and inhabitants of St. Philip's.

The defts. determined that the plt.'s services were not necessary, the staff necessarily employed by them being sufficient.

*Phipson, Q.C. (A. Wills with him) for the plt.*—It is submitted that the plt. is entitled to the accustomed fees as clerk and sexton of St. Philip's for the burial of parishioners and inhabitants of that parish in the new burial-ground. The 15 & 16 Vict. c. 85, which applied only to the metropolis, is extended, by the 16 & 17 Vict. c. 134, to the parts beyond by sect. 7; and sect. 32 of the former Act is made to apply to the present case. Sect. 32 is absolute as regards incumbents and ministers, but the clause relating to clerks and sextons contains the qualification that they are to perform their duties "when necessary;" and the burial board contend that if they choose to employ persons to dig the graves, toll the bell, &c., the services of the parish sextons and clerks are not necessary. That, however, is not the meaning of the section, but it means that whenever the services ordinarily performed by clerk and sexton are necessary, those services shall be performed by the clerks and sextons of the respective parishes. It is now penal to bury in the old burial-grounds, and no compensation is given to clerks and sextons. The former Act, by sects. 22, 34, 37, contemplates that fees will be payable to clerks and sextons. So also do the stats. 17 & 18 Vict. c. 87, 20 & 21 Vict. c. 81, s. 17. The words "when necessary" in sect. 32 meet the cases in which the friends of the deceased dispense with some of the usual services at funerals, such as tolling the bell.

*O'Malley, Q.C. (Field Q.C. with him) for the defts.*—The intention of the Legislature was to vest the whole of the management of interments in the burial boards, and many of the duties could not be performed by any but their servants with any regard to convenience or decency. Digging graves is sometimes a very critical operation, having regard to the nature of the soil, the adjacent graves and the foundations, &c., of vaults, which it would be unwise to allow unskilled persons to do. The duties of clerk and sexton are the same in one funeral as another, and are inconsistent with the new duties created by the new burial-grounds.

COCKBURN, C. J.—The words "when necessary," apply equally to the clerk and sexton, and it is a strong proposition to say that they empower burial boards to deprive them of all their fees.

CROMPTON, J.—Suppose the case of two parishes, could the burial board, by appointing the sexton of one parish to do the duties of both, deprive the other sexton of his fees? It is very difficult to say that the fees of the clerks and sextons are taken away by these words.

SHEE, J.—It may be they have their fees whether the services are necessary or not.

Judgment for the plt.

May 24 and 25, 1864.

REG. v. TIVNAN AND OTHERS.

Extradition Acts—6 & 7 Vict. c. 76—Piracy.

*Under the 6 & 7 Vict. c. 76 (an Act for giving effect to a treaty between England and the United States, for the apprehension of certain offenders), there is no power to commit accused persons to gaol for the purpose of being delivered up to the United States authorities, unless the United States have exclusive jurisdiction to try and punish the accused.*

*It is not necessary that there should be any warrant*

Q. B.]

REG. v. TIVNAN AND OTHERS.

[Q. B.]

issued or depositions taken in the United States, in order to found a requisition by the United States authorities for the delivery up of any accused person within the Act 6 & 7 Vict. c. 76.

*It is not necessary for the magistrate who commits an accused person to gaol in pursuance of the Act, to state in his warrant that the evidence on which it issued was given upon oath.*

*The word "piracy" does not mean piracy jure gentium, but a crime made such by the municipal law of one alone of the parties to the treaty, and over which each has exclusive jurisdiction.*

In last term a writ of *habeas corpus* was issued by this court, directing the gaoler of the borough gaol of Liverpool, in whose custody the defts. then were, to bring them into this court, together with a return of the cause of their detention by him. They were accordingly now brought into court, and the gaoler returned that he had them in custody by virtue of several warrants which he set out.

It appeared that a merchant ship of the United States of America was at Matamoras, bound with a cargo for New York, and that whilst there six passengers came on board, three of whom were the prisoners. Whilst on board they seized the ship as and on behalf of the Confederate Government, under which they claimed to be authorised. Having disposed of the ship and cargo, the three prisoners were found at Liverpool, and upon a requisition from the American Ambassador in this country, the Secretary of State for the Home Department issued his warrant for their apprehension under the provisions of the 6 & 7 Vict. c. 76, s. 1, which warrant was as follows:

To Her Majesty's Justices of the Peace and other magistrates and officers of the peace in and for the borough of Liverpool, &c. Whereas on the 18th day of February 1864, in pursuance of a treaty between Her Majesty and the United States of America made on the 8th day of August 1852, and ratified on the 10th day of October in the same year, and of an Act of Parliament passed in the session holden in the 6th & 7th years of Her Majesty's reign, entitled "An Act for giving effect to a treaty between Her Majesty and the United States of America for the apprehension of certain offenders," a requisition was made by Charles Francis Adams, Esq., the United States' Minister at this court, to deliver up to justice certain persons called or known by the name of James Clements Wilson, Daniel O'Brien and Kelly, charged with the crime of piracy on board the schooner *Joseph Gerry* of New York within the jurisdiction of the United States of America.

I therefore, the Right Hon. Sir George Grey, Bart., one of Her Majesty's principal Secretaries of State, do hereby in pursuance of the power and authority given to me as such Secretary of State by the said Act require you and all of you within your several jurisdictions to govern yourselves accordingly, and to aid and assist in apprehending the said James Clements Wilson, Daniel O'Brien and Kelly and committing them to gaol for the purpose of being dealt with according to the provisions of the said treaty, and deliver up to justice pursuant to the said Act if found to be within the same.

In witness whereof I have hereunto set my hand and seal this 20th day of February 1864. G. GREY. [L.S.]

By the 6 & 7 Vict. c. 76 (entitled "An Act for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders") it is, by sect. 1, recited,

That whereas, by the 10th article of a treaty between Her Majesty and the United States of America, it was agreed that Her Majesty and the United States should, upon mutual requisitions by them or their ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper committed within the jurisdiction of either of the high contracting parties, should seek an asylum, or should be found within the territories of the other, provided that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found would justify his apprehension and committal for trial, if the crime or offence had been there committed, &c.; and it is then enacted, "that in case requisition shall at any time be made by the authority of the said United States in pursuance of and according to the said treaty for the delivery of any person charged with the crime of murder or assault with intent to commit murder, or with the crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper

committed within the jurisdiction of the United States of America who shall be found within the territories of Her Majesty, it shall be lawful for one of Her Majesty's principal Secretaries of State . . . by warrant under his hand and seal to signify that such requisition has been so made, and to require all justices of the peace and other magistrates and officers of justice, within their several jurisdictions, to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to gaol for the purpose of being delivered up to justice according to the provisions of the said treaty, &c.

The prisoners had been apprehended upon the foregoing warrant, and evidence had upon several occasions been taken upon the charge before Mr. Raffles, the stipendiary magistrate for Liverpool. Upon these occasions it had been objected on their behalf that the case was not within the statute. They had been from time to time remanded, and when the writ of *habeas corpus* issued they were still under remand. It was admitted that the sole object of the present charge was, that they might be given up to the United States Government under the provisions of the statute.

Edward James, Q.C., Littler and T. H. James now moved that the defts. should be discharged out of custody, and they contended that the offence of piracy *jure gentium*, which all nations have a power to punish, as being an offence against all mankind, is not the piracy meant by the statute, which is intended to be confined alone to municipal piracy, that is piracy which is such alone by the particular laws of the complaining country; that the piracy referred to in the warrant of the Secretary of State, and set forth in the depositions, is piracy *jure gentium*, and could be dealt with by the courts of this country, and that the treaty and statute only contemplated such piracy as this country could not take notice of, and which the American Government alone could punish. They cited

Kent's Commentaries, 8th edit. pp. 86, 95;

Re Kane, 14 Howard, pp. 103, 187 (American);

Wheaton, 236, 242, 250.

They also objected that the warrant of the Secretary of State was bad, inasmuch as it did not appear that it was founded upon any warrant or depositions issued or taken by the United States Government.

May 25.—Lush, Milward and Lushington showed cause against the discharge of the prisoners. The word "jurisdiction" in the 6 & 7 Vict. c. 76, s. 1, has two senses: (1) in its primary sense it denotes authority and power; (2) in its derivative sense it denotes the territory within which authority and power are exercised. The words "committed within the jurisdiction of either of the contracting parties" mean committed within places or territories over which the law of either country prevails. And the treaty is for the delivery of *all* persons charged with the crimes specified. The compact is to give up all offenders, although both powers have jurisdiction to try them, and it was the intention that the one power immediately affected by the crime should have the power to punish. There is no implied exception of cases within the jurisdiction of either: (Dwarris on Stats. 654.) Although we may have jurisdiction to try, we have no power to bring over witnesses from the United States. The word "piracy" in the statute indicates that offence which both countries know to be piracy, or it may apply to all the cases which both countries call piracy. The jurisdiction applies to territory, not to authority to punish:

Wheaton, 208;

Lee's Law of Prize, 1758;

MacLachlan on Shipping, 465;

Reg v. Lopez, 1 Deane. C. C. 625;

Nash's case, 4 B. & Ald. 295.

E. James, Q. C., in reply, cited  
Wheaton, 258.



Q. B.]

REG. v. TYNAN AND OTHERS.

[Q. B.]

COCKBURN, C. J.—The main and principal question for our determination is, what construction is to be put upon the 6 & 7 Vict. c. 76, which gives effect to the treaty between Her Majesty and the United States of America for the apprehension of certain offenders. Besides that, two or three minor points have been made with reference to the regularity of the proceedings by virtue of which the prisoners on whose behalf this application is made have been taken into custody and remanded from time to time. It has been objected that, prior to the issuing of the warrant by the Secretary of State, there should have been depositions taken and a warrant issued in the United States, and that that should have been the foundation of the requisition to the Government of this country to issue a warrant for the prisoners' apprehension. I think that point is untenable. The second section of the Act does not require the issuing of any warrant or the taking of depositions in the United States. The whole effect of the proviso is, that before a Secretary of State issues a warrant for the apprehension of any person under the Act, there must be evidence before him which would justify the apprehension and committal of such person in the United States, and the second section only provides that such evidence may be made up of copies of the depositions upon which the original warrant (if any had been granted) was issued in the United States. Another objection made was, that the magistrate's warrant was imperfect in not stating that the evidence on which it proceeded was taken upon oath to support the charge for which it was issued. Mr. Lush met that objection successfully by pointing out a form given in a subsequent statute which had been followed in the present instance. Then we come to the great question in the case, what is the true construction of the statute? Now the words are undoubtedly large enough in their primary and ordinary sense to comprehend this case. Provision is made for the delivery up to the authorities of the United States of persons who have been guilty of piracy "committed within the jurisdiction of the United States of America." Passing for a moment from the question whether there was evidence of the crime of piracy committed there, there can be no doubt that, if in this case it is an offence at all, it is piracy *jure gentium*; and the statute provides for cases of piracy "committed within the jurisdiction of the United States of America." Nor can there be any doubt that, if it was piracy, it was committed on board an American ship, and so in that sense within the jurisdiction of the United States. Then comes the question whether that is sufficient within the meaning of the statute. The main argument for the prisoners is, that the statute is to be read as applicable only to a case where the act of piracy which has been committed is within the exclusive jurisdiction of the United States. If the term piracy in the statute is to be read as piracy *jure gentium*, then it appears the case for the prisoners is at once disposed of. If the contracting parties intended that such piracy should be deemed within the treaty, then, inasmuch as piracy is an offence not against any particular statute, but against the whole civilised world and punished by all civilised nations, then the offence here would not be one committed within the exclusive jurisdiction of the United States; so that if the word piracy is used in the statute in the largest sense, the case for the prisoners falls to the ground. Now what is there to show that the term piracy is used in a limited sense? If it is to be restricted to piracy by the municipal law as a matter for the exclusive jurisdiction of the particular country where the offence is committed, then no doubt the statute may be construed in the way contended for the prisoners, as being restricted to certain offences committed within the exclusive

jurisdiction of the country claiming the extradition of the accused. If such had been the intention, it strikes me we should have had piracy by the municipal law in some way distinguished from piracy as understood in the more general acceptance of the term, but the language is the widest and most comprehensive. Why, then, is it to be implied in a limited sense? It is said, and with truth, that the mischief the Extradition Treaty was intended to prevent was that of persons committing crimes within the territory of one State and within its jurisdiction, escaping out of that jurisdiction with impunity, and that for such purpose only was this statute passed. That this was the primary object I entertain no doubt, but that it was the only one I entertain great doubt, because it is impossible not to see that the mischief is not limited to such cases. It may be that an offence may be cognisable in two countries, as in the case of a murder committed by one British subject upon another in the United States, in which case the accused may be tried in this country by the municipal law, yet it would be highly inconvenient that he should be tried here, because criminals, as I observed during the argument, may escape not only by going beyond the territory and reach of the law of the country in which the crimes have been committed, but also by failure of evidence and the difficulty of adducing sufficient evidence except in the country where the crimes have been committed. Therefore, if the language of the statute is large enough to comprehend both these kinds of mischief, it is highly inexpedient to restrict it to one only. It has been urged, indeed, with great force, that it is inconsistent with the dignity of this country to surrender the jurisdiction of its own tribunals in a case of concurrent jurisdiction, and allow persons who could be tried here to be carried away to be tried elsewhere. But it seems to me, that the moment you say you will give up offenders with a view to promote the large interests of justice throughout the whole civilised world, as a matter in which all nations have a common interest, you must then look to see what is the extent and scope of the mischief you thus desire to counteract and to prevent; and I cannot see that there is any abandonment of national dignity or honour in saying that, though there may be concurrent jurisdiction in respect of offences which have been committed by our own subjects in foreign countries, yet if the foreign States against whose laws the crimes have been committed require that the criminals should be surrendered to justice, and justice can be better done in the country in which the offence is committed, then I cannot see that there is any violation of national dignity or character in doing that which is expedient and desirable to promote the interests of justice. And, looking to the ground of convenience, I think that, if the treaty and the Act were not capable of the construction I put upon them, the feeling of the country would probably be to amend them. And, as the words are strong enough to include the case of piracy *jure gentium*, and I see no reason for a more limited construction, I think that, if there was a *prima facie* case of such piracy before the magistrate, the case comes within the Act. It is impossible, in my opinion, to limit the word "jurisdiction" by the insertion of the word "exclusive," and on that point I am inclined to adopt the view taken by Mr. Lush, that the true meaning of the word is the area over which, whether it be land or sea, the laws of the particular State prevail; and, inasmuch as it is conceded that the ship of a certain territory is, constructively, part of its territory, or, at all events, a place where its laws prevail, this ship was within the jurisdiction of the United States. I feel, therefore, bound (though I regret to differ



Q. B.]

REG. v. TIVNAN AND OTHERS.

[Q. B.]

from my learned brethren), in adherence to the view which I take of the statute, to hold that this case comes within it, and therefore that the prisoners are not entitled to be discharged. As to the other question, whether, supposing piracy *jure gentium* to be within the Act, there was sufficient *prima facie* evidence of it, I agree in everything Mr. James said as to acts done with the intention of acting on the behalf of one of the belligerent parties; and I concur in thinking that persons so acting, though not subjects of a belligerent State, and though they may be violating the laws of their own country, and may even be subject to be dealt with by the state against whom they thus act with a rigour which happily is unknown among civilised nations in modern warfare, yet if the acts were not done with a piratical intent, but with an honest intention to assist one of the belligerents, such persons cannot be treated as pirates. But then it is not because they assume the character of belligerents that they can thereby protect themselves from the consequences of acts really piratical. Now, here it is true that the prisoners at the time said they were acting on behalf of the Confederates, and that was equivalent to hoisting the Confederate flag. But then pirates sometimes hoist the flag of a nation in order to conceal their real character. No doubt, *prima facie* the act of seizing a vessel, saying at the same time that it is seized for the Confederates, may raise a presumption of such an intention; but then all the circumstances must be looked at to see if the act was really done piratically, which would be for the jury, and I cannot say that the magistrate was not justified in committing the prisoners for trial. It is, however, unnecessary to say more upon this point, as, upon the main question, my learned brethren (for whose opinions I have the utmost deference, and who, I have no doubt, are right) are of opinion in favour of the prisoners, and therefore they will be discharged.

CROMPTON, J.—I desire to speak with great deference, as I did not hear the argument when the rule for the *habeas* was argued. This is a motion on a *habeas corpus* to discharge the prisoners on the ground that the custody is illegal. I agree with Cockburn, C.J., that it is not necessary that there should be any foreign proceedings before proceeding in this country under the statute. All I think we have to consider is, whether there was any evidence on which the magistrate could reasonably, in the exercise of his discretion, commit these prisoners to gaol for the purpose of being delivered up to the United States' authorities. It is not a convenient practice for this court to interpose before the magistrate has decided, but in the present case he has asked our assistance. In determining this case, we must see if there would be anything illegal in the magistrate's committing these prisoners to gaol under the Act. We are not the proper parties to judge of the evidence, but we have the power of saying that there is no evidence before him on which he ought legally to come to the conclusion to commit them to gaol. I cannot say that the magistrate, in his discretion, ought not to commit them, on the ground that the act done was something like a belligerent act; for, looking at the surreptitious way in which the prisoners went on board and took the vessel, there was evidence before the magistrate that this was piracy. Upon this point I quite concur with my Lord, because it is not for us to weigh the effect of the evidence, which is for the magistrate, and all we can consider is, whether there is enough to justify a committal; and I agree with my Lord that we cannot say that there is not. But upon the other and the main question I have come, after a careful consideration of the case, to a different conclusion. The preamble of a statute is a good

key to its meaning, and here the preamble of the statute points clearly to offences committed within the jurisdiction of either of the contracting States—that is, within the jurisdiction of one of them, and not of the other. It goes on to speak of persons who, having committed certain crimes within the jurisdiction of one of the two States (that is, as I read it, of one of them and not of the other), shall “seek an asylum” and be found in the territory of the other. Now, an “asylum” surely means a place where the criminal is safe from prosecution or pursuit, not a place where he may be tried and convicted. The enactments of the statute apply to cases in which persons having committed murder or piracy or robbery within the jurisdiction of the United States, afterwards seek an asylum or are found in British territory; and it appears to me that they mean only cases of crimes committed within the peculiar jurisdiction of the United States. And that phrase, of course, could not be applied where the crime is equally within the jurisdiction of every nation in the world, as is piracy *jure gentium*. It would not be a proper use of words to say that such a crime was committed within the jurisdiction of the United States. The words, “within the jurisdiction of either of the contracting States,” mean within the jurisdiction of either of them respectively or relatively to each other—i. e., or of one of them and not of the other. But here the crime was within the jurisdiction, not only of both of them, but of every nation in the world. Then the persons charged are to be “delivered up to justice”—that is, to the justice of the country where justice can be done, implying that they are in a country where it cannot be done. Otherwise, when the men were actually committed for trial in this country, they might be claimed, to be tried abroad, which surely would be a strange construction of the Act. Indeed, according to that construction, one does not see why they might not be claimed back again by this country. For this is clearly, if anything, a case of piracy *jure gentium*, and triable in either country. The fact that the men, being in the ship, seized it, makes no difference; it is equally piracy unless it was an act of belligerency; but, if such, more so on that account than if the men had been in another ship. No doubt, in either case, it would be within the jurisdiction of the United States, but that would be a jurisdiction shared equally with the whole world. Is that a case within the meaning of the Act? Surely it would be a strange construction of its terms, and it must mean peculiar and exclusive jurisdiction. The case here was near American waters, but would be the same in principle if it had occurred in the Chinese seas. Whether the Act would apply in all cases, even of piracy by American subjects in distant seas, it is not necessary to determine. It is not to be lost sight of that the statute, in my view of it, carries out what was deemed by some writers to be the obligation of international law before it passed—viz., to deliver up criminals who could not be tried here. My view of the Act is also confirmed by some high American authorities who have been referred to. The learned Judge here referred to the following extracts from a speech of the Hon. J. Marshall, delivered in the House of Representatives of the United States, in *Nash's* case, 5 Wheaton's Reports, appendix:—“The well-considered opinion of the American Government is, that the jurisdiction of a nation at sea is personal, reaching its ‘own citizens only,’ and that this is the appropriate part of each nation on that element.” “A pirate, under the law of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. Any act which denotes this universal hostility is an act of piracy. Not only an actual robbery, therefore, but cruising on the high seas without commission, and with intent to rob, is

Q. B.]

REG. V. TIVNAN AND OTHERS.

[Q. B.]

piracy. This is an offence against all and every nation, and is therefore alike punishable by all. But an offence which in its nature affects only a particular nation is only punishable by that nation. A statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation. But piracy under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offence against all. No particular nation can increase or diminish the list of offences thus punishable." So the able judgment of Mr. Justice Nelson in the case of *Re Kaia*, 14 Howard's American Reports, 187: "The two nations agree that upon mutual requisition by them, or their officers or authorities respectively made, i. e., on a requisition made by either one Government, or by its ministers or officers properly authorised, upon the other, the Government upon whom the demand is thus made shall deliver up to justice all persons charged with the crimes as provided in the treaty, who shall have sought an asylum within her territories. In other words, on a demand made by the authority of Great Britain upon this Government, it shall deliver up the fugitive; and so in respect to a demand by the authorities of this Government upon her. This is the exact stipulation entered into when plainly interpreted. It is a compact between the two nations in respect to a matter of national concern—the punishment of criminal offenders against their laws—and where the guilty party could be tried and punished only within the jurisdiction whose laws have been violated." Taney, C. J. and the other judges referred to this judgment as containing an exposition of the law on which they based their own judgments, and the result is, that in their opinion the statute only applies in cases where the fugitives could only be tried in the territory to which it was proposed to deliver them up. It is difficult to see that two great maritime nations would have given up their jurisdiction to try pirates whenever they were caught. Take the case of a pirate taking an American, an English and a French vessel, on the same day, in some of those distant seas where pirates abound. Why should not the courts of either of the three countries in which the pirates might be found do justice upon them? It is said that we must trust to the discretion of the other State that it will not demand extradition in cases where it is unreasonable to do so. But that is very dangerous doctrine, to which I cannot subscribe; and I think it is far more wise to construe the Act in such a way, if we can, as to exclude cases in which the demand would be unreasonable. At first sight it certainly occurred to me that the word "piracy," in its primary sense, was against my reading of the statute; but that was answered by Mr. James in his able argument, for he stated that there were some species of piracy by the municipal law of America not piracy by our law. It was said by Mr. Lushington that the jurisdiction would depend upon whether the ship was the ship of one nation or of another, but that can hardly be so. It is an offence against all nations. The pirates are not English pirates or American pirates, but pirates against all nations. The principal argument in support of the committal was founded upon the fact that the ship was American, and it was argued that therefore the case was, in some peculiar way, within American jurisdiction. But I doubt that. The piracy—if piracy—was not altered in character because committed in the ship itself which was seized. Suppose the prisoners had been in a ship of their own, and sunk the other, without ever going into it? It would be the same offence, and equally, in both cases, it would be within the common jurisdiction of the courts of all

nations. And it does not appear to me, therefore, that it could be said to be within the jurisdiction of the United States more than of any other country. Nor can I see that in this statute the two States have given up their jurisdiction to try pirates whenever they can take them. I think, upon the whole, that the case is not within the statute, which I read as being limited to piracy committed within the peculiar jurisdiction of the United States. If, therefore, this was a belligerent act, the prisoners are entitled to our judgment; but if not—and I think it was not, but a charge of piracy *contra jus gentium*—in my view, the case is not within the statute. The prisoners are therefore entitled to be discharged.

BLACKBURN, J.—I agree with my brother Crompton in thinking that the prisoners ought to be discharged. They have been committed to gaol on a warrant under the Extradition Act, and the question is, what is the state of things required to authorise their being committed to gaol for the purpose of being delivered up to the United States authorities? There would be no right so to commit but for the 6 & 7 Vict. c. 76. That Act was passed for carrying out a treaty between this country and the United States, for the apprehension of certain offenders, and the Act recites part of the treaty, and the words of the statute are to be construed as if it had been a contract between two subjects. Looking at the words alone, I think it would apply to crimes committed within the jurisdiction of one of the contracting countries only, and not to crimes within the jurisdiction of both. I think this is clear, whether we look to the terms of the Act, or to its obvious object. The main argument in favour of the opposite view is founded upon the force of the word "piracy," which, it is urged, in its primary sense, means piracy *jure gentium*, and so must apply to cases within the jurisdiction of both countries, and no doubt it would include such piracy if it stood alone; but then there are the words "committed within the jurisdiction of the United States," which run through the Act and are its governing words. The question is not one of territorial jurisdiction, but of piracy, which is quite different. There are a great many offences called piracy which are not piracy by the law of nations. Offences of piracy in which there is a common jurisdiction do not seem to me to satisfy the words of the statute. In Kent's Commentaries, 186, I find it written: "It is of no importance, for the purpose of giving jurisdiction, on whom or where the piratical offence has been committed. A pirate who is one by the law of nations may be tried and punished in any country where he may be found, for he is reputed to be out of the protection of all laws and privileges. The statute of any Government may declare an offence committed on board its own vessels to be piracy, and such an offence may be punishable exclusively by the nation which passes the statute. But piracy, under the law of nations, is an offence against all nations, and punishable by all." Such is the law as laid down by that great American authority, and it is also perfectly good English law, and both countries must be supposed to have entered into the treaty with a full knowledge of it. Why, then, should piracy by the law of nations be deemed within the jurisdiction peculiarly of one of the two States? It would be so if it were piracy only by its own municipal law. The American citizen, who has done an act declared to be piracy by American statutes, would be within American jurisdiction, and the English subject who has done an act which was declared piracy by an English statute would be within English jurisdiction; and such piracy, no doubt, would be within the treaty, and America would give up an English subject who

Q. B.]

REG. v. TIVNAN AND OTHERS.

[Q. B.]

had committed piracy by English law, and England would give up American subjects who had committed piracy by American law. But the man who has committed piracy *jure gentium* is equally within the jurisdiction of either country, and peculiarly in the jurisdiction of neither, and so is not within the meaning or the mischief of the statute. I therefore think that in a case of municipal piracy the accused ought to be delivered up under the Act, but the case of piracy *jure gentium* is not within the words or mischief of the Act, as I think. It is true there may be cases in which it may be more convenient that the prisoners should be tried in one country than in another, but this is a question not of convenience, but of jurisdiction. No power is given to us by any other Act to send accused persons to another country for trial where a trial can be more conveniently had. The question then comes round to this, whether this was piracy *jure gentium* or not? It strikes me that there was such an amount of evidence of its being piracy *jure gentium* as, if the case had been before a jury, the judge would not have been justified in withdrawing it from them. I do not wish to prejudge the case, and all I say is, that there is, upon the depositions, a case of that sort. As to the evidence, its effect would be for the jury, and though the Confederate States are not recognised as independent, they are recognised as a belligerent power, and there can be no doubt that parties really acting on their behalf would be justified. But the case is either one of piracy by the law of nations—in which case the men cannot be given up, because they can be tried here—or it is a case of an act of warfare, in which case they cannot be tried at all; and as they are now detained for the purpose of their being delivered up to the American Government, they are entitled to be discharged.

SHEE, J.—I have had the advantage in this case of hearing two arguments, one on the motion for the rule, and another on the motion for the discharge of the prisoners, and I have referred to and considered the cases which have been cited. The crime with which the prisoners are charged as described in the return, and as appears on the depositions, is piracy, a crime of pre-eminent enormity, and which, by the law of nations, is punishable wherever the offender may be found. It is not, in my opinion, the crime for which, under the name of piracy, extradition is stipulated, in the treaty of the 9th Aug. 1842; the provisions of that treaty were not needed for, nor are they, as it appears to me, applicable to, its repression. The treaty provides that persons charged with having committed the crimes of murder, piracy (not piracy on the high seas), arson, robbery, or forgery, within the jurisdiction of the United States, and seeking an asylum in or found in the territories of our Sovereign, shall, on the requisition of the United States, be delivered up to justice. The object of the 10th article of the treaty, as appears from its provisions and from the title and enacting clauses of the 6 & 7 Vict. c. 76, which gave effect to it, was to legalise the apprehension within the territories of the Queen of persons charged with the commission of the crimes mentioned in the treaty within the jurisdiction of the United States for the purpose of their surrender to that jurisdiction. The persons whose apprehension and extradition are contracted for by the treaty and authorised by the Act of Parliament are persons "fugitive" from the justice of the United States, and "seeking an asylum" that is (but for the treaty and the Act of Parliament), safe in the asylum of the territories of our Queen, because not liable to be arraigned before her tribunals. The words "surrender," "deliver up to justice," mean deliver from an asylum or place of safety up to

justice, that is to the ministers of justice of the United States, by whose courts only, on the persons charged with the crimes imputed, justice can be done. Read with reference to the declared object of the treaty and the Act of Parliament, and by the light which the words "fugitive," "seeking an asylum," "surrender," "deliver up to justice," afford, the words "within the jurisdiction" must, as I think, mean within the exclusive jurisdiction of the United States, and cannot be held to extend to crimes not within any jurisdiction exclusively—but justiciable wherever the person charged with having committed them may be found. It is injurious to suppose that a State should, in a public treaty, admit the possibility of its unwillingness or inability to do justice by binding itself to surrender to the justice of another State persons charged with the commission of crimes which it would be the duty of both to punish, and over which both would have jurisdiction. Had this been intended, provision would surely have been made for the case of justice by acquittal or conviction having been done by one State before cognisance of the crime taken by the other—for pleas of *autrefois convict*, or *autrefois acquit*—familiar in this case to the jurisprudence of both States, and for proof by the record of conviction or acquittal—that the crime for which the offender had been in jeopardy was the crime for which extradition was claimed. But the treaty and the Act of Parliament contain no such provisions, though stipulations for the extradition of criminals had been long in force between the two Governments, and the meaning of the words "within the jurisdiction" had been the subject of serious discussion between them. Upon the words, therefore, of the treaty and the Act of Parliament alone I should have been prepared to hold that the words "within the jurisdiction" mean within the exclusive jurisdiction of the State requiring the extradition. We have been invited, however, to consider—and I think we must consider—the state of the law as respects piratical offences before the date of the treaty, in order the more satisfactorily to determine to what extent the provisions of the treaty would take effect if the word "exclusive" were added to the words "within the jurisdiction," that is, first, within the exclusive jurisdiction of the United States as respects the place where the offence was committed; secondly, within the exclusive jurisdiction of the United States as respects the person by whom the offence was committed. It will be seen, I think, on reference to the legislation of the United States before and at the time the treaty was signed, that consistently with that legislation, the words "within the jurisdiction" in both of these meanings may have, as respects offences of a piratical character, a very extensive range, without the crime of piracy on the high seas. The Constitution of the United States gave power to the Congress to define among other crimes the crime of piracy. It was inherent in the sovereignty of the United States, as respects the subjects of the United States, to designate as piracy, and punish as piracy, crimes committed within its jurisdiction which were not thus piracy on the high seas, not piracy by the law of nations. The Act of Congress of the 30th April 1790 provides "that if any person shall commit upon the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular State, murder or robbery, or any other offence which, if committed within the body of a country would by the laws of the United States be punishable with death, or if any captain or mariner of any ship or other vessel shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship voluntarily to any pirate; or if any seaman shall lay violent hands on his commander,

Q. B.]

BAYLEY v. ALDRED.

[Q. B.]

thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken and adjudged to be a pirate and a felon, and being thereof convicted shall suffer death. And that if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof upon the high seas, under colour of any commission from any foreign prince or State, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber, and on being thereof convicted shall suffer death." These provisions, most of which are with little more than verbal alteration taken from our own statute-book, include, as respect citizens of the United States, and persons owing temporary allegiance to them in return for the protection of themselves, not only piracy by the law of nations, but, as respect citizens, offences also which are piracy because the municipal lawgivers have chosen so to call them. By an Act of Congress of March 3, 1819, c. 75, s. 5, it was enacted that, if any person on the high seas should commit the crime of piracy as defined by the law of nations, he should on conviction thereof suffer death. By an Act of Congress of the 5th May 1820 it was enacted, that any person who should upon the high seas or in any open roadstead (which has been held in the Supreme Court of the United States to be upon the high seas), or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate, and being convicted thereof shall suffer death. And, if any person engaged in a piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and on shore shall commit such robbery, such person shall be adjudged a pirate, and on conviction thereof shall suffer death." It thus appears that the Legislature of the United States, in framing municipal laws for the repression of offences of a piratical character, has always kept in view and made special mention of "piracy on the high seas," grouping with it, however, a large class of offences which bear a strong family resemblance to it, within the territorial jurisdiction, but which are not piracy by the law of nations—viz., "robbery in any river, haven, basin, or bay out of the jurisdiction of any particular State of the United States, upon any vessel or upon the lading or ship's company of any vessel in any open roadstead, haven, basin, or bay, or in any river where the sea ebbs and flows." On land, if the robbery be committed by persons engaged in a piratical cruise or enterprise, or being of the ship's crew or ship's company of any piratical ship or vessel, who shall land from such ship or vessel, and on shore commit such robbery, many of the crimes thus defined, though included in a list at the head of which is "piracy on the high seas," and classed with it as equal in guilt and deserving of equal punishment, differ from it in the essential particular that they are not committed on the high seas, but within the territorial jurisdiction of the United States; and being committed within the territorial or personal jurisdiction of the United States, they are thus offences, not against our laws (though we have laws to the same effect), but against the laws of the United States. Regarding had to this legislation, which must have been in full view of the American minister who negotiated this treaty, it is a remarkable feature of the treaty, tending strongly to show that "within the jurisdiction" means within the exclusive juris-

diction, territorial or personal, of the United States, that, though "piracy" committed within the jurisdiction of the United States and—as if to avoid all cavil as to its meaning—"robbery" are mentioned,—piracy on the high seas—piracy by the law of nations—has been omitted. For these reasons I am of opinion that the true reading of the words "within the jurisdiction" is within the exclusive jurisdiction of the State requiring extradition.

COCKBURN, C. J.—I wish to add, that one of the grounds of the conclusion to which I came was, that if we are to construe the statute as applying only to cases of exclusive jurisdiction, this consequence would follow—that whenever an English subject has committed in America a crime for which he could be tried there, although he could also be tried here, he could not be given up. I do not think the Legislature could have contemplated a result so mischievous. However, as the majority of the court are of an opposite opinion the prisoners must be discharged.

Friday, May 27, 1864.

BAYLEY v. ALDRED.

*False imprisonment—Notice of action—Committing a nuisance.*

*The owner of property is not justified in giving a person into custody found (popularly speaking) committing a nuisance against his premises, nor is he entitled to notice of action for having done so, unless he is fairly justified in believing that the person had the intention to soil or deface them, within the 2 & 3 Vict. c. 47, s. 54, or the intention to commit damage or injury or spoil to them within the 24 & 25 Vict. c. 97, s. 52.*

*Action for false imprisonment.*

*Plea.—Not guilty by statutes 2 & 3 Vict. c. 47, ss. 54, 79; 2 & 3 Vict. c. 71, s. 53; and 24 & 25 Vict. c. 97, ss. 52, 61, 71.*

At the trial before Cockburn, C. J. it appeared that the deft. was the owner of a house in Oxford-street, which had a street-door down an adjoining gateway; that the plt. and a friend one night turned down the gateway for a convenient purpose; that the deft. came up and an altercation took place, and that the deft. thereupon gave the plt. into custody for committing a nuisance against the street-door.

The jury found that the deft. acted in the *bona fide* belief that he was entitled to give the plt. into custody; but they also found that the plt. had not committed a nuisance against the street-door. The verdict was entered for the plt. with 40s. damages.

*M. Chambers* moved to enter the verdict for the deft. on the ground of want of notice of action.—It is submitted, that the deft. was, on the finding of the jury, entitled to notice of action under the 2 & 3 Vict. c. 47, sect. 54 of that Act. The 2 & 3 Vict. c. 47, s. 54, enacts, that every person shall be liable to a penalty, not more than 40s., who within the limits of the metropolitan police district shall in any thoroughfare or public place commit any of the following offences (among others):

10. Every person who, without the consent of the owner or occupier shall affix any posting-bill or other paper against or upon any building, wall, fence, or pale, or write upon, soil, deface, or mark any such building, wall, fence, or pale, with chalk or paint, or in any other way whatsoever, or wilfully break, destroy, or damage any part of any such building, wall, fence, or pale, or any fixture, or appendage thereunto, or any tree, shrub, or seat in any public walk, park, or garden. . . . And it shall be lawful for any constable belonging to the metropolitan police force to take into custody without warrant any person who shall commit any such offence within view of any such constable.

Sect. 79 incorporates the 10 Geo. 4, c. 44, which by sects. 41 requires a month's notice of action. The

[Q. B.]

REG. v. THE OVERSEERS OF SOUTH WEALD.

[Q. B.]

24 & 25 Vict. c. 97, also applies, and sect. 52 thereof enacts,

That whosoever shall wilfully or maliciously commit any damage or injury or spoil to or upon any real or personal property whatsoever, either of a public or a private nature, for which no punishment is hereinbefore provided, shall on conviction thereof, &c.

And sect. 61 enacts that any person found committing any offence against the Act may be immediately apprehended without a warrant by any peace officer or the owner of the property injured, &c. And sect. 71 requires a month's notice of action to be given. *Read v. Coker*, 18 C.B. 850, was cited. [The Court referred to *Roberts v. Orchard*, 38 L.J. 65, C.P., where it was decided by the Ex. Ch. that the true test is, whether the deft. honestly believed in the existence of such a state of facts as would, if it had existed, have afforded a justification for the arrest under the statute, and that he must believe that the plt. had been found committing the offence.]

COCKBURN, C.J.—I am of opinion that there should be no rule. This case does not fall within either statute. It is not within 2 & 3 Vict. c. 47, s. 54, because it is necessary that there should be the intention to soil and deface the building, wall, or fence with chalk or paint or in some way analogous thereto. So, again, with regard to the 24 & 25 Vict. c. 97, s. 52, there must be the intention to commit damage, injury, or spoil to the property. It is not because accidentally some injury may arise from the act done that it falls within these sections. The party giving another into custody must have not merely a belief that he is justified by the existing state of facts, but there must be a state of facts which would have justified him in giving another into custody. Here there was not a state of facts which justified the deft. in giving the plt. into custody. The deft. could not fairly believe that the plt. had the intention to damage or spoil his property.

The rest of the COURT concurring,

*Rule refused.*

*Saturday, May 28, 1864.*

REG. v. THE OVERSEERS OF SOUTH WEALD.

*Burial board—Chapelry—Election of member of board. When districts are formed into a chapelry by an Order in Council, such order need not be enrolled.*

*By the 18 & 19 Vict. c. 128, s. 4, a vacancy in a burial board is to be filled up by the vestry within one month, or in default it may be filled up by the burial board:*

*Held, that a vacancy filled up after the lapse of one month was well filled up, the burial board not having taken advantage of the delay.*

A *mandamus* having issued to the overseers of South Weald commanding them to pay over to the Burial Board of Great Warley the sum of 53*l.* 15*s.*, a return was made whereupon issue was joined, and upon coming on for trial at the Chelmsford Assizes, it was arranged that the facts should be turned into a special case. This accordingly now came on for argument.

It appeared that in the year 1855 an Order in Council was issued directing that a portion of each of the parishes of Great Warley, Shenfield and South Weald should be consolidated into one chapelry, under the provisions of the 59 Geo. 3, c. 134. Subsequently a burial board was constituted for the said chapelry, and money being required by the board, they made their certificate for the payment by the overseers of South Weald of the above-mentioned sum, such certificate requiring the signature of three members of the board, and being so signed by a Mr. Francis as one of such three members.

The overseers of South Weald objected to make

the payment on the grounds, first, that the chapelry was not duly constituted, inasmuch as the order was not enrolled as provided for by sect. 6 of the 59 Geo. 3, c. 134; secondly, that the certificate of the burial board was not valid, inasmuch as Mr. Francis, one of the three members who signed it, had not been duly elected.

By the 59 Geo. 3, c. 134, s. 6, the order is directed to be enrolled; but by the 8 & 9 Vict. c. 70, s. 9, which recites the former statute and explains the course to be pursued upon the junction of chapelries, nothing is said with reference to enrolment.

By the 18 & 19 Vict. c. 128, s. 4, provision is made for filling up vacancies in burial boards, and it enacts that

Every vacancy in any burial board shall be filled up by the vestry appointing the same within one month after such vacancy shall have happened, and immediately on the occurrence thereof such vacancy shall be notified by the burial board to the churchwardens or other persons to whom it belongs to convene meetings of the vestry; and in case any such vestry shall neglect to fill up any such vacancy, the vacancy may be filled up by the burial board at any meeting thereof, &c.

It appeared that, a vacancy having occurred, the vestry omitted to fill it up within the month, but that afterwards, the burial board having themselves neglected to fill it up, the vestry elected Mr. Francis, who accordingly took his seat and acted at the board, being in fact one of the three members by whom the certificate was signed.

*Petersdorff* now appeared for the Crown, and contended, first, that whether or not the provision in the 59 Geo. 3, c. 134, as to enrolling, was compulsory or only directory, the subsequent statute of the 8 & 9 Vict. c. 70, which in sect. 9 says nothing about enrolling, must be taken as laying down the legislative directions upon the subject. Secondly, that although the burial board, upon default by the vestry within a month of an election of a member, may themselves elect, yet their power to elect is not gone, but may be lawfully exercised if the burial board omit to do so. There was a further objection taken—that the Burial Board Acts do not apply to chapelries of this sort. This objection, however, was abandoned.

*Gray, Q.C. (Woollett and Philbrick with him)* argued that the certificate was illegal upon both grounds—first, that the 59 Geo. 3, c. 134, as to enrolling, is compulsory, and is not repealed; secondly, that the vestry, having allowed the month to elapse, their power to elect was wholly gone. [COCKBURN, C.J.—They do not require the assistance of the 59 Geo. 3, c. 134, for they have the Order in Council under the 8 & 9 Vict. c. 70. 'There may have been very good reason for an enrolment under the old Act, but with reference to an Order in Council under the Act of Victoria, which sets out the boundaries, there can be no necessity for its enrolment.] The word "may," in sect. 4 of the 18 & 19 Vict. c. 128, imposes a duty upon the burial board to fill up the vacancy upon the default of the vestry to do so, and there cannot be a right in two parties at the same time to fill it up.

COCKBURN, C.J.—We disposed of the first objection in the course of the argument. As to the second point, I think Mr. Francis was properly a member of the burial board. The effect of the legislation is, that the vestry are under an obligation and duty to fill up the vacancy within the space of a month, and by way of securing the discharge of that duty, it is enacted that if the vacancy is not then filled up by such vestry, the burial board may themselves appoint. It has been argued that it was imperative upon the vestry to appoint within the month, and that after that period the power could not be exercised. But I think that is not the effect of the enactment, and that even after the

Q. B.]

REG. v. THE INHABITANTS OF GREAT SALKELD.

[Q. B.]

lapse of the month it is still the duty of the vestry to appoint. It may be said that it could not be intended that both bodies should make an appointment at one and the same time; but if such a case were to arise, there might be good reason for giving a preference to the appointment of the burial board as against the vestry. But we are not called upon to say anything upon that point, for the burial board in this case did not make any appointment.

MELLOR and SHEE, J.J. concurred.

*Judgment for the Crown.*

#### REG. v. THE INHABITANTS OF GREAT SALKELD.

*Irremovability—Removability from one parish to another parish in the same union.*

*The 24 & 25 Vict. c. 55, s. 1, which enacts that the residence of a person in any part of a union shall have the same effect, in reference to the provisions of the 9 & 10 Vict. c. 66, s. 1, as a residence in any parish, has reference only to the pauper's status with reference to a parish out of such union, and does not affect his status with reference to parishes within the same union. Where, therefore, A. and B. were two parishes in the union of C., and the pauper, whose parish of settlement was at A., had resided there all his life with the exception of a few months (less than three years) next before the obtaining of the order of removal, during which he resided in the parish of B.:*

*Held (Crompton, J. dissentiente), that he was removable to his parish of settlement (A.), and that the order was good.*

This was an appeal against an order of justices for the removal of John Mallinson and Hannah his wife and their five children from the township of Plumpton Wall to the parish of Great Salkeld, both in the Penrith Poor Law Union, in the county of Cumberland. The appeal was tried at the last Michaelmas Quarter Sessions for the county of Cumberland, when the order was affirmed subject to the following case:—

The pauper John Mallinson, who is now forty-two years of age, never resided in any parish or township in the Penrith Union, other than the parish of Great Salkeld and township of Plumpton Wall, above mentioned, and he was resident in Great Salkeld continuously from the year of his birth until he removed to Plumpton Wall, on the 1st July 1862. He became legally settled in Great Salkeld in 1842 by apprenticeship, and also gained a second settlement in Great Salkeld, in 1857, by renting a tenement therein. While so residing in Great Salkeld with his wife and family, he in the month of Dec. 1860 became chargeable thereto, and applied for relief to the relieving officer of the Penrith Union, and was relieved by him at the charge and expense of Great Salkeld. From the 14th Dec. 1860 to the 6th July 1861, with the exception of a fortnight, during the period from the said 14th Dec. 1860 to the 6th July 1861, he and his family resided in Great Salkeld. On the 1st July 1862 (up to which time the pauper and his family had resided in Great Salkeld, as stated before) the pauper took a cottage in Plumpton Wall, and removed there with his wife and family. On the 30th Sept. 1862 the pauper, whilst residing in Plumpton Wall, again became chargeable, and applied to the relieving officer of the Penrith Union (in which both Great Salkeld and Plumpton Wall are situate, and of which they form a part) for relief; the officers brought the case before the board of guardians of the Penrith Union, who ordered the pauper to be relieved from the common fund of the union till the 2nd June 1863, when the board of guardians, on the complaint of the parish officers of the parish of Penrith, in the same

union, stopped the relief from the common fund. The pauper continuing chargeable to Plumpton Wall after the stoppage of the common fund relief, the parish officers of that township obtained the present order of removal.

If the court shall be of opinion that the residence in the parish of settlement should not be included in the calculation of the three years' residence in a union required to establish the status of irremovability under the 24 & 25 Vict. c. 55, s. 1, then the said order to be confirmed. But if the court shall be of a contrary opinion, then the said order shall be quashed.

By the 9 & 10 Vict. c. 66, s. 1, it is enacted that no person shall be removed from any parish in which such person shall have resided for five years next before the application for the warrant. And by the 24 & 25 Vict. c. 55, s. 1, it is enacted:

That after the 25th March next, the period of three years shall be substituted for that of five years specified in the first section of the statute 9 & 10 Vict. c. 66, and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish.

Mellish, Q. C. appeared in support of the order of sessions, and argued that the order of removal was good, for that the 1st section of the 24 & 25 Vict. c. 55 was not intended to affect the relationship of each other of parishes in the same union, but to apply only to the power of removal from the union to parishes out of the union.

Maule, contra, for the apps., contended that the Legislature intended no such limitation as that contended for by the resps., that its object was to place the union upon the same footing as the parish was before the Act, and that therefore, under the circumstances, no removal could take place from one parish to another in the same union.

COCKBURN, C. J.—I am of opinion that the order of Quarter Sessions should be confirmed. The effect of the recent statute, the 24 & 25 Vict. c. 55, was, I think, merely this, that so far as regards the ambit of the pauper's residence, when he is sought to be removed to a place out of the union, it is sufficient that he has resided in any part of that union, to give him the status of irremovability. Formerly he could be removed if he had not resided for a certain number of years in the same parish; but it is enough now if he has resided in any of the parishes of the same union for a certain period. It is true that formerly there was nothing known of a removal from one union to another, it was a removal from one parish to another parish only, whether such parishes were included in a union or not. But the effect of the recent enactment is to give the status of irremovability if the pauper has resided in the same locality, though in several parishes of the same union. I can see very good reason for that alteration, for as the cost of the irremovable paupers was paid out of the common fund, it did no injustice to the parishes within it. But as between the parishes within the same union, there might be great injustice and hardship if a pauper could, by removing into a neighbouring parish of the union, acquire the status of irremovability, and as against another parish count as part of the three years his residence in the parish of settlement. Such a result, I think, could scarcely have been intended by the Legislature.

CROMPTON, J.—I have certainly great difficulty in coming to any other conclusion than that the Legislature in the recent Act did intend to make the union exactly like a parish as far as regards the question of removability, and I find no words which enable me to adopt the construction which my Lord and my brother Shee adopt. I certainly think that the recent statute means not merely that the

Q. B.]

CHURCHWARDENS, &amp;c. OF POTTON v. BROWN—LEADER v. YELL.

[C. B.]

word "union" shall be substituted for that of "parish," as regards removability to places beyond the union, but means that whenever the pauper has resided three years in the same union he shall not be removable at all. Henceforth, I think a pauper may use the union as he formerly used a parish, and may go from any one part of it to any other without his removability being affected. I believe the Legislature thought that that would be for the benefit of the working classes, without perhaps considering all the consequences of such an enactment.

SEER, J. said he entirely agreed with the Lord Chief Justice.

*Order confirmed.*

*Wednesday, June 1, 1864.*

CHURCHWARDENS, &c. OF POTTON v. BROWN.

*Lighting rate—Nullity—Wrong heading.*

*The Watching and Lighting Act (3 & 4 Will. 4, c. 90), so far as related to lighting, was adopted by part of a parish only, and a rate was made under the Act which in its heading purported to be a rate on the whole of the parish; but the names only of persons liable to be rated were inserted in the rate:*

*Held, that the rate purported to be a rate for the whole of the parish, and as there was no power to make such a rate, it was a nullity; and that a fresh rate could be made for the same purpose the first was intended for, without quashing the first.*

Case stated by justices under 20 & 21 Vict. c. 43, on a refusal to make an order on a complaint for refusing to pay a lighting rate, dated 23rd Nov. 1863.

It appeared that the Watching and Lighting Act (3 & 4 Will. 4, c. 90), so far as the same related to lighting, had been adopted for part only of the parish of Potton (Beds.), and that a rate, intended to raise the necessary funds, was made on the 3rd Feb. 1863, intituled "An assessment for the lighting of the parish of Potton, in the county of Bedford, and for other purposes chargeable thereon, according to law, made the 3rd Feb. 1863, after the rate of 1s. in the pound."

The overseers collected the greater part of it, but as some persons named in it refused to pay, the overseers in office, on the 27th May then next, made a complaint against several of them for refusing to pay it, and they having been summoned and attending accordingly, the complaint came on to be heard before the justices of Biggleswade Petty Sessions, and was dismissed on the ground that the rate was bad, because by the heading it purported to be a rate for lighting the entire parish of Potton, instead of for lighting such part only of the said parish as had adopted the Act.

On the 23rd Nov. 1863, the then churchwardens and overseers of the same parish, without getting the first rate quashed, and assuming it to be a nullity, made another rate intended to raise money for the same purposes as the first rate had been made for, and the last rate was intituled "An assessment for lighting such part of the parish of Potton as is mentioned in the schedule hereunder written, under the provisions of the Act 3 & 4 Will. 4, c. 90, intituled 'An Act to repeal an Act of the 4th year of the reign of His late Majesty King George the Fourth, for the lighting and watching of parishes in England and Wales, and to make other provisions in lieu thereof, viz. all that part of the said parish of Potton,' &c. describing particularly the part of the parish by which the Act had been adopted.

In collecting the rate the overseers gave credit to those who had paid the first rate for the sums so paid, and demanded the rates of those who had not

paid the first, which being refused by some of them, on the 9th Dec. 1863 a complaint was made on the part of the churchwardens and overseers against them, the present resps., for refusing to pay it, and when it came on to be heard the resps. objected that the rate of the 23rd Nov. 1863 was bad and invalid, because the rate dated the 3rd Feb. 1863 having been made for the same purpose and for the same time was still in existence, and not quashed or otherwise got rid of, to which the apps. replied that the first so-called rate was an absolute nullity by reason of the defect in the heading above mentioned.

The justices thought that the rate of Feb. 3 could not be treated as a nullity, and was in existence, not being quashed, and therefore that the November rate was bad.

*Douglas Brown for the resps.*—The November rate is bad, as the previous one of February was still in existence, and was made for the same purposes. In *Reg. v. Fordham*, 11 A. & E. 73, it was held that a rate is bad, which is made for a period for which a rate has already been made, and not quashed. [BLACKBURN, J.—In that case the question arose on appeal against the rate, not on a proceeding to enforce it by order of justices in petty sessions.—COCKBURN, C.J.—There was no authority at all to make a lighting rate for the whole of the parish of Potton. If this is a rate, as it purports to be, for the whole parish, it was *ultra vires* and a nullity.] All the persons mentioned in the rate were liable to pay, but the heading merely was wrong. [BLACKBURN, J.—The rate sets out an Act which gives authority merely to rate part of the parish. What authority is there for rating the whole? The rate is not a good rate under sect. 78.] Sect. 32 was referred to, and also the case of

*Reg. v. Eastern Counties Railway*, 5 E. & B. 974.

*Sills, contra*, was not called upon.

By the COURT.—The first rate was a nullity, and the second one was good, and the justices ought to enforce the payment of it.

*Judgment for the apps.*

#### COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

*Tuesday, May 31, 1864.*

LEADER v. YELL.

*Beershop licence—Certificate of good character.*

*By the 2nd and 8th sections of 4 & 5 Will. 4, c. 85, it is enacted that no person shall have a licence to keep a beershop without a certificate from six rated householders that he is a "person of good character;" and also that any person using such a certificate, knowing it to be false, is liable, on conviction, to certain penalties:*

*Held, that a man living in concubinage with a woman by whom he had children, and also the fact of his being occasionally drunk, was not sufficient to convict him of uttering a certificate of six rated persons, knowing it to be false.*

This was an information preferred by David Yell, of Newton in the Isle of Ely and county of Cambridge, labourer, against Robert Leader, of the same place, blacksmith, for that the said Robert Leader, on Friday, the 9th Oct. 1863, at the parish of Long Sutton, in the said parts of Holland, county of Lincoln, for the purpose of obtaining for himself a licence to retail beer or cider, unlawfully did make use to one Samuel Cooke, of Holbeach, in the said county, an officer of the Inland Revenue, a certain certificate required under the provisions of the statute in that behalf made and provided to wit, a



[C. B.]

LEADER v. YELL.

[C. B.]

certificate in the words and figures following, that is to say :

We, the undersigned, being inhabitants of the parish of Newton, in the county of Cambridge, and respectively rated to the poor at not less than 6*l.* per annum, and none of us maltsters, common brewers, or persons licensed to sell spirituous liquors, or being licensed to sell beer or cider by retail, do hereby certify that Robert Leader, dwelling in Newton in the said parish, is a person of good character.

Dated this 27th Aug. 1863.

(Here follow the six signatures.)

I do hereby certify that the above-named applicant is the real resident holder and occupier of the said house, and that the true rent or annual value at which such house, with the premises occupied thereby, is rated in one rating to the poor-rates, &c. And I further certify that all the above-mentioned persons whose names are subscribed to this certificate are inhabitants of the parish of Newton, rated to 6*l.* to the relief of the poor of the said parish.

Dated Aug. 28, 1863.

(Signed) SAMUEL SHIPPEY,  
Overseer of the parish of Newton.

The said Robert Leader then and there well knowing one or more of the matters certified therein, to wit, that the said Robert Leader was a person of good character, and that the said Robert Leader, as the applicant named in the application attached to the said certificate, was the real resident holder and occupier of the said house, and the true rent or annual value of which such house, with the premises occupied therewith, is rated in one rating to the poor-rates according to the last sum or rating made and allowed in such parish for the relief of the poor, is the sum of 13*l.*, to be false, contrary to the form of the statute in such case made and provided.

HENRY MASON.

And after hearing the parties, and the evidence adduced by them, we, the undersigned, being two of Her Majesty's justices of the peace in and for the parts of Holland in the county of Lincoln, did thereupon dismiss that part of the charge against the said Robert Leader relating to his unlawful use of the certificate of the rating or assessment of his house and premises, but did convict him under the 6th section of the statute 3 & 4 Vict. c. 61, of the charge of having unlawfully made use of the said certificate, so far as he was thereby certified to be a person of good character, he, the said Robert Leader, then and there well knowing such statement to be false. And the said Robert Leader alleging that he is dissatisfied with the said determination as being erroneous in point of law, did, within three days thereafter, apply to us, the said justices, to state and sign a case setting forth the facts and the grounds of such determination for the opinion of Her Majesty's Court of C.P., in pursuance of the statute in such case made and provided.

Case.—The deft. having appeared upon the summons before us, the undersigned, to answer to the said information, it was thereupon proved on the part of the said informant, that the said deft. did make use of the said above-mentioned certificate by presenting the same in person, on or about the 9th Oct. last, to Samuel Cooke, the officer of excise then sitting and acting officially in our aforesaid petty sessional division; that the deft. had been previously to the said 9th Oct. cautioned by Samuel Shippey, the overseer of the said parish of Newton, that he (Shippey) had received a letter from Mr. John Barwise, the supervisor of excise for the same district, stating that he (Mr. Barwise) had received an intimation that the certificate was untrue and incorrect, and was objected to; that notwithstanding such caution he (the deft.) did apply for and obtain a licence for selling beer by retail on his aforesaid premises; that the said deft. has been ever since the year 1854, and still is, living in open concubinage with a widow woman named Cox, and has three illegitimate children by her, all now living in the house with them, and that from 1854 or 1859 he was also frequently drunk; that the deft. has been several times warned by two successive curates of the parish of Newton of the immorality and guilt of his course of life, and desired by those gentlemen to reform himself and

marry the woman; that one of those gentlemen, on being applied to by the deft., refused to receive the children in question at the deft.'s hands into the church or otherwise to baptize them, in consequence of the deft.'s living with and refusing to marry Cox. And it was further stated on oath by the two parties who had lastly so signed the said certificate of good character, that they signed the same without in fact reading the certificate or otherwise knowing its contents, and that if they had read it they should certainly both (knowing the deft.'s course of life in the matter aforesaid) have refused to sign the same, and it was thereupon objected by deft.'s attorney that the mere proof of immorality in a man did not constitute him not to be a person of good character, but that it was necessary to prove him to have been guilty and convicted of some criminal offence to deprive him of that quality.

Whereupon we, the said undersigned, did adjudge and determine that the said deft. was not a person of good character, and did convict him of the offence of having unlawfully used the aforesaid certificate of his being such a person, he well knowing the same to be false, and did further adjudge and determine that he should forfeit and pay for such offence the mitigated penalty or sum of forty shillings, besides costs, and should moreover forfeit the licence so obtained as aforesaid.

If the court shall be of opinion that our determination on the above point was correct, then the conviction shall be confirmed. But if the court shall be of a contrary opinion, then the said conviction shall be quashed. (Signed),

Denman, Q.C. appeared for the app.

O'Malley, Q.C. and Naylor for the resp.

ERLE, C.J.—I am of opinion that the conviction is wrong. The app. had been convicted of using a certificate that he was a person of good character, knowing it to be false. The question for us to consider is, whether evidence that the app. was living in concubinage with a person by whom he had three illegitimate children compelled the magistrates to find that he knew that certificate to be false. It is quite clear that the magistrates have a very wide discretion in these cases, and I do not wish to interfere with them in the exercise of this discretion; but I can find nothing else in the case except that the app. had cohabited with a woman without the ceremony of marriage. There was nothing imputing the open violation of decency, and the very fact of its being stated that he had been known to be drunk on different occasions, between 1854 and 1859 shows me that there had been an inquiry of a very strict nature into his character, and it proves that there has been nothing like a want of sobriety on his part since that time. He had cohabited with this woman, and his neighbours have certified that he was of good character. Did he know that he was giving a false certificate when he uttered that certificate of their opinion of him, rendering him liable to this penalty? I do not think that his so using such a certificate made it incumbent on the magistrates to convict him. The words "person of good character" were intended to prevent the danger of these houses becoming the resort of dishonest and immoral people, who might there plan and concoct their schemes, and so conduct themselves as to set at defiance the feelings of the public. No doubt persons who so acted would be held to be persons of bad character; but cohabiting with a woman and having children born by her, does not necessarily impute to him that he knew he was of bad character. It was possible that when this cohabitation began the woman might have believed her husband to be dead, and that afterwards it might have turned out that he was alive. It by no means



C. B.]

BAYLEY v. WILKINSON.

[C. B.]

follows that his neighbours should refuse to certify because they knew of his living with this woman. The cohabiting with a woman, and having children born to her, does not necessarily impute to him that he knew he was of bad character. The only evidence I can see of this matter being notorious was, that the curate of the parish had remonstrated with him for not marrying and he had refused to do so. I am of opinion, therefore, for these reasons, that the conviction was wrong.

WILLIAMS, J.—I am of the same opinion, but I have some doubt whether the magistrates really intended to leave this narrow point for us to decide. It is quite possible that there might have been some other evidence upon which they might have convicted the app., but which has not been laid before us.

BYLES, J.—I am of the same opinion. I think the word "character" in the Act means character in the sense of repute, and I do not think that the consciousness of the app. having lived in concubinage with a woman is any evidence that he did not believe that what his neighbours had certified was true; and the fact of his six neighbours having signed the certificate is strong evidence of his being a person of good repute.

*Judgment for the app.*

*Friday, April 29, 1864.*

BAYLEY (app.) v. WILKINSON (resp.)

Local board of health — 11 & 12 Vict. c. 63, s. 69; 21 & 22 Vict. c. 98.

*By sect. 69 of 11 & 12 Vict. c. 63 it is enacted that in case any present or future street, or any part thereof, (not being a highway) be not sewered, levelled, flagged and channelled to the satisfaction of the local board of health, such board may by notice in writing to the respective owners or occupiers of the premises fronting or abutting upon such parts require them to level, sewer, pave, flag, or channel the same within a time to be specified in such notice; and if the said notice be not complied with, the local board may, if they think fit, execute the work; the expenses to be borne by the owners in default, according to the frontage of their respective premises, in such proportion as shall be settled by the surveyor, and in case of dispute as shall be settled by arbitration, &c.*

On the 8th April the local board gave notice to the resp. requiring him to sewer, level, pave, &c., and to which notice the following was appended:—"Particulars of the necessary works may be obtained from the borough surveyor, No. 3, Town-hall." On the 16th May the resp. served a notice on the board, stating that he disputed his amount of the proportion of the expenses, and on the 10th June he did the same, requesting them to concur in the appointment of an arbitrator; but upon the 14th Oct. he gave notice that he abandoned the notices, and that he did not dispute the proportion of the expenses, but disputed his legal liability to pay the same.

On the 18th Oct. the board gave the resp. notice that they had appointed an arbitrator, who, on the 29th Nov., in the absence of the resp., he having refused to attend, sat and eventually made his award, reciting the resp.'s notice of the 10th June, and awarding that the proportion due to the local board by the resp. was 92l. 7s. 6d., and that he should pay his own costs:

*Held, that the notice of the 8th April was good; that the appointment of the arbitrator was invalid, and that his award was void; and also that all the arbitrator has to do under the 69th section is, to decide upon the proper apportionment amongst the houses of all the expenses incurred, and that he has no power to decide what the amount of the expenses should be.*

At a petty sessions of the peace holden at Wolverhampton on the 17th and adjourned to the 24th June 1863, the resp. Joseph Wilkinson was summoned before me for refusing to pay his proportion of certain expenses incurred by the Local Board of Health for the borough of Wolverhampton for certain works executed by them, together with certain costs. The summons, so far as it is material to set out the same, is as follows:

That certain expenses have been incurred by the local board of health of the said borough and corporate district in sewerage, levelling, paving, flagging and channelling, metalting and making good certain streets, called respectively Bromney-street, Ledgley-street and Duncan-street, in the said borough and corporate district, to or upon which said streets respectively certain premises belonging to you (the resp.) front, adjoin, or abut; and that the proportion of expenses you are liable to pay, according to the frontage of your premises in the said streets respectively having been settled by the surveyor of the said local board at the sum of 97l. 19s. 5d., and having been disputed by you was settled by arbitration by the award of Rupert Kettle, Esq., made pursuant to the statutes in that behalf, and dated the 31st day of Dec. 1862, at the sum of 92l. 7s. 6d., and which sum being such proportion of the expenses as aforesaid, together with the sum of 28l. 3s. 10d., being the amount of the costs of the proceedings incurred by the said board in that behalf, you have neglected to pay, contrary to the statute in such case made and provided.

The summons was dismissed, and the following case was stated for the opinion of the court:—

The Local Board of Health of Woverhampton (who will be henceforth in this case called the Board) in the month of April 1861 served the owners and occupiers of property in several streets in the district called the Blakenhall estate or district with notices under the Public Health Act 1848, and the Local Government Act 1858, to sewer, level, pave, flag, channel, metal and make good those streets to the satisfaction of the board. The said resp. J. Wilkinson was the owner of property in three of those streets called Bromney-street, Ledgley-street and Duncan-street, and he was served with three notices which, with the exception of the names of the several streets in which the property was situate, were in the following words:

BOBOROUGH OF WOLVERHAMPTON.

The Public Health Act 1848, and the Local Government Act 1858.

The Town Council, acting as the Local Board of Health within and for the borough and corporate district of Wolverhampton, do hereby give you notice that the street called Duncan-street, situate within such corporate district, and not being a highway, is not sewered, levelled, paved, flagged and channelled, metalled and made good to the satisfaction of such local board of health. And the said local board of health do hereby give you further notice, and require you within one month from the service hereof, to sewer, level, pave, flag and channel, metal and make good the said street to their satisfaction; and in case you do not comply with the above notice the said local board will execute the works above referred to and charge and recover the expenses thereof as directed by the Public Health Act 1848 and the Local Government Act 1858.

E. J. HARRIS,

April 8, 1861. Clerk to the said Local Board of Health. To the respective owners or occupiers of the premises fronting, adjoining, or abutting, upon the said street.

At the foot thereof the following notice was printed in red ink:

Particulars of the necessary works may be obtained from the borough surveyor's office, 3, Town-hall.

Certain plans and specifications were accordingly lodged at the surveyor's office, and were seen there by the resp. and several of the other owners of property in the said streets. The resp. and other owners of property in the said streets did not execute the works by the said notices required, and the same were subsequently executed by the said board, and the proportion of the resp. of the amount of the expenses incurred by them in so doing was settled by the surveyor of the said board at the sum of 97l. 19s. 5d., and notice of the amount of such proportion was given to the resp. on the 11th March 1862, and payment thereof then demanded from him.

On the 10th May 1862 the resp. and other owners

C. B.]

BAYLEY v. WILKINSON.

[C. B.]

of property presented a memorial to the Mayor which is as follows :

Wolverhampton, 10th May 1862.

To the Worshipful the Mayor of Wolverhampton.

Sir,—We, the undersigned, being owners of property in the Blakenhall estate with respectivity to bring to the notice of the Town Council, through your worship, the enormous charges levied upon us for paving, flagging, &c., certain streets on the said estate, particulars of which have been laid before the streets committee by a deputation that waited upon them. Not having heard anything respecting the reduction of the same we now make this application.

On the 16th May 1862 a notice to the board, signed by the resp. and other owners of property in the said Blakenhall district, was served upon the clerk to the board, which is as follows :

Wolverhampton, May 15, 1862.

To the Local Board of the Borough Corporate District of Wolverhampton.

We, the undersigned, beg respectively to give you notice that we severally dispute the amounts of the proportion settled by your surveyor to be due from us in respect of works executed by you under the Public Health Act 1848, or the Local Government Act 1858, and for the repayment of which we are liable, on the ground that the cost of the said works excessive and unfair; and we beg leave to call your attention to the memorial presented through the mayor to the town council on Monday last relating to this overcharge, and hope you will reduce the price and make it fair and reasonable. And as the contractor has constructed the streets with improper material, we consider you may fairly call upon him to reduce the amount of contract.

On the 10th June 1862 another notice, signed by the resp. and other owners of property in the said district, was served on the clerk of the board, of which the following is a copy :

Wolverhampton, 10th June 1862.

To the Local Board of the Borough Corporate District of Wolverhampton.

We, the undersigned, beg respectively to give you notice that we severally dispute the amount of the proportion settled by your surveyor to be due from us in respect of works executed by you under the Public Health Act 1848, or the Local Government Act 1858, and for the repayment of which we are liable, on the ground that the cost of the said works is excessive and unfair: and we respectfully request you to concur with us in the appointment of a single arbitrator, pursuant to the said Acts.

On the 14th June the town clerk wrote the following letter to the resp. :

I would suggest you referring me to your attorney with whom I shall be happy to communicate. I think he will advise you that you have taken an erroneous view of the question to be submitted to arbitration, which is not as to the amount of the contract price being excessive, but confined to the proper apportionment of the amount expended or incurred between the respective owners of property; and if you will inspect the apportionment and plans in the borough surveyor's office you will probably be satisfied as to the accuracy of the apportionment.

E. J. HAYES,

To Mr. Jeremiah Mason and others.

Town Clerk.

On the 28th June 1862 the clerk to the board wrote and sent the following letter in reply :

Town Clerk's office, Wolverhampton, 28th June 1862.

Gentlemen,—In reply to Mr. J. Mason's letter of the 16th inst., I beg to inform you that several of the persons whose names are attached to your notice of the 10th inst. have paid the amount of their respective apportionments, and others have informed the rates collector that they will pay and are desirous of having their names withdrawn from the notice. Under these circumstances I shall be glad to see Mr. Wilkinson or any other person on your behalf, but you must distinctly understand that the council do not recognise the power of an arbitrator to do more than ascertain whether the expenses have been properly apportioned, pursuant to the Public Health Act and the Local Government Act. It is quite clear that the arbitrator has no power to go into the question of the amount expended, his power being confined to settling the proportion payable by the respective owners in case of dispute, &c.

E. J. HAYES,

Mr. J. Mason and others.

Town Clerk.

On or about the 5th Aug. 1862 the resp. and others were summoned before the magistrates by the board under the 129th section of the Public Health Act 1848, to recover the several amounts apportioned upon them by the surveyor of the board; and on 7th Aug. the said summonses came on for hearing, and were adjourned by arrangement between the parties to the 21st of that month, on which day they came on for hearing, when the attorney for the resp. and other owners, before the

merits were gone into, objected to the sufficiency of the said notice to do the works, dated 8th April 1861, on the authority of *Parkinson v. The Mayor of Blackburn*, 33 L. T. Rep. 119; and the magistrates adjourned their decision on this objection to a day which was ultimately extended to the 9th Oct. 1862.

In the meantime the board being so advised, offered the resp. and others to withdraw the summonses and pay the costs; and on the 8th Oct. they served the resp. and others with a notice of arbitration.

On the 9th Oct., when the summonses again came on for hearing, the clerk to the board again offered to withdraw the summonses and to pay the costs, stating to the magistrates, as a reason for taking such course, that the board was then advised that the notice of the 10th June 1862, given by the resp. and others, had made arbitration the only proper mode of proceeding against the resp. and others. The magistrates refused to allow the summonses to be withdrawn, and on the 11th Oct. dismissed them all with costs, on the preliminary objection taken to the notice of the 8th April 1861.

On the 14th Oct. the attorney for the resp. and the other parties sent by post to the clerk to the board a letter (which was duly received by him on the following day), to the effect that the notice of the 10th June was abandoned, and that he did not dispute the proportions of expenses as settled by the surveyor, but disputed his legal liability to pay the same.

On the 18th Oct. the board gave the resp. notice that, in pursuance of his notice of the 10th June, and in consequence of his having failed to appoint an arbitrator, they thereby appointed R. K. arbitrator, and that the matter to be referred was that mentioned in his aforesaid notice as to his proportion as settled by their surveyor.

On the 29th Nov. the resp. was duly served with notice to attend the arbitration on the 6th Dec., on which day the arbitrator sat, when the resp. protested against his proceeding on the arbitration, upon the grounds, first, that there was no dispute between him and the board which an arbitrator had power to decide; secondly, that he did not dispute the proportion of expenses as settled by the surveyor; thirdly, that he disputed his liability on the ground of the excessive and unreasonable cost of the works executed, and on the ground that the local board did not, previous to the execution of the works, give him the notice required by 11 & 12 Vict. c. 63, s. 69, and because the board had proceeded against him to recover his proportion in a summary way before magistrates, who had adjudicated on and dismissed the same with costs. The resp. refused to go into the arbitration, and went away. The arbitrator proceeded with the reference *ex parte*, and, on the 31st Dec., published his award, which, after reciting the resp.'s notice of the 10th June, awarded that "the proportion due and payable by the said J. Wilkinson (the resp.) to the said local board for works executed by the said local board, under 11 & 12 Vict. c. 63, and 21 & 22 Vict. c. 96, was 92l. 7s. 6d., and that the resp. should pay his own costs."

The amount apportioned by the surveyor against the resp. was 97l. 19s. 3d.; but the arbitrator reduced the amount to 92l. 7s. 6d. The appointment of the arbitrator was made a rule of court in Hilary Term 1863, and the costs of the board, consequent upon the reference and of making the appointment a rule of court, were taxed at 23l. 8s. 10d.

On the 21st April 1863 the board obtained a rule of this court, calling upon the resp. to show cause why he should not pay the board the sum awarded and the costs, which rule was discharged.

I find, as facts on the evidence before me, that up to the 31st July 1862 the resp. disputed his liability

C. B.]

BATLEY V. WILKINSON.

[C. B.]

to pay the amount of the proportion settled by the surveyor, on the ground that the costs were excessive and unfair; that on the 10th June 1862, the resp. gave notice to the board that he required the matters to be settled by arbitration; that on the 5th Aug. 1862 the resp. took the objection before the magistrates to the validity of the notice to execute the works, dated the 8th April 1861, which was decided in his favour on the 11th Oct. 1862; that on the 8th Oct. the resp. was served by the board with notice of arbitration; that on the 14th Oct. the resp. gave notice to the board that he abandoned his notice of arbitration of the 10th June 1862, and also gave notice to the board that he did not dispute the proportions of expenses incurred, but did dispute his legal liability to pay the same or any part thereof. I find, also, that up to the hearing before the arbitrator, and by his protest, delivered to the arbitrator, he disputed his liability to pay the amount on the ground of the excessive and unreasonable cost of the works. I was also of opinion that the notice of the 8th April 1861 was good; but I dismissed the summons in consequence of the doubts I had, whether under the facts and circumstances stated in this case, and looking at the judgment of the Court of C. P., the award was good.

The following questions were submitted to the court: Whether the notice of the 8th April 1861 was a good notice? whether the award was valid; and whether, looking at sect. 123, 11 & 12 Vict. c. 63, I had any jurisdiction to inquire into its validity.

(Signed),

*Hayes*, Serjt. (*Mr. Mahon* with him) appeared for the apps., and cited

*Parkinson v. The Mayor of Blackburn*, 38 L. J. 119;  
*The Mayor of Salford v. Ackers*, 16 M. & W. 85.

ERLE, C. J.—In this case I am of opinion that our judgment ought to be for the resps. This was a proceeding under the Public Health Act of the 11 & 12 Vict. c. 63, s. 69, and by that section a power is given to the local board to give notice as regards streets requiring to be paved, and so forth, to the owners and occupiers of the adjoining premises, and if the owners and occupiers after such notice do not execute the works mentioned therein, the expenses incurred by the board in doing the works shall be paid by the owners in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration. Now, the first question in the case is, whether the notice to pave was a valid notice; and I take the notice to be in effect a notice calling on the parties to pave. I take that as an example of one of the things required by sect. 69; but the notice does not specify either what breadth is to be paved, or what level is to be kept, or other particulars which would be absolutely essential before the work could be done. In the case of *Parkinson v. The Mayor of Blackburn* a notice which required the party to pave, and omitted any of the requisites which would enable the party to pave according to the requirements, was held to be void, and the present notice has been thought to be void according to the doctrine laid down in that case. But I think there is a material distinction. In the *Blackburn* case it was required that the party should pave, and there were no means pointed out by which the party could learn what was the work he was required to do. In the present case at the foot of the notice the parties are referred to the office of the surveyor, and it appears by the case that at the office of the surveyor plans and information were to be seen, and that the parties called on to do the work did go to the office and see those plans. I do not mean to say that I affirm distinctly that this notice, with the reference to where the plans were to be seen according to that reference, made it a

good notice; but I am perfectly clear that it is not shown to be bad. It may have been that the plans and sections were perfectly sufficient. The parties appear to have gone and seen them. There is nothing said in the case about the information not being sufficient. This would therefore be a notice of reference to a place where further information might be got if the parties wanted to have that information. There is nothing to show me it was not the most ample that could be required, that it was not a specification of the work to be done, with plans and sections, and all that was material to enable the parties to do it; so far I agree with the judgment of the justice before whom this proceeding was. The proceeding before the justice was to enforce payment of the sum given by the award, and the justice has been of opinion that the award was not valid, and I think that the opinion of the justice is right. I come to the conclusion that the statute only authorises an arbitration in respect of the apportionment, but that the local board are to settle the amount of expenses actually incurred, and that then the surveyor is to apportion to the persons who are liable the portion that each of them is to bear; and if those persons are dissatisfied with the surveyor's decision, they have a right to demand that an arbitrator should be appointed, and for him to say what is the portion. The words of the section which I have read appear to me clearly to bear the meaning, that they shall pay in such proportions as shall be settled by the surveyor, or in case of dispute, as shall be settled by arbitration, having regard to all the circumstances of the case. Then, as to the dispute about the apportionment, I take the term "apportionment" of a sum amongst a number of persons liable to make up a total to have one recognised meaning throughout the kingdom, as in the Tithe Commutation Act, where the total to be paid by the parish is one sum, and there is an apportionment thereof amongst the persons liable for each portion, and a right given to dispute the apportionment and an appeal in respect of it. That seems to be the old meaning of the word, and the words in this section are to be so considered. I have also looked at the 21 & 22 Vict., which gives a provision for proceeding before the justices where the sum is under 20*l*. There the justice is at liberty to call before him a district surveyor, not the surveyor of the corporation, and to examine what are the works that have been done, and the claims in respect of those works. At the first reading, that appears to be a power to go and examine whether the expenses alleged to have been incurred by the board have been properly incurred. I have looked further to the statute, and I think it only goes to this, it only allows such reference as was clearly within the 11 & 12 Vict. c. 62, which is an arbitration of the matters in the statute, and the mode of proceeding under the 21 & 22 Vict. is the same as by the prior statute, and though it may be rare that a local board should have power to incur expenses, and that the persons on whom those expenses should be laid should not have the means to investigate whether the board has confined itself within its proper duty, yet, in respect of many cases where self-government is given to certain persons, the parties who are elected by the district to have that self-government are entrusted with powers in respect of which they cannot be called directly to answer to the body that appointed them. They are elected for a time, and if they misbehave, the remedy is afforded to the electors to elect persons in whom the body can have more confidence for the future. It is not an absolutely irresponsible power, because the outlay made by the local board is to be examined by auditors; they are final in allowing and disallowing, but they have no juris-

[C. B.]

BAYLEY v. WILKINSON.

[C. B.]

diction to go into the question whether the outlay was reasonable, only whether the outlay has been actually made, and, on the best opinion they can form, the outlay actually made is settled finally by the board, and the matter for the surveyor, if there is no dispute to settle, is the apportionment amongst the occupiers of houses who are liable. If there is a dispute, the arbitration is confined to the apportionment amongst the houses; the arbitrator is not at liberty to go into an examination whether the expenses were reasonable or ought to have been incurred, or whether the board had employed a contractor to do the work upon an estimate. Then, if that was so, this award is bad for two reasons: one, that the arbitrator has gone into the question whether the expenses were properly incurred and has taken off a portion of the expenses which the board charged, and so far as that went, it would be in favour of the persons who are called on to pay. Secondly, the party has given a notice that he intended to appeal, and the notice might be to dispute the amount of the apportionment; he really likewise wishes to have a trial whether the expenses had been reasonably incurred or not. He gives a notice that he required an arbitrator, and said that he disputed the amount apportioned to him, because the total of the outlay had been, in his judgment, excessive. The legal adviser of the board informed him that he had mistaken the power of appeal; that power was only given in respect of his portion, not in respect of the sum total of which a portion had been cast upon him. Such having been the notice of appeal, the board then treated the notice of appeal as a nullity, as, in my judgment, they had a perfect right to do, and summoned him to pay the amount which had been put upon him by the surveyor. The summons was dismissed by the magistrate, on the ground that the notice to treat was bad. Then, the moment the parties obtain a judgment in their favour, they withdraw their notice requiring an arbitrator to be appointed. I think they had a right to withdraw their notice requiring an arbitrator in respect of the apportionment. They say: "We are of opinion the arbitration only relates to apportionment; we give you notice that we withdraw the claim, and do not want an arbitration in respect of the apportionment. We will try to get redress, if possible, in respect of the sum total, which we say is an excessive charge on your part." There can be no arbitration in respect of the unreasonableness of the sum total of the charge. Their withdrawal of the former notice was a valid withdrawal. The local board have said, "The arbitration may relate to the sum total if you withdraw your complaint as to the apportionment, but if you keep your complaint as to the sum total, we have a right to treat it as a dispute still existing, and go to arbitration." In my opinion the board have no right to say, "There is a dispute as to the reasonableness of the sum total, we insist, whether you will or will not, upon going to arbitration." I think the appointment by one side is void, and that the award made by the arbitrator so appointed is in my opinion void. That was the opinion entertained by the magistrate. I therefore think the judgment of the magistrate ought to be affirmed.

WILLES, J.—With respect to the question, whether the original notice is valid, I concur with my Lord, assuming that the proper construction to be put on the words "expenses incurred" in the 69th section is that which my Lord has put on them. I agree in all the rest of my Lord's judgment, because those words mean, in my mind, expenses incurred to be fixed by the board of health, or by their surveyor, and the subsequent proceedings before the arbitrator relate to an apportionment of the amount only upon the persons who are liable. It is quite clear

there was no ground for the appointment of an arbitrator by the board of health on the 18th Oct., and unless that appointment was a valid one all the subsequent proceedings were void. Upon the 10th June the notice was given by the resp. that he required an arbitration, which notice was revoked upon the 14th Oct., when the resp. notified that all dispute as to the apportionment was at an end, and he only disputed his legal liability, including in those terms, as has been properly admitted on his behalf, the amount of the total of the expenses claimed to be apportioned. But if that amount was to be considered as fixed for the purpose of arbitration under the 69th section, it is clear that the notice of the 14th Oct. put an end to any dispute, and withdrew any request to refer to arbitration. Then the only question is whether the "expenses incurred" means the expenses claimed to have been incurred by the local board; or, in other words, whether the arbitrator has a right, not merely to determine the proportion which the owner is to pay, having regard to the frontage of his house, and any local circumstances affecting the expenses incurred, or to the portion of the street opposite his house, or whether he has a power to enter into the question how the whole amount charged on all the occupiers ought to be apportioned; whether he is entitled to tax the amount or to moderate it? Upon that question I have entertained some doubt, because the expenses incurred would, according to the ordinary rule of construction, mean the expenses reasonably incurred. As a rule, where a discretion is given to a public body appointed by an Act of Parliament, that is a discretion, not to be exercised according to their own private caprice, but according to the rules of law and reason. Therefore, if sect. 69 had stood alone, I should have thought that it ought to be read, "The expenses reasonably incurred by them." But I do not dissent from the opinion of the court, because I think, having reference to other sections of the Act, to which I proceed to refer, a very great light is thrown on the construction of the 69th section in this particular context. The words "expenses incurred" may not unreasonably, having regard to the duties imposed on the board of health, and having regard especially to the provisions of the 85th section, be held to mean expenses which they in the course of their duty have incurred, or thought it right to contract to pay to another. It will be found that expenses of this description are referred to in very many parts of the Act; that the expression "expenses to be incurred," except in one instance, is invariably used where the board have powers to execute works upon the default of some person who by the Act is bound to execute them or to pay the price of them. In such cases it will be found the expression invariably used is "expenses incurred." Where expenses are to be incurred by the board for doing works which they themselves are to perform, it will be found that the expressions "necessary," and so on, are used with reference to such expenses. The language of the Act varies in speaking of expenses which the board are to undergo on the part of the public, and which they are to undergo on default of the person who ought to do the work which they undertake. I think a consideration of those sections may not be out of place. The first to which I refer is the 49th, which deals with the case of a house being without a drain, and in that case a notice being given and not complied with, the board, if they think fit, are to do the work, and the "expenses incurred" by them in so doing are to be recoverable. There you have the expression of the 69th section. The same is the case in sect. 51, in dealing with the case of a house wanting a proper supply of water. The same is the case in sect. 54 with reference to drains. And now

C. B.]

BAYLEY v. WILKINSON.

[C. B.]

we come to a section dealing with other cases, sect. 57, which enacts that the board is to provide public closets, conveniences, and so on, and to defray not "the expenses incurred by them," but "the necessary expenses" out of the district rates to be levied under the Act. Therefore, in dealing with the expenses to be incurred by the public, we have a change of language. Then, passing on, you come to the 69th section, and now another change of expression is to be found, and the 71st is a section which enables the board to require gas and water pipes to be moved at the expense of the board; they are to give notice, and the expenses attendant upon or connected with any such alteration shall be paid by the local board out of the district rates. Where they are to pay some person to do work which they require, language is used which clearly means the amount of the expenses, differs from the language throughout used as to the "expenses incurred" by the board in the former case of default. The expression "expenses incurred" is again used in the 72nd and 76th sections. I pass over some sections as to expenses which are of a special character, and the next section at which I arrive is the 90th, and there they deal with private improvement rates; and where private improvements are being made, and the occupier of a house becomes liable to a special rate, then the expression is used "had incurred or become liable to," following the sections relating to default, probably not differing in substance, though differing in language. Then the only other section to which I need refer is the 85th, and that is a very special provision for preventing an abuse of the powers of the board, preventing them from giving a preference to their friends, or from entering into contracts with reference to any private favour or object which requires publicity to be given to their proceedings, and which requires that they shall not incur any expenses considerable in amount without a process such as to insure publicity and to expose their proceedings to public opinion. For these reasons, though I own I entertained and do entertain a doubt upon a decision which has the inevitable effect of vesting considerable discretion in the board of health, I do not dissent from the judgment of the court.

BYLES, J.—I am also of opinion that our judgment should be for the respas. With respect to the notice, the main objection to it is this, that the plans and specifications at large are not sent to every owner. Now that would be most unreasonable, because I see in the interpretation clause of this Act of Parliament that the word "street" applies to any roads, bridges not being public highways, lanes, footways, squares, courts, alleys, passages, whether a thoroughfare or not. It would seem, therefore, independently of the late enactment, which does not apply to this case, to be most reasonable that a general reference should be given to plans and specifications to be seen at some public office accessible to the parties interested at all reasonable hours. I think the recent enactment is very strong in favour of this notice, for it makes obligatory that which was before most reasonable and proper, and what was done in this case. The notice therefore founding the proceedings seems to me to be good. With respect to the main question, whether the jurisdiction of the arbitrator applied to anything beyond the proportions, with the great deference and respect which I always feel for any opinion of my brother Willes, I do not participate in his doubts. It will be observed that all the things which the occupiers are to do are things which they might reasonably be expected to do. An observation might be made on the word "sewerage," but on reference to the 45th section of

the Act of Parliament, I find that the board of health may, if they please, make all the district sewers themselves, and they may, if they think fit, leave to the occupiers any small sewers or drains which it may be reasonable for them to make. Then the statute says, "If you do not do the work to the satisfaction of the board of health, you will receive a notice requiring you to do so within a limited time." It is their duty, therefore, to do it within a limited time. They need not fear any partiality or any unreasonableness on the part of the board of health, because they can anticipate and prevent the board having anything whatever to do with it. If they do not do it, in order that it may not remain undone, the Act goes on and says the board may, if they think fit, execute the works mentioned or referred to therein. No limit is placed to their power in raising the sum of money and in expending the sum of money. I agree that they are to incur a reasonable sum, but who is to judge of the reasonableness? If it be said that they ought not to be the judges of the reasonableness, who else is to be? Is the arbitrator? And if it be the arbitrator and the surveyor, do the public get any security as to the reasonableness of the sum if, instead of the body at large judging of it, a servant appointed by them, to wit, the surveyor, is to judge of it? It seems to me they do not. That being so, they are to say what is to be done, and to lay out the money. I cannot help saying that I felt very forcibly the observation of Mr. Gray. Suppose they lay out 300*l.*, and it is 200*l.* more than they ought to do, how is that 200*l.* to be got back again? On whom is the loss to fall? The reasonable construction seems to me to be that, inasmuch as the ratepayers have chosen to throw this burden upon them, they must exercise it as well as they can, and that they are not responsible if they act honestly in what they do. The consequence of that is, that we should read those words according to their natural sense, that the expenses shall be paid by the owners in default, according to the frontage of their respective premises, in such proportions as may be settled by the surveyor, or in, cases of dispute by the arbitrator, having regard to all the circumstances of the case. It is not therefore a mere arithmetical computation, as was asserted by my brother Hayes, but it is a duty intrusted, and very properly intrusted, to the person, the surveyor, or arbitrator, who seems to stand in the place of the surveyor, and that being so, the arbitrator had, as it seems to me, no jurisdiction whatever except to inquire into the proportions. That being so, he was acting without jurisdiction. More than that, the defect of the jurisdiction appears on the face of the award, because it appears on the face of the award that what was submitted to him was the excess of the gross sum, and he makes his award for a less sum. He has taken that into consideration. It seems to me not only that the award was made without jurisdiction, but that the absence of jurisdiction appears on the face of it when it is made. In addition to that, before the award was made, it was revoked in terms—doubly revoked. The parties say, "We will not proceed with the arbitration further; we object to the proportions, which was the only thing the arbitrator could entertain." On these grounds it therefore seems to me that the respas. are entitled to our judgment. I regret it very much, because I cannot help thinking this is a sum which they ought to pay, and I trust they will be disappointed if they suppose that the time for payment in this, or in some other way, has elapsed.

KEATING, J.—In this case I am also of opinion that the magistrate was right on both the points which he decided. I think that the notice which

has been alluded to was good for the reasons which have been already given, to which I do not think it necessary further to advert, agreeing as I do with them all. I also think he was right that the award was bad, because I think that, reading this 69th section in the manner which has been adopted by the majority of the court, namely, that if the notice be not complied with, the local board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners. It seems, in my opinion, that means the expenses actually incurred, not the expenses which, in the opinion of an arbitrator to be appointed, might reasonably have been incurred; and it seems to me that this must be so when you consider what the object of the Legislature was. The object of the Legislature was that those works should be done. First of all it gives the option to the owners of the property to do the work; on their refusal the board may do it; and if the board were to do it at the peril of having their expenditure reviewed by an arbitrator, it would follow practically that it never would be done, because the board of health never would expend sums in the performance of works of this description, upon which we know from experience so much contradictory evidence might be given before an arbitrator, if that was to be at the peril of their expenses actually incurred being disallowed by an arbitrator. Therefore I think there is nothing strained in the construction that they should be made the judges of the proper expenditure. They are elected by the ratepayers, as has been already suggested by my lord, and they can be changed by the ratepayers if they do not properly discharge their duty; and the Legislature, in those enactments, does not assume that they will do otherwise than rightly discharge their duty. Therefore, inasmuch as the reasonableness of the expenditure, the propriety of the expenditure, is a question that must be decided by somebody, it seems to me more in accordance with the whole frame of the Act that that discretion should be exercised by the board of health, the representative body, than that it should be controlled by an arbitrator to be chosen in cases of this description. That being so, it then follows that the only matter of dispute over which the arbitrator would have jurisdiction would be to settle the proportions. That does not necessarily exclude his inquiry as to the amount actually expended upon the works in question, and therefore he would, no doubt, have to make that inquiry, but it seems to me that his jurisdiction is limited to that inquiry. It appears from the facts of the case, and, as my brother Byles has observed, upon the face of the award, that he has exceeded his jurisdiction, therefore, that the magistrate was right in holding that the award was bad. I therefore think the magistrate was right upon both the points which he has decided, and that the resps. are entitled to our judgment.

*Judgment for the resps.*

*Thursday, June 9, 1864.*

COLES (app.) v. DICKINSON (resp.)

*Factory Act—7 & 8 Vict. c. 15, s. 73—Information for employing young persons under eighteen years of age without registering name—Exception.*

*The resps. were owners of a mill at Manchester and another in Herts; the mill at the former place was worked by machinery, and was used for sorting, cleaning and breaking up of cotton waste rags and other materials, and reducing them to what was known in the trade as "half stuff," which was then sent to the mill in Hertfordshire and converted into paper:*

*Held, that the two mills were parts of one factory, and used solely for the purpose of making paper, and therefore that the mill at Manchester was within the exception mentioned in sect. 73 of the Factory Act, and that the resp. was not liable to be informed against for employing a person under the age of eighteen years without having registered his name.*

This was an appeal against the decision of the stipendiary magistrate of the city of Manchester on an information laid by the app., who is a sub-inspector of factories, against the resps., an old-established firm carrying on a very extensive business as wholesale stationers and papermakers in London, and who have paper works or mills in different parts of Hertfordshire, and also carry on one branch of their business at a mill belonging to them in Elm-street, in the city of Manchester.

The object of the information was to render Messrs. John Dickinson and Co. liable for non-compliance with the provisions of the Factory Act (7 & 8 Vict. c. 15), as amended by the 13 & 14 Vict. c. 54, intitled "An Act to amend the Acts relating to labour in factories;" and by the Act made in the 16 & 17 Vict. c. 104, intitled "An Act further to regulate the employment of children in factories," on the ground that their mill at Elm-street was a factory within the 7 & 8 Vict. c. 15, s. 73, being used for the preparing of cotton, and that it was not within the exception contained in that section, not being a factory, or part of a factory, used solely for the manufacture of paper.

Messrs. John Dickinson and Co. contended that they were not so liable, but that their Elm-street mill was within the exception, being solely used in cleaning and preparing waste and rags to be by them made into paper at their other mills in Hertfordshire, and that the Elm-street mill was, in fact, merely a branch of the Hertfordshire works.

The stipendiary magistrate, after having referred to the case of *Hoyle and Sons v. Oram*, 12 C. B., N. S., 124, which was quoted by the resps., dismissed the case.

On the application of the app., the stipendiary magistrate granted the special case now to be argued, of which the following is a copy:—

#### CASE.

Messrs. John Dickinson and Co., of Nash-mills, in the parish of Abbots Langley, in the county of Herts, who carry on the business of papermakers there and elsewhere, appeared before me, Cuthbert Edward Ellison, Esq., the stipendiary magistrate duly appointed and acting in and for the city of Manchester, on the 30th Oct. 1863, pursuant to a summons obtained against them by Robert William Coles, Esq., sub-inspector of factories, upon an information and complaint which, omitting formal parts, charged them for that on the 14th Oct. 1863, they did employ a young person, to wit, Frederick Beardsall, in a certain factory, occupied by them in the said city, without having registered his name and the date of the first day of his employment as by law required.

Upon the hearing of this information the following facts were proved:—Frederick Beardsall, the boy mentioned in the summons, was under sixteen years of age, and was employed by the resps. on the 14th Oct. 1863, at their mill in Elm-street, Manchester, and he worked there as a waste carrier, or, in other words, was employed in carrying cotton waste and rags to or from a willowing or cleaning machine previous to and after being cleaned, and his name and the date of the first day of his employment were not registered.

The resps. use steam power in their mill in Manchester for the purposes of moving machinery.

Since the mill in Elm-street, Manchester, has been established, all the material cleaned and pro-

C. B.]

BURGESS v. PEACOCK.

[C. B.]

pared has been forwarded to the resps'. Hertfordshire works and there made into paper. On no occasion has any material prepared in Manchester been sold by the resps. at that place or elsewhere, or used by them for any purpose except for that of papermaking.

In all paper works the material used for manufacture of paper is subjected to a process before being made into paper by which it is reduced into half stuff or semi-pulp, and many papermakers have establishments for the purpose of reducing their materials to this state situated at considerable distances from the mills where the manufacture is completed.

The only work done in the Elm-street mill is the sorting, cleaning and breaking up of cotton waste, rags and other material, and reducing the same into a state known to the trade as half stuff. The cotton waste so cleaned and prepared consists of the sweepings and refuse which accumulate in the course of spinning cotton, and the old materials which have been used for wiping and cleaning machinery.

For the purpose of cleaning and preparing the cotton waste and other materials the resps. employ the under-mentioned processes:

1. *Dusting*.—This process consists in the cotton waste being placed in a revolving sieve-like machine moved by steampower, which shakes the dust out of it.

2. *Picking*.—After having been dusted the cotton waste or other material is carefully picked over by hand, and all foreign substances removed from it.

3. *Willowing*.—After having been picked the cotton waste is put into a machine called a willow, within which is a revolving cylinder studded with rows of blunt iron teeth coming into contact with the cotton waste, which open the fibres and clean it.

4. *Boiling*.—After having been willowed the cotton waste is boiled with lime and alkali, for the purpose of removing the grease.

5. *Washing and grinding*.—These processes are performed with the same machine which is known as a "rag engine." This engine consists of a cistern with a middle partition, on one side of which revolves a roll fitted with steel blades that can be brought more or less in contact with the other blades fixed below, and thus shorten the staple of the cotton waste or other material, or grind it.

6. *Second washing, willowing, dusting and packing*.—Washing the cotton waste only without grinding is frequently done by the same engine. After the first boiling and washing the cotton waste is boiled a second time still further washed and ground, pressed dry with a hydraulic press, then willowed, then dusted, then willowed again, and afterwards dried and packed. These are the only processes performed by the resps. in their mill at Manchester. All of the above processes used by the resps. in cleaning and preparing their cotton waste, rags and materials, are also generally used by waste cleaners carrying on business in Manchester and elsewhere. The premises of such waste cleaners are considered to come within the Factory Acts, and are under inspection accordingly. The cotton waste and materials thus cleaned are fit for the manufacture of paper, and the same are also fit for the manufacture of wadding, or for being mixed with other cotton spun over again, and manufactured into cotton goods.

It was argued that the mill of the resps. was a factory within the 7 & 8 Vict. c. 15, s. 73, and being used for the preparing of cotton it was not within the exception, not being a factory or part of a factory used solely for the manufacture of paper.

For the resps. it was contended that this mill was within the exception, being solely used in cleaning and preparing waste and rags to be by the resps. made

into paper at their mill at Hemel Hempstead, and that the mill was in fact merely a branch of the Hertfordshire works, and the case of *Holl and Sons v. Oram*, 31 L. J., N. S., 213, was referred to.

Upon these facts, and upon the authority of the case of *Hoyle and Sons v. Oram*, I determined that the mill of the resps. was within the exception above mentioned, and dismissed the summons accordingly.

The question for the court is, whether that decision was or was not correct in point of law.

If correct, the decision will stand; if not correct, the resps. will be convicted in a penalty of 20s. and costs.

C. E. ELLISON.

Feb. 26, 1864.

The facts are contained in the above case, and need not be here repeated, except that although each of the processes employed by the resps. may be used by waste cleaners, in no instance we believe are they all used together.

The *Solicitor-General* (T. Jones with him) appeared for the app., and contended that the mill in Manchester was a factory within the meaning of the Factory Act (7 & 8 Vict. c. 15), s. 73, inasmuch as steam power was used therein to work the machinery employed in preparing cotton for the purpose of its being afterwards manufactured into paper; and that the mill was not employed solely for the manufacture of paper, and therefore did not come within the exception contained in the above section.

*Mellish*, Q. C. (*Holker* with him), who contended that the mill was used solely for the manufacture of paper and therefore came within the exception, was stopped.

*ERLE*, C. J.—In this case the magistrate decided that the mill in Manchester and the mill in Hertfordshire were two parts of one factory, and used solely for the manufacture of paper. I am of opinion that his decision was right. It appears that the mill in Manchester was used for the purpose of turning cotton waste into "half stuff," which was then sent to the mill in Hertfordshire to be converted into paper, and that such process is a step in the manufacture of paper. The case of *Hoyle v. Oram* decides that the distance between the two mills is entirely immaterial. We have nothing to do with the reasons which actuated the Legislature in deciding that these penal provisions shall not apply to factories used solely for the manufacture of paper. This mill being used solely for the manufacture of paper comes within the exception and the person in question being employed in its manufacture, I think the magistrate was right in deciding as he did.

WILLIAMS, WILLES and BYLES concurred.

*Decision affirmed.*

Attorney for app., *Solicitor to the Treasury*.

Attorney for resps., N. C. Milne.

Saturday, June 11, 1864.

BURGESS v. PEACOCK (Clerk to the Local Board of Health for the District of Barnsley).

*Public Health Act 1848—Local Government Act 1858*  
—Power of local board of health to make bye-laws affecting buildings existing at date of constitution of district.

*A local board of health has no power under sect. 34 of the Local Government Act 1858 to make a bye-law relating to buildings erected before the date of the constitution of the district, and to the closing of such buildings when unfit for human habitation and to the prohibition of their use for such habitation.*



C. B.]

BURGESS v. PEACOCK.

[C. B.]

The declaration stated that the plt. sued the deft. as clerk to the local board of health for the district of the township of Barnsley, in the West Riding of the county of York—

For that the said local board on or about the 18th Aug. 1863 broke and entered the dwelling-house of the plt. situate at Pogmoor in the district of the said township of Barnsley in the county aforesaid, and unlawfully procured and caused to be affixed in and upon a conspicuous part of the said dwelling-house a certain printed placard stating that the said dwelling-house was unfit for human habitation, and kept and continued the said placard affixed thereto for a long time, whereby the plt. was compelled to quit the said dwelling-house, and was put to great expense and inconvenience.

And also for that the said local board on or about the 29th Aug. 1863 broke and entered the said dwelling-house of the plt. and ejected him therefrom, and prevented and hindered him from continuing to occupy the same, and the plt. has been and still is prevented from continuing to occupy the said dwelling-house by the said unlawful and illegal acts and proceedings of the said local board, and the said house has since in consequence of the proceedings of the said local board remained untenanted and uninhabited.

The deft. pleaded not guilty, by statute 11 & 12 Vict. c. 63, s. 189 (public); 21 & 22 Vict. c. 98, s. 4 (public); 16 Vict. c. 24, ss. 1 and 2 (public).

Notice of action had been served on the deft. on the 29th Dec. 1863, a month before the issuing of the writ.

At the trial before Blackburn, J., at the last assizes at York, it appeared that there was no dispute between the parties as to the facts, the only dispute being as to the power of the local board of health to make a bye-law affecting buildings erected before the constitution of the township of Barnsley into a district. The plt.'s house was erected before the year 1853, in which year a local board of health was established for the district of the township of Barnsley under the provisions of 11 & 12 Vict. c. 63 (the Public Health Act 1848). By an Act of Parliament (16 Vict. c. 24) entitled "The Public Health Supplemental Act 1853," a provisional order set out in the schedule and made by the General Board of Health for the application of the Public Health Act 1848 to the district of Barnsley, was confirmed and made of like force as if expressly enacted in that Act.

By sect. 84 of the Local Government Act 1858 (21 & 22 Vict. c. 98), declared by sect. 4 to form part of and be construed with the Public Health Act 1848, it was enacted that the 53rd and 72nd sections of the Public Health Act 1848 should be repealed, and in lieu thereof it should be enacted as follows:

Every local board may make bye-laws with respect to the following matters (that is to say):—1. With respect to the level, width and construction of new streets and the provisions for the sewerage thereof. 2. With respect to the structure of walls of new buildings for securing stability and prevention of fire. 3. With respect to the sufficiency of space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings. 4. With respect to the drainage of buildings to water-closets, privies, ash-pits and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation. And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done, in contravention of such bye-laws: Provided always that no such bye-law shall affect any building erected before the date of the constitution of the district. But for the purposes of this Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the framework shall be left down to the ground-floor, or of the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building.

The local board for the district of Barnsley thereupon made bye-laws, in the manner prescribed by the Public Health Act 1848, and the Local Government Act 1848, which bye-laws were approved by the Home Secretary on the 31st March 1860.

Bye-law 27 was as follows:

In any case where it is certified to the local board of health by the officer of health of the district, if any, by the surveyor, by the inspector of nuisances, or by any two medical practitioners, that any building or part of a building is unfit for human habitation, the local board of health may, by their order affixed conspicuously on the building or part of the building, declare that the same is not fit for human habitation, and shall not, after a date to be therein specified, be inhabited, and any person who after the date mentioned in such order, lets or occupies, or continues to let or occupy, or knowingly suffers to be occupied such building or part of a building, shall be liable for every such offence to a penalty not exceeding 20s. for every day during which the same is so let or occupied. Provided always, that if at any time after such order made the local board of health shall be satisfied that such house has become or rendered fit for human habitation, they may revoke their said order, and the same shall thenceforward cease to operate.

On the 23rd June 1863, at a meeting of the local board, a resolution was passed ordering the officer of health to inspect the plt.'s house and report to the board whether it was fit for human habitation. The officer of health having made his inspection accordingly, reported that it was not fit for human habitation.

On the 21st July 1863 the local board passed a resolution that the board should give the proper order declaring the house unfit for human habitation, and at a meeting of the board, held on the 18th Aug. 1863, the following notice was signed and sealed by the board:

Barnsley Local Board of Health.

Whereas our officer of health has certified to us in writing that the dwelling-house situate at Pogmoor, within the district of the township of Barnsley, in the county of York, belonging to George Wilke, and in the occupation of Samuel Burgess, is unfit for human habitation. Now we, the said local board of health for the said district do by this order, affixed conspicuously on the said dwelling-house, declare that the same is not fit for human habitation, and that the same shall not be inhabited after the 29th day of Aug. instant.

And we do hereby give notice that any person who, after the said 29th day of Aug. instant, lets or occupies, or continues to let or occupy, or knowingly suffer to be occupied the said dwelling-house, will be liable to a penalty not exceeding 20s. for every day during which the same dwelling-house shall be so let or occupied.

This notice, duly signed and sealed, was affixed on the outer and only door of the plt.'s dwelling-house on the same day; and on the 29th Aug. the plt. left the house and it remained unoccupied down to the commencement of the action.

These facts being admitted at the trial, the plt. denied the power of the local board to make any bye-laws entitling them to declare unfit for human habitation a building erected before the date of the constitution of the district. Assuming, however, that the bye-law was authorised by the Act of Parliament, it was admitted by the plt. that all the proceedings of the board had been regular, with the exception that the plt. contended that notice and an opportunity of being heard ought to have been given to him before the order was made by the board. Blackburn, J. directed a nonsuit, giving the plt. leave to move to enter a verdict for him for five guineas. A rule nisi having been obtained accordingly,

*Manisty, Q.C. and Kemplay* showed cause.—The proviso that "no such bye-law shall affect any building erected before the date of the constitution of the district," applies only to bye-laws containing the stringent powers of removing and pulling down houses which are given to the local board by the part of sect. 34, which immediately precedes the proviso. Although the Legislature gives power to pull down new buildings, they decline to give the same power with respect to old buildings. Nothing can be more reasonable than this bye-law, and the beneficial effect of the Act will be in a great measure prevented if the power of the local board is thus restricted:

*Shiel v. The Mayor, Aldermen and Burgesses of Sunderland*, 6 H. & N. 796.



C. B.]

REG. v. BULMER.

[C. CAS. R.]

*Ocerend, Q.C., Field, Q.C. and Maule* supported the rule.—Sect. 34 of this Act is enacted in lieu of two repealed sections, which are both prospective, and this gives a clue to the intention of the Legislature in this enactment, that it was intended to be prospective also, and not to affect existing buildings. It cannot be that the proviso was intended as a limitation to the powers given by the words immediately preceding it, as contended by the *defts.*, because those powers obviously apply only to new buildings, and therefore the proviso would be unnecessary.

ERLE, C.J.—I am of opinion that the bye-law 27 constituted no defence for the *deft.*, and therefore that our judgment ought to be for the *plt.* The *plt.*'s house was erected before the date of the constitution of the district, and the bye-law, under which the *defts.* acted, provides for the closing of buildings which are unfit for human habitation. The local board of health have power, under sect. 34 of the Local Government Act 1858, to make bye-laws respecting the closing of houses unfit for human habitation; but the wide words of that part of the section which give them that power are controlled by a proviso; and giving effect to the plain words of the section and the proviso, it seems to me that the local board had no power to make a bye-law empowering them to close an old building. I am much pressed by a scruple lest, in giving this interpretation to the words of the statute, I should be obstructing the sanitary operation of the statute, for the power claimed by the local board would, if executed with fairness, produce a good effect, and the local board having to act on a wide district, full of old buildings, I am very anxious not to limit their authority. But I find powers given in different parts of the Act, and several already exist at common law, to prevent any persons from being a nuisance to any other persons in their neighbourhood; and, on the other hand, the Legislature might be disposed to be extremely cautious in taking away legal rights vested in legal owners of property. Where, however, an owner chooses to lay out his capital in places affected by bye-laws of a local board of health it is reasonable that he should be subject to the powers contained in them. I am confirmed in this view on looking to the repealed enactments for which this section is substituted, and am clearly of opinion that the proviso at the end of the section was intended to limit the authority of the local board in making bye laws, and that they had no power to make a bye-law applying to an old house.

WILLIAMS, J.—I am of the same opinion. The ordinary grammatical construction of the section and proviso is confirmed by the context. If the *defts.*' contention were right and the proviso applied only to bye-laws containing the specified provisions made for their observance, classes of the matters with respect to which bye-laws are authorised to be made would be left perfectly unfettered and include buildings erected either before or after the constitution of the district. This would be a harsh power to confer upon the local board, having regard to the rights of parties who erected buildings before the consideration of what is healthy and what is not healthy received the attention which it now does. In the second place, if the *defts.*' interpretation were the correct one, the proviso would be useless, not to say senseless, for the authorised provisions for the observance of the bye-laws necessarily apply to matters arising after the constitution of the district. Lastly, the *defts.*' interpretation would make the clause at the end of the section beginning with the words "But for the purposes of this Act," useless if not senseless. According to the *plt.*'s construction, the bye-laws are not to apply to existing

buildings, and then this clause narrows the immunity of existing buildings by enacting that buildings pulled down and rebuilt, or buildings converted into human habitations, shall be considered as new buildings. But if the *defts.*' construction were the correct one, and the local board already possessed an absolute power of making bye-laws respecting both old and new buildings, these words, which enlarge what was absolute before, are useless.

WILLES and BYLES, JJ. concurred.

*Rule absolute.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, June 4, 1864.

(Before COCKBURN, C. J., WILLIAMS, J., MARTIN, B., CROMPTON, J. and BRAMWELL, B.)

REG. v. BULMER.

*False pretences—Evidence—Larceny—24 & 25 Vict. c. 96, s. 88.*

*An indictment for false pretences alleged that the prisoner pretended he was the servant of Mr. Hardman, and was sent to buy a horse for him, whereby the prisoner unlawfully obtained a horse from the prosecutor. The evidence was, that the prisoner represented himself as the servant of Mr. Hardman, but the prosecutor's son, confounding the name with that of Harding, a person whom he knew, said in the prisoner's presence to his father, "I am going to sell the horse to Mr. Harding," whereupon the prisoner adapted his story to meet that belief of the prosecutor and his son, and so obtained the horse:*

*Held, that a conviction could not be sustained, as the pretence by which the horse was obtained was, that the prisoner was the servant of Mr. Harding, and that was not averred in the indictment.*

*To prevent a prisoner indicted for false pretences from being acquitted on the ground that the offence is that of felony (24 & 25 Vict. c. 96, s. 88) the false pretences laid must be proved, for under the statute he is to be found guilty of the misdemeanor.*

Case reserved for the opinion of this Court by the Recorder of Newcastle-on-Tyne.

The prisoner was tried before me at the last General Quarter Sessions for the town and county of Newcastle-upon-Tyne, on a charge of obtaining a horse by false pretences.

The indictment ran as follows:—

Newcastle-upon-Tyne (to wit).—The jurors for our Lady the Queen upon their oath present that George Bulmer, on the 30th March 1864, unlawfully, knowingly and designedly did falsely pretend to one James Henderson the younger, that he the said G. Bulmer was the servant of one William Hardman, of Stickleby, in the county of Northumberland (the said W. Hardman then and long before being well known to the said J. Henderson the younger), and that the said G. Bulmer was then sent by the said W. Hardman to buy a horse for the said W. Hardman, by means of which said false pretences the said G. Bulmer did then unlawfully obtain from the said J. Henderson the younger, a certain horse, with intent thereby then to defraud; whereas in truth and in fact the said G. Bulmer was not then the servant of the said W. Hardman; and whereas in truth and in fact the said G. Bulmer was not then or at any other time sent by the said W. Hardman to buy a horse for the said W. Hardman; to the great damage and deception of the said J. Henderson the younger, to the evil example of all others in the like case offending, against the form of the statute, &c.

The following are the principal facts that were proved in evidence:—

James Henderson, of Denton Burn, had a mare for sale at the horse fair in Newcastle, on Wednesday, March 30. The prisoner went up to him and asked if the mare was for sale. "Yes." "What price?" "12l." "Where do you come from?" "Denton

Burn." "The same place," said the prisoner, "that my governor is from." "Who is he?" "Mr. Hardman; he lives at Stickley Farm." "What does your master want her for?" "To drive in a waggonette and ride occasionally."

Henderson knew no person of the name of Hardman, of Stickley Farm, but he had known very well a gentleman named Harding, who had lived some time previously at Benwell Lodge, about ten miles from Stickley.

Henderson and the prisoner then went into the Sun Inn, where Henderson's father joined them. Henderson said to his father, "I am going to sell a horse to Mr. Harding of Benwell Lodge," upon which his father remarked to the prisoner, "He does not live there now." "No," said the prisoner; "he lives now at Stickley Farm." "How long is it since he went there?" The prisoner turned about, gave a bow of his head and no answer.

After some bargaining, during which the prisoner expressed his great wish that his master should see the mare, Henderson agreed to take 1*l.* for the loss of the fair, and it was arranged that the prisoner should take the mare home to his master, and meet Henderson next day at the Sun Inn to pay the agreed price, *videlicet*, 12*l.* The prisoner, according to Henderson, then said, "You must give me a note of the price for my master to see." To this Henderson agreed, and he wrote out and signed the following memorandum, which the prisoner dictated:

George Bulmer bought of James Henderson a brown horse for the sum of 12*l.*, to be paid at the Sun Inn at eleven o'clock on March 31. JAMES HENDERSON, Butcher.  
Denton Burn.

The prisoner then paid Henderson 1*l.*, and the mare was handed over to him.

Henderson was pressed upon cross-examination as to whether this 1*l.* was not paid on account of the purchase-money; but he positively swore that the 1*l.* was paid as the consideration for his giving up the chance of a better price at the fair. In answer to further questions he said, that if the prisoner had met him at the Sun Inn and paid the money next day it would have been all right; but he added that he never would have parted with the mare at all, or accepted the 1*l.*, or signed the memorandum or agreed to meet at the inn, but in the belief that the prisoner was the servant of Mr. Harding, late of Benwell Lodge, and was purchasing the mare for his master.

Mr. Hardman, of Stickley Farm, was called and proved that the prisoner was not his servant, or in any way authorised by him to buy the mare, and that the prisoner lived a mile and a half from his farm.

It was proved that there was no other Hardman or Harding at Stickley, and that Mr. Hardman, of Benwell Lodge did not reside at or near Stickley Farm.

A few hours later on the same evening, March 30, the prisoner sold the mare in the fair for 6*l.*, having first asked 9*l.* for her. She was resold for 8*l.* 12*s.* 6*d.* the same night, and next day was offered to Henderson himself by a third owner for 16*l.*

The prisoner never appeared at the Sun Inn; and on Friday, April 1, was taken into custody.

On the warrant being read, which charged him with obtaining a horse by false pretences from J. Henderson, he said, "Is that all?" and afterwards added that he bought the horse, producing the document above mentioned as a voucher for his statement.

At the close of the case for the prosecution, Mr. Blackwell, the counsel for the prisoner, submitted to me:

First, that, looking to the memorandum signed by the prisoner, to the payment of the 1*l.*, and to the admission of the prosecutor that it would have been

all right if the prisoner had met him at the inn and paid the money, the evidence showed that the prosecutor had sold the mare to the prisoner, and having taken the risk of parting with her on the understanding that the price should be paid next day, there was no case to go to the jury. He referred to *Reg. v. Dale*, 7 C. & P. 352.

Secondly, that the evidence did not support the false pretences laid in the indictment, inasmuch as the prosecutor admitted he parted with the mare in the belief that the prisoner was the servant of Mr. Harding of Benwell Lodge, whereas the pretence proved was, that he was the servant of Mr. Hardman, of Stickley Farm, and the innuendo as to the said W. Hardman being very well known to the prosecutor was, in fact, disproved.

I overruled both objections, holding, as to the first, that it was a question for the jury whether the prosecutor would have parted with the mare at all, or agreed to have met at the Sun Inn, if he had not believed that the prisoner was a servant acting for his master in the transaction; and, as to the second objection, holding that, if the jury thought the pretence as to W. Hardman, of Stickley, being the prisoner's master was false, and that it led the prosecutor to part with his mare even under a misapprehension as to the identity of the master referred to, they might convict the prisoner under the present indictment.

I then called the attention of the prisoner's counsel to the Criminal Law Consolidation Act, 24 & 25 Vict. c. 96, s. 88, "Provided that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor."

Upon this it was submitted that there was not sufficient evidence, had this been an indictment for larceny, to justify a conviction for felony; and, secondly, that though the Act provided that the prisoner "should not be acquitted," the jury would not be justified in returning a general verdict of guilty under this indictment, if they thought the false pretences were not proved as laid.

I held that they might, and that the Act was intended to apply to such a case as the present, and that it was for the jury to say whether the prisoner acted *bona fide*, or whether he had from the first fraudulently designed to deprive the owner of his mare and appropriate her to his own use, for that if the whole proceeding on his part was a trick and contrivance to deprive the owner of his property and possession of the mare, that would be enough to support a conviction for larceny: (*Reg. v. Shepherd*, 9 C. & P. 121.) The learned counsel then addressed the jury on behalf of the prisoner.

In summing up I directed the jury according to the above ruling. The jury after some deliberation found a verdict of guilty, and in answer to a question from me they said they found the prisoner guilty of obtaining the mare by the false pretences laid, and further that, taking my ruling as to the law, they thought the facts amounted to a larceny by the prisoner.

Bail not having been tendered, I sentenced the prisoner to six months' imprisonment with hard labour, which he is now undergoing.

Being requested in the course of the argument to reserve a case for the Court of Criminal Appeal, I consented to do so; and the question for the Court I respectfully submit is, whether the prisoner has been properly convicted.

W. DIGBY SEYMOUR, Recorder.

No counsel was instructed for the prisoner.

*Gainsford Bruce* for the prosecution.—First, on the facts in this case and the finding of the jury, that

C. CAS. R.]

REG. v. COLLINS AND OTHERS.

[C. CAS. R.]

this was a larceny, the conviction may be sustained under the 24 & 25 Vict. c. 96, s. 88. [CROMPTON, J.—The enactment does not say that if any larceny is proved he is not to be acquitted of the misdemeanor; but, that if you prove the misdemeanor as it is laid in the indictment, the prisoner is not to be acquitted because the case amounts to a larceny.] Secondly, as to the false pretences, it is submitted that, although the prisoner subsequently altered his story to meet the prosecutor's misconception that he was dealing with Mr. Harding's servant, nevertheless he also made the false representation that he was Mr. Hardman's servant, and the jury must be taken to have found that that led the prosecutor to part with the horse; and if so, the conviction may be supported. [COCKBURN, C. J.—There was plenty of false pretences, if rightly charged in the indictment. The false pretence which operated on the prosecutor's mind, and led him to part with his property, must be properly laid and proved. It is plain that the prosecutor confounded the name of Harding with that of Hardman, used by the prisoner, who, seeing that, adapted his story to meet that, and it was the representation that he was Mr. Harding's servant which led the prosecutor to part with his horse. But, unfortunately, the indictment makes the pretence that he was Mr. Hardman's servant the inducing cause of the prosecutor's parting with the horse. BRAMWELL, B.—On this indictment, if the averments were true, the seller would have a right to look to Mr. Hardman as liable for the price, whereas he intended to sell the horse to Mr. Harding, and to hold him liable.] Supposing the indictment not proved, the prisoner may be convicted of larceny. [MARTIN, B.—No. My brother Crompton has given the true reading of the section. CROMPTON, J.—The prisoner is to be convicted of the misdemeanor, not of larceny.]

WILLIAMS, J.—I feel great difficulty in concurring with the judgment of the court.

Conviction quashed.

REG. v. COLLINS AND OTHERS.

*Attempt to commit larceny.*

*In order to convict of an attempt to commit larceny, it must appear that there was property in the place where the attempt is made that could be stolen.*

*Therefore, where a person put his hand into the pocket of another with intent to steal, he cannot be convicted of an attempt to steal, unless it appear that there was property in the pocket which might be stolen.*

*It should be left to the jury to say whether there was any property in the pocket.*

Case reserved for the opinion of this Court by the Deputy-Assistant Judge at the Middlesex Sessions.

The prisoners were tried before me at the Middlesex Sessions on an indictment which stated that they unlawfully did attempt to commit a certain felony; that is to say, that they did then put and place one of the hands of each of them into the gown pocket of a certain woman, whose name is to the jurors unknown, with intent the property of the said woman in the said gown pocket then being from the person of the said woman to steal, &c.

The evidence showed clearly that one of the prisoners put his hand into the gown pocket of a lady, and that the others were all concerned in the transaction. The witness who proved the case said on cross-examination that he asked the lady if she had lost anything, and she said "No."

For the defence it was contended that to put a hand into an empty pocket was not an attempt to commit a felony, and that as it was not proved affirmatively that there was any property in the pocket at the time, it must be taken that there was

not, and as larceny was the stealing of some chattel, if there was not any chattel to be stolen, putting the hand in the pocket could not be considered as a step towards the completion of the offence.

I declined to stop the case upon this objection, but as such cases are of frequent occurrence I thought it right that the point should be determined by the authority of the Court of Criminal Appeal.

The jury found all the prisoners guilty, and the question upon which the opinion of your Lordships is respectfully requested is, whether under the circumstances the verdict is sustainable in point of law.

The prisoners are in custody awaiting sentence.

JOSEPH PAYNE, Deputy-Assistant Judge.

*Poland for the prisoners.*—The conviction is bad. It is not an indictable offence to put your hand into an empty pocket with intent to steal, but an offence punishable only under the Vagrant Act. It is not alleged in the indictment that there was any property in the pocket. This is very like the case of *Reg. v. M'Pherson*, 1 Dears. & B. 197, where it was held that a man who was charged with breaking and entering a dwelling-house and stealing certain specified goods could not be convicted unless the specified goods were in the house, notwithstanding other goods were there. [COCKBURN, C. J.—That case proceeds on the ground that you must prove the property as laid.] In the course of the argument Bramwell, B. put this very case, and said: "The argument that a man putting his hand into an empty pocket might be convicted of attempting to steal appeared to me at first plausible; but supposing a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be?" So in *Rex v. Scudder*, 3 C. & P. 605, it was held that there could not be a conviction for administering a drug to a woman to procure abortion, if it appear that the woman was not with child at all. That case was before the Consolidation Act, 24 & 25 Vict. c. 100, s. 58. [BRAMWELL, B.—You may put this case. Suppose a man takes away an umbrella from a stand with intent to steal it, believing it not to be his own, but it turns out to be his own, could he be convicted of attempting to steal?] It is submitted that he could not.

*Metcalf* for the prosecution.—The fallacy in the argument on the other side consists in assuming that it is necessary to prove anything more than an attempt to steal. The intent to steal is conceded is not sufficient, but any act done to carry out the intent, as putting the hand into the pocket, will do. [CROMPTON, J.—Suppose a man were to go down a lane armed with a pistol, with the intention to rob a particular person, whom he expected would pass that way, and the person does not happen to come, would that be an attempt to rob the person?]

COCKBURN, C. J.—We are all of opinion that this conviction cannot be sustained, and in so holding it is necessary to observe that the judgment proceeds on the assumption that the question, whether there was anything in the pocket of the woman which might have been the subject of larceny, does not appear to have been left to the jury. The case was reserved for the opinion of this court on the question, whether, supposing a person to put his hand into the pocket of another for the purpose of larceny, there being at the time nothing in the pocket, that is an attempt to commit larceny. We are far from saying that, if the question, whether there was anything in the pocket of the woman had been left to the jury, there was not evidence on which they might have found that there was, and in which case the conviction would have been affirmed.

But, assuming that there was nothing in the pocket of the woman, the charge of attempting to commit larceny cannot be sustained. This case, we think, is governed by that of *Reg. v. M'Pherson*, and that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged. In this case, if there was nothing in the pocket of the prosecutrix in our opinion the attempt to commit larceny cannot be established. It may be illustrated by the case of a person going into a room, the door of which he finds open, for the purpose of stealing whatever property he may find there, but finding nothing in the room, in that case no larceny could be committed, and therefore no attempt to commit larceny could be committed. In the absence, therefore, of any finding of the jury in this case, either directly or inferentially by their verdict, that there was any property in the pocket of the prosecutrix, we think that this conviction must be quashed.

— Conviction quashed.

#### REG. v. JOHN GLOVER.

*Embezzlement—Relation of master and servant—County Court bailiff.*

*A County Court bailiff was indicted for embezzling moneys of the prosecutor, the high bailiff. The moneys embezzled were received on levies under County Court processes:*

*Held, that the charge could not be sustained, as the relation of master and servant did not exist between the bailiff and high bailiff, nor was the bailiff bound to pay over the moneys to him.*

Case reserved for the opinion of this Court at the Oxfordshire General Quarter Sessions.

The indictment contained three counts:

The first count charged that, on the 3rd Sept. 1863, the prisoner being then employed as servant to the prosecutor, did, by virtue of such his employment, then and whilst he was so employed, receive and take into his possession certain money, to the amount of 12s. 3d., for and in the name and on account of the prosecutor his master, and did then fraudulently embezzle the said money; and that the prisoner did feloniously steal, take and carry away the said money, the property of the prosecutor, from him his master as aforesaid, against the form of the statute, &c.

The second count charged that the prisoner afterwards, and within six calendar months, &c., to wit, on the 1st Oct. 1863, being the servant to the prosecutor, embezzled 1l. 1s. 2d. (as in the first count).

And the third count charged a similar embezzlement of 3l. 6s. 9d. on the 11th Oct. 1863.

The prisoner pleaded to the indictment generally, not guilty. On the trial the jury found him guilty; but the justices, before whom the case was tried, reserved for the consideration of the Court of Criminal Appeal the following question of law, which arose on the trial, and judgment was postponed and the prisoner discharged on recognisance of bail to appear and receive judgment.

Question: Whether the prisoner was the servant of the prosecutor within the provisions of the statute 24 & 25 Vict. c. 95, ss. 68 and 71?

The evidence was as follows:—That the prosecutor being high bailiff of the Witney County Court, appointed the prisoner (by the allowance of the judge of the court, and under the provisions of the statute 9 & 10 Vict. c. 95, s. 31), to be one of the bailiffs to assist the high bailiff.

That the prisoner in his official capacity received the three sums mentioned in the indictment, being the amounts of three levies received by virtue of

processes issued out of the court, and that he neglected to pay over the amounts to the registrar of the court, but embezzled them, and that consequently the prosecutor was held responsible to the County Court.

By virtue of the above Act, s. 31, the high bailiff may at his pleasure dismiss a bailiff; and the prosecutor had in this case (subsequently to the appropriation of the three sums of money) dismissed the prisoner; and every bailiff so appointed may also be suspended or dismissed by the judge. And by sect. 33, the high bailiff is entitled to receive all fees and sums of money allowed by the Act in the name of fees payable to the bailiff, out of which the high bailiff is to provide for the execution of the duties for which such fees are allowed, and for the payment of the assistant bailiffs according to a scale, and the high bailiff is to be responsible for all the acts and defaults of himself and of the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers.

Rule 31 of the Statutory Rules of Practice of the court is as follows:

Every bailiff levying or receiving any money by virtue of any process issuing out of the court of which he is bailiff shall, within twenty-four hours from the receipt thereof, pay over the same to the registrar of such court, and shall file such process and retain the same in his custody.

Although the prosecutor was answerable for the acts of the prisoner, and for all moneys not paid into court by him, yet, as the sums in question ought, under the above rule, to have been paid to the registrar of the court, the question arose whether the prisoner was in law the servant of the prosecutor as laid in the indictment.

The statute 9 & 10 Vict. c. 95, s. 116, provides:

That if any bailiff of the court shall be charged with not duly paying or accounting for any money levied by him, under the authority of this Act, it shall be lawful for the judge to inquire into such matter in a summary way, and for that purpose to summon and enforce the attendance of all necessary parties, in the like manner as attendance of witnesses in any case may be enforced, and to make such order thereupon for the repayment of any money so levied as aforesaid, and for the payment of such damages and costs, as he shall think just, and also if he shall think fit to impose such fine upon the bailiff, not exceeding 10l. for each offence, as he shall deem adequate, and in default of payment of any money so ordered to be paid, payment of the same may be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the said court.

HUGH HAMERSLEY, Chairman.

No counsel appeared for the prisoner.

*Sleigh* for the prosecution.—The conviction is good. The relation of master and servant existed in this case. The high bailiff appoints the bailiff, and has power to dismiss him: (9 & 10 Vict. c. 95, s. 31.) The power given to the judge of the County Court by sect. 116 of the 9 & 10 Vict. c. 95, to inquire into the bailiff's conduct and fine him has reference to defaults arising out of mere negligence and carelessness and not to a case of felony. A servant is a person who is employed by another, and bound to obey the orders of another. [COCKBURN, C.J.—The bailiff is bound to obey the orders of the court. CROMPTON, J.—If the high bailiff were to tell the bailiff not to pay over moneys levied by him to the court, and he were to obey, the bailiff might be punished by the court for not paying them over.] It is submitted that the bailiff is the servant of the high bailiff, although he is also required by the County Court rules to pay over moneys levied or received under process to the registrar.

COCKBURN, C.J.—Even if it were made out, which I think it is not, that the bailiff is the servant of the high bailiff, he was not bound to pay over these moneys to his master. But as he was not the servant of the high bailiff, and this was not the money

Q. B.]

LATHAM AND OTHERS v. THE QUEEN.

[Q. B.]

of the high bailiff, the conviction must be quashed. He was anything but the servant of the high bailiff, and by the statutory rule of practice he was bound to pay the moneys to the registrar.

CROMPTON, J.—Even in the case of a bound bailiff to the sheriff, the bailiff is not answerable criminally. I never heard of a prosecution against a bound bailiff in a case like this. The bailiff is the officer of the court, and he was not bound to pay these moneys to the high bailiff.

The rest of the Court concurring,

*Conviction quashed.*

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Saturday, June 4, 1864.

LATHAM AND OTHERS v. THE QUEEN (in error).

*Indictment—Error—Two counts and judgment on one only—Quarter sessions—Jurisdiction—Conspiracy.*

*The plts. in error were indicted at the quarter sessions upon an indictment containing two counts, one for obtaining money by false pretences, and the other for a conspiracy, by divers false pretences, to defraud the prosecutor of his money. They were found guilty upon the second count only, and upon a writ of error the record, though it set out the finding and judgment upon such second count, was wholly silent as to any finding or judgment upon the first count:*

*Held, that the finding and judgment upon such second count was good.*

*By the 5 & 6 Vict. c. 38, s. 1, the quarter sessions are prohibited from trying any persons for conspiracies, except conspiracies to commit any offence which the sessions have jurisdiction to try when committed by one person:*

*Held, that a count charging the defts. with conspiring, by divers false pretences, against the form of the statute in such case made and provided, the said A. B. of his money to defraud, sufficiently showed a conspiracy within the jurisdiction of the quarter sessions.*

*This was a writ of error upon a conviction of the defts. upon an indictment.*

It appeared that the defts. were indicted at the Lancashire Quarter Sessions holden at Salford, and the indictment contained two counts: first, a count for obtaining money by false pretences; secondly, a count for a conspiracy to obtain such money, the material part of such second count being as follows:

That the said Benjamin Latham, &c., being evil disposed persons, and contriving and intending to defraud the said Richard Bealby of his money, unlawfully, knowingly and designedly did amongst themselves combine, conspire, confederate and agree together, by divers false pretences, against the form of the statute in that case made and provided, the said Richard Bealby of his money to defraud, against the form of the statute in that case made and provided.

At the trial the jury found the defts. guilty upon the second count only, and they were accordingly sentenced.

The record, as made up and returned into this court, contained the proper averment as to the conviction of the defts. upon such second count, but was quite silent as to the result of the first count, containing no averment of acquittal upon such count.

By the 5 & 6 Vict. c. 38 (the Quarter Sessions Jurisdiction Act), s. 1, it is enacted that

Neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough shall, at any sessions of the peace, or at any adjournment thereof, try any person for (*inter alia*) unlawful combinations and conspiracies, except conspiracies or combina-

tions to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person.

Cottingham now appeared for the defts. (plts. in error), and contended, first, that the record was bad, inasmuch as the defts., being convicted alone upon the second count, it takes no notice of their acquittal upon the first count, for that being convicted only upon the second count, they were entitled to have an entry of acquittal upon such first count, and that by such omission, if again indicted for the offence contained in such first count, they would be unable to plead either *autrefois acquit* or *autrefois convict*:

*R. v. Hayes*, 2 Ld. Raym. 1518;

*O'Connell v. The Queen* (in error), 11 Cl. & Fin. 295-G (Parke, B.)

Secondly, that as the quarter sessions have only a limited jurisdiction in cases of conspiracy, it should appear upon the record that the conspiracy was one which they had a right to try, and that in the present case it did not so appear, for that the conspiracy set out in the record of the indictment might be to do some act not indictable at quarter sessions, such as to defraud as a bankrupt, and that therefore the nature of the fraud ought to have been set out, that the court might see that there was jurisdiction: (*Reg. v. Jones*, 1 Dear.) Thirdly, that it was not averred on the record that the defts. were present when judgment was pronounced, actual presence being requisite, though the case was one of misdemeanor, corporal punishment being awarded:

1 Chit. Crim. Law, 696, 720.

*Campbell Foster*, contra (who was directed to confine his arguments to the first objection only), argued that, there being a good count upon which judgment was passed, it was immaterial that there were other counts which were passed over in silence, for that separate counts in an indictment stand upon the footing of separate indictments, and it is no objection that no judgment is given upon one, if a right judgment is given upon others, and that at any future time the omission can be supplied if necessary:

*Peak v. Oldham*, Cowp.;

*O'Connell v. The Queen*, Tindall's judgment, 255;

*Holloway v. The Queen*, 2 Den. 295;

*Gregory v. The Queen*, 15 Jurist.

Cottingham in reply.

BLACKBURN, J. (a)—I think that in this case the Crown is entitled to judgment. There were in this indictment two counts, and the jury ought regularly to have pronounced a verdict on both. No doubt, in fact, the verdict was one of guilty on the second count and of not guilty upon the first count; and it is by a misprision of the clerk who drew up the record that the first count is untouched. If in due time an application to amend had been made, it would have been set right, and even now, if any inconvenience should arise to the prisoners with reference to future proceedings, it may be amended. At present I cannot speculate upon that. Then comes the question as to the effect of the omission upon the finding of the jury. As to that, where there is an issue which the jury have to try, and they imperfectly dispose of it, the court will award a *venire de novo*. We need not, however, inquire into that, for here there has been no imperfect finding. But when there are two counts in an indictment, they are to all intents and purposes two separate indictments, and the finding upon them would be as though they were separate indictments. An imperfect finding upon a count might be a ground for a *venire de novo*; but if there is

(a) Cockburn, C. J. and Crompton, J. were sitting in the Court for Crown Cases Reserved.

Q. B.]

REG. v. THE COMMISSIONERS OF METROPOLITAN POLICE.

[Q. B.]

a good finding upon a good count, why may a deft. not be convicted upon that? There is nothing that I can see in principle against it. It is said that the question is concluded by authority, and one case is cited from Lord Raymond. [His Lordship here referred to the case, and continued:] But I think that case has no bearing upon the present one. An indictment has no analogy to a civil claim where the claim is entire, whereas in a criminal case each count is in effect a separate indictment. In *O'Connell v. The Queen*, Lord Wensleydale, then Mr. Baron Parke, shows that this was his view in his judgment at page 296. I certainly cannot see why the judgment upon one count should not be supported merely because there is no judgment upon another. The second question is, as to whether or not the second count (for the conspiracy) sets out an offence within the jurisdiction of the court of quarter sessions? It is a count for a conspiracy. [His Lordship here read the count.] The object of the conspiracy is stated to be to defraud the prosecutor of his money, and the objection is, that inasmuch as the quarter sessions have only a limited jurisdiction in cases of conspiracy, the count should set out the facts of the fraud so as to show whether the offence came within its jurisdiction. The count alleges that the defts. conspired, by divers false pretences, to defraud Richard Bealey of his money, against the form of the statute. Now, in conspiracies, it is not required that the object of the conspiracy should be set out so precisely as though the indictment were for the substantive offence; all that is required is to show that there was a conspiracy to defraud, and before finding the bill the grand jury must be satisfied that the conspiracy was to defraud the prosecutor of his money by false pretences. There were other technical objections taken, such as not setting out the false pretences, and then there being no allegation that the defts. were present when judgment was passed; but there is really nothing in them, and the case of *Sydeff v. The Queen*, 11 Q. B. 245, is in point. There must therefore be judgment for the Crown.

SHEE, J.—I am of the same opinion. It appears there were two counts in the indictment, and that judgment is entered only upon one of them. Now the two counts are in principle the same as two indictments, and the record shows that the defts. were tried and convicted upon one count. It is said that the record is bad, because it does not appear that any judgment was given upon the first count. It certainly does appear that no sentence was passed upon it, and although it does not say that the defts. were acquitted, it is rather an imperfect statement than a statement that prejudices, and if hereafter there is any difficulty it may easily be set right. Upon the second point the objection was, that inasmuch as it does not appear upon the face of the second count that the offence which the defts. conspired to commit was one over which the quarter sessions had jurisdiction it was bad, for that the sessions could only try a conspiracy to do an act which would have been triable at sessions. Now it is not necessary that the offence in a charge of conspiracy should be set forth with the same particularity as would be required in stating the substantive offence. Here the gist of the offence is the conspiracy, and I think the count is sufficient.

*Judgment for the Crown.*

Thursday, June 9, 1864.

REG. v. THE COMMISSIONERS OF METROPOLITAN POLICE.

*Hackney and Stage Carriage Act—Omnibus conductors' licences—Suspension for misconduct.*

*The Commissioners of Metropolitan Police have power under the 6 & 7 Vict. c. 86 to suspend the issuing of renewals of licences to omnibus drivers and conductors for a period, for misconduct during the preceding year.*

This was an application for a *mandamus* to the Commissioners of the Metropolitan Police to grant a licence to a conductor of an omnibus under the 6 & 7 Vict. c. 86 (an Act for regulating hackney and stage carriages in and near London).

The applicant had been a licensed omnibus conductor for eight years, and his licence expired on the 1st June last. He had made the usual application for the renewal of his licence, and produced to the Commissioners of Police the certificate of good behaviour required by sect. 8 of the statute to be produced to the registrar (the Commissioners of Police being substituted for the registrar by a later statute). The applicant was informed at the office of the commissioners that his licence was suspended for a month and would not be granted until July 1. The ground of suspension was that the applicant had been summoned three times, and fined on each occasion.

The following are the sections of the Act referred to in the argument:

Sect. 8:

That it shall be lawful for the registrar (of metropolitan public carriages) to grant a licence to act as driver of hackney carriages, or as driver or as conductor of metropolitan stage carriages, or as waterman (as the case may be) to any person who shall produce such a certificate as shall satisfy the registrar of his good behaviour and fitness for such situation respectively. Provided always that no person shall be licensed as such driver as aforesaid who is under sixteen years of age, and in every such licence shall be specified the number of such licence and the proper name and surname and place of abode, and age, and a description of the person to whom such licence shall be granted, and in the case of a waterman of the standing or place at which he shall be thereby authorised to act as waterman and the nature of his duties, and every such licence shall bear date on the day on which the same shall be granted in the month of May in any year, then to continue in force until and upon the first day of June in the year next following that in which the same shall be granted, except in either case the same shall be sooner revoked, and except the time (if any) during which any such licence shall be suspended; and on every licence of a driver or conductor the registrar shall cause proper columns to be prepared in which every proprietor employing the driver or conductor named in such licence shall enter his own name and address and the days on which such driver or conductor shall enter and shall quit his service respectively, and in case any of the particulars entered or indorsed upon any licence in pursuance of this Act shall be erased or defaced every such licence shall be wholly void and of none effect; and the said registrar shall, at the time of granting any licence, deliver to the driver, conductor, or waterman, to whom the same shall be granted, an abstract of the laws in force relating to such driver, conductor, or waterman, and of the penalties to which he is liable for any misconduct, and also a metal ticket upon which there shall be marked or engraved his office or employment, and a number corresponding with the number shall be inserted in such licence.

Sect. 14:

That before any such licence shall be granted a requisition for the same, in such form as the registrar shall from time to time appoint for that purpose, and accompanied with such certificate as heretofore is required, shall be made and signed by the person by whom such licence shall be required; and in every such requisition all particulars as the registrar shall require shall be truly set forth, and every person applying for, or attempting to procure any such licence, who shall make or cause to be made any false representation in regard to any of the said particulars, or who shall endeavour to obtain a licence by any forged recommendations, or who shall not truly answer all questions which shall be demanded of him in relation to such application for a licence; and also every person to whom reference shall be made who shall, in regard to such application, wilfully and knowingly make any misrepresentation, shall forfeit for every such offence the sum of five pounds, and it shall be lawful for the registrar to

Q. B.]

REG. v. THE DARLINGTON LOCAL BOARD OF HEALTH.

[Q. B.]

proceed for recovering of such penalty before any magistrate, at any time within one calendar month after the commission of the offence, or during the currency of the licence so improperly obtained.

## Sect. 25 :

That it shall be lawful for any Justice of the peace before whom any driver, conductor, or waterman shall be convicted of any offence, whether under this Act, or any other Act, if such Justice in his discretion shall think fit, to revoke the licence of such driver, conductor, or waterman, and also any other licence which he shall hold under the provisions of this Act, or to suspend the same for such time as the Justice shall think proper, and for that purpose to require the proprietor, driver, conductor, or waterman in whose possession such licence, and the ticket thereunto belonging, shall then be to deliver up the same; and every proprietor, driver, conductor, or waterman, who being so required shall refuse or neglect to deliver up such licence, and any such ticket or either of them shall forfeit so often as he shall be so required, and refuse or neglect as aforesaid, the sum of £4., and the Justice shall forthwith send such licence and ticket to the magistrate, who shall cancel such licence if it has been revoked by the Justice, or if it has been suspended, shall, at the end of the time for which it shall have been suspended, redeliver such licence with the ticket to the person to whom it was granted.

*E. James, Q. C.*, in support of the application.—Sect. 8 is imperative on the commissioners to grant a licence on the production of the certificate of good behaviour. If the commissioners are satisfied with the certificate they are bound to grant the licence. No further questions have been asked under sect. 14, and what the commissioners have done is in effect to inflict a punishment upon the applicant, which they have no power to do. The Justices, under sect. 25, are the proper parties to do that. [*MELLOR, J.*—That section relates to misconduct arising after the granting of the licence and during its currency.] The consequence of suspending licences in this way is that this class of persons are thrown out of employ and subjected to a fresh punishment not specified by the statute.

*COCKBURN, C. J.*—I think this court ought not to interfere. The jurisdiction exercised by the Commissioners of Police is essential to the proper conduct of these men. It is quite clear that the commissioners are not bound to be satisfied with the mere production of a certificate of good behaviour, but they are entitled to see that the behaviour has been proper. That appears to be so from the provisions of sect. 14. Therefore when it was disclosed that the applicant had been three times fined, it was competent to the commissioners to say that they would not grant him a licence, notwithstanding sect. 8. If then they could refuse the licence altogether, it was perfectly competent for them to say to the applicant that what he had done during the last year was a sufficient reason why they should not at once grant him a licence, and that, as a salutary check, they would withhold it until July 1, and that if he returned for it at that period, they would give it to him.

The rest of the Court concurring,

*Application refused.*

Wednesday, June 8, 1864.

REG. on the prosecution of THOMAS TAYLOR v. THE DARLINGTON LOCAL BOARD OF HEALTH.

11 § 12 Vict. c. 63, ss. 45, 144, 145 (*Board of Health Act*)—21 § 22 Vict. c. 98, ss. 68, 70, 73, 74 (*Local Government Act*)—*Mandamus*—*Local boards*—"Injuriouly affecting"—*Watercourse*—*Right to compensation*.

By 11 § 12 Vict. c. 63, s. 45, local boards are empowered to construct sewers, and by sect. 144 compensation is awarded to persons injured by the exercise of their powers.

By the 21 § 22 Vict. c. 98 (which incorporates the

former Act), s. 73, local boards are prohibited from injuriouly affecting any river or stream, &c., or the supply, quality, or fall of water contained in any river, stream, &c., in cases where any company or individuals would, if the Act had not passed, been entitled by law to prevent or be relieved against the injuriouly affecting such river without the previous written consent of the parties.

The prosecutor is the owner of a water-mill on the river S., and as a riparian proprietor is entitled to the flow of the water of the river S. to his mill. The defts. are the Local Board of Health of D., and some years since under the Board of Health Acts caused a sewer to be constructed near the river S. The result of the construction of this sewer was to divert and diminish the supply of water to the mill.

On mandamus to compel compensation for injuries done in the exercise of the powers of the board:

*Held*, that the acts complained of constituted an injuriouly affecting of the river S., which the prosecutor would have been entitled by law to prevent or be relieved against. That they might still have been the ground of an action at law. That they therefore did not form the subject of compensation, and that the mandamus was wrong.

This was a case stated for the opinion of the court by an arbitrator.

It appeared that by lease dated the 2nd March 1858 George Stonehouse, being seised in fee of Blackwell-mill, demised the same for ten years to the prosecutor, who occupied the mill until some time in the month of March 1861, and carried on the business of a miller.

The mill is situated on the right bank of the stream called the Skerne, and at a short distance below the town of Darlington, through which the Skerne flows.

For a long period before the operations of the defts., the occupiers for the time being of Blackwell-mill, as the representatives of ordinary riparian proprietors without any prescription, enjoyed the benefit of the waters of the Skerne for the working of the mill, and the prosecutor was entitled, as such representative, to the use of the waters of the Skerne for working the mill, subject to the rights of other riparian proprietors, and the exercise by the defts. of their statutory powers.

The defts. were constituted a local board of health according to the Public Health Act 1848, by a provisional order of the general board, dated the 1st Aug. 1850, and confirmed by the Public Health Act 1850.

In the year 1859, the defts. constructed a drain or sewer from a point above Darlington along the right bank of the Skerne for some distance, then for some distance beneath the bed of the stream and terminating in a cesspool close to the left bank of the Skerne, with trap-doors admitting the waters of the Skerne into the sewer for the flushing thereof; this is hereafter called the first sewer. The termination of the first sewer and the discharge or return to the Skerne of the water so admitted being higher up the Skerne than Blackwell-mill, no perceptible diminution of the water flowing to the mill was occasioned while the first sewer terminated at that place.

In the years 1858 and 1859 the defts. constructed a new drain or sewer in continuation of the first sewer from the place where it so terminated as aforesaid along the left bank of the Skerne, to a new cesspool considerably lower down the stream than the old cesspool, and below the place where the waters of the Skerne enter the dam of the said mill, and beyond the district of the board of health. This new drain is hereinafter called the second sewer. The water passing through the second sewer passes to the Skerne at a place so far down the stream as to be lost to the mill.



[Q. B.]

REG. v. THE DARLINGTON LOCAL BOARD OF HEALTH.

[Q. B.]

On the 18th June 1859, after the first and second sewers were connected by the direction of the person whose business it was to flush the sewers for the board of health, a hole was made into the first sewer for the purpose of letting the water of the Skerne into that sewer to flush it, and this hole continued open until some time on the 20th June, when upon the complaint of the prosecutor it was filled up by the direction of the surveyor of the board of health. During the time the hole continued open a large portion of the Skerne passed through the hole into the first sewer, and thence into the second sewer, and was wholly lost to the prosecutor, and the working of his mill was thereby stopped. This is the first head of the prosecutor's claim.

During the construction of the second sewer a certain quantity of the water of the Skerne oozed into the second sewer by reason of that sewer being near to and below the bed of the stream, and certain underground springs also oozed into the second sewer, which would, but for the making of that sewer, have percolated into the Skerne; and such quantity of the water of the Skerne was lost to the prosecutor. But since the completion of the second sewer, no portion of the Skerne or of the said springs finds its way into the second sewer either by percolation or otherwise. This is the second head of the prosecutor's claim.

Since the construction of the second sewer, any water which passes into the first sewer through the trap-doors is lost to the mill; but the trap-doors are usually kept closed, and no water passes into the sewer through the trap-doors, except when they are opened for the purpose of flushing the sewers, which is only done occasionally, and when there is fresh water in the Skerne. This is the third head of the prosecutor's claim.

Before the said sewers were constructed, the surface drainage water from the town of Darlington, which had never found any natural definite channel, together with the house drainage water, was conducted by artificial drains into the Skerne. These drains were altered by the defts. and made to carry their water into the first sewer. Since the completion of the second sewer this water is carried by it below the prosecutor's mill, and is thus wholly lost to the mill. This is the fourth head of the prosecutor's claim.

The street and houses of the town of Darlington are supplied with water from the river Tees by means of waterworks and not from the Skerne.

The questions for the opinion of the Court are:—

1. Whether the prosecutor is entitled to compensation, as in the *mandamus* suggested, in respect of all or any of his four heads of claim.

2. Whether, if the court should be of opinion that the prosecutor is entitled to compensation upon one or more of the said heads, and upon such heads or head he should not be able to prove any substantial damage, he would be entitled to nominal damages.

Judgment to be entered for the Crown or defts. as the case may be.

*T. Jones* (with him *J. Henderson*) for the prosecutor.—The injuries caused to the prosecutor's rights by the operations of the local board were the results of acts performed by them in the exercise of their statutory powers, and are the proper subject of compensation. The right and obligation of local boards in reference to third parties are settled by the 11 & 12 Vict. c. 63, and 21 & 22 Vict. c. 98. By the 43rd, 44th and 45th sections of the earlier statute vast powers are given them to make sewers and deal with the property of others for that purpose. But by the 144th section a compensation is awarded to those who may have suffered damage from the employment of those powers. By the 145th section, however, they are prohibited from injuring and

interfering with certain public works therein specified, and also with watercourses and streams in which the owners of mills, &c., are interested, without a written consent. Now, if this section was still in force, it might be conceded that the remedy by *mandamus* for compensation could not be sustained. But it has been repealed by the 68th section of the 21 & 22 Vict. c. 98, and various modifications have been substituted. By that section the absolute prohibition is confined to public works alone; and by the 73rd section the local board are forbidden to "injuriously affect any river, stream, &c., in cases where any company or individuals, would, but for the Act, have been entitled by law to prevent or be relieved from, such injurious effects." The most natural meaning of this language would seem to be, that the board may be permitted to interfere with the rights of persons situated like the prosecutor except in cases where the acts done are such that a court of equity would intervene and stop them by injunction. The question therefore arises, in what cases would the court grant such an injunction? The rule is clearly stated in *Drewry on Injunctions*, p. 249, and in the judgment of Lord Brougham in *The Earl of Ripon v. Hobart*, 3 Myl. & K. 179, where he says: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial, and will according to the circumstances direct an issue or allow an action, and, if need be, expedite the proceedings, the injunction meantime being continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which according to circumstances may become so, the court will refuse to interfere until the matter has been tried at law." The acts performed here do not come within that rule; they must then be held to fall within the earlier sections of the 11 & 12 Vict. c. 63, and may consequently be made the subject of compensation.

*W. A. Rew* (with whom was *Darison*) for the local board.—The prosecutor has shown no ground here for compensation. It is questionable whether any injuries have resulted from the acts complained of; but, at any rate, if they have, they constitute an "injurious affecting" within the 73rd section, and are prohibited. They are, therefore, the subject of action. The argument that the words "prevent, or be relieved from," must be confined to cases where an injunction would be granted, is fallacious. It would be sufficient if the parties injured would be entitled to apply for injunction. It is an injurious affecting if there has been damage, however small. He referred to

*The New River Company v. Johnson*, 2 El. & El. 435.

*T. Jones* replied.

*BLACKBURN, J.*—I am of opinion that our judgment should be for the defts. on the questions asked by the arbitrator. The Local Board of Darlington have constructed a sewer under the provisions of the Public Health Act 1848, and in doing so have more or less affected the waters of a stream that flowed to the prosecutor's mill. The mill was not an ancient one, but he was a riparian proprietor, and had a right that the water should come down to his mill. He has been more or less injured by the operations of the board, and the only question is, whether they are injuries for which he would be entitled to compensation. If they are, then the *mandamus* to the defts. is right. But if they are not, if they are such for which an action at law may still be brought, and it is not necessary to inquire what the action should be, then the defts. are entitled to succeed. The general principle of law is well established, that when anything has been done actionable at common law, but authorised



[Q. B.]

REG. v. OVERSEERS OF TOWNSHIP OF CASTLETON, LANCASHIRE.

[Q. B.]

by Act of Parliament, then, though there is *damnum* to the party affected, yet there is no longer *injuria*; and no action will lie. To remedy this injustice the Legislature, when it has given powers to interfere with the rights of third persons, has also awarded compensation for the injuries inflicted by the exercise of those powers. But when the wrong done is not authorised, an action may still be maintained. Now, by the enactments under consideration, several matters actionable at law are sanctioned, and the action for them is taken away; while there are others which still remain unauthorised. The 21 & 22 Vict. c. 98, s. 68, repeals the 144th section of the 11 & 12 Vict. and substitutes matter relating entirely to works of a public nature. It is then followed by the 73rd section, which provides that nothing in the Act shall be construed to authorise any local board to injuriously affect any river or stream, &c., or the supply, quality, or fall of water contained in any river, stream, &c., in cases where any company or individuals would, if the Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such river, stream, supply, quality, or fall of water, unless they shall have first obtained their written consent. Now the obvious meaning of this is, that they shall not have authority to injuriously affect without the consent of the parties, if such parties would have been entitled to relief. The consent is a condition precedent, and, unless obtained, the board would be clothed with no authority under the Act; and an action would therefore lie if an injury has been sustained. Is the prosecutor in this situation? I think he is. He is the owner of a mill, and has a right to the flow of water to it as of old; and if any unauthorised person interferes with, diverts, or takes it away, he is entitled to maintain an action at common law, and also to seek for an injunction from the performance of acts which are an infringement of his legal rights. Equity, indeed, might not interfere in every case where there has been an injury to a legal right, but still the matter is not to be stopped when it may be compensated for in damages. A court of equity may exercise its discretion in interfering; but still the question would be whether or not the act done was authorised by the Legislature, and whether an action would lie even if a court of equity would not interfere. I think that this view is confirmed by the 74th section, which allows that any difference of opinion between the parties as to whether the supply of water has been injuriously affected shall be referred to arbitrators, who are to proceed and decide in the manner pointed out in the 70th section, and by that section it is provided that if the arbitrator shall think that no injury will be caused, the board may proceed with the works; if they think that an injury will be caused which can be compensated for by money, then they may award such compensation; but if they think that the injury could not be so compensated, then the board shall be prohibited from proceeding to do any matter or thing in respect of which such opinion is given. I think therefore that, if they injuriously affect any watercourse, that would be illegal, and the act would be a ground of action, but not for compensation. The acts complained of by the prosecutor in the present case are ranged under four heads. Now it seems to me doubtful whether all or any of these acts constitute a ground of complaint at all, but assuming that they do, then they must be considered as acts which injuriously affect the prosecutor's rights; they are therefore not the subject of compensation, but should form the basis of an action for damages.

SHEE, J.—I am of the same opinion. By the 45th section of the Public Health Act of 1848, local

boards are authorised to construct sewers under certain conditions mentioned in the 145th section. They are permitted to do so provided they do not use, injure, or interfere with certain works therein excepted. It appears from the enactments of the subsequent Act that the restrictions were considered too large, and that it was deemed desirable to confine the prohibition to public works under the management of commissioners acting by virtue of an Act of Parliament. Accordingly, by the 68th section of the 21 & 22 Vict. c. 98, the 145th section of the former Act is repealed, and various provisions substituted as to interference with public works and other works under the management of persons appointed by an Act of the Legislature. Then this is followed by the 73rd section. This section does not apply to all the matters contained in the 145th section, but to only a portion of them. It provides that the boards shall not be authorised to injuriously affect any reservoir, river, stream, &c., or the supply, quality, or fall of water contained therein, in cases where a company or individuals would be entitled by law to prevent or to be relieved against such injurious affecting, without previously obtaining their consent. Now, I understand these words to mean, that they shall not only not use or interfere with, but shall not "injuriously affect," which expression is considerably larger, in every case where the party concerned would be entitled by law, that is, by going to law, to prevent them from interfering with their property in any way which would affect it, as in the present instance, by diverting the supply of water. Therefore, if the person aggrieved is entitled to prevent or to be relieved by a court of equity, the board would not be authorised to do the act; and the injury would be a ground for action and not for compensation. I think that the acts done here were an injuriously affecting, and that therefore the *mandamus* was wrong.

BLACKBURN, J. stated that Mellor, J., who had been obliged to leave after the termination of Mr. Jones's reply, had requested him to say that he concurred with the rest of the court.

*Judgment for the defendants.*

Attorney for the defendants, H. Dunn, Darlington.

REG. on the prosecution of THOMAS STALEY AND ANOTHER (apps.) v. THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF CASTLETON, IN THE PARISH OF ROCHDALE, LANCASHIRE.

Poor-rate—6 & 7 Will. 4, c. 96, s. 1—"Net annual value"—"Reasonably expected to let from year to year"—Meaning of—Cotton-mill.

The 6 & 7 Will. 4, c. 96, s. 1, enacts that "no poor-rate shall be allowed which shall not be made upon an estimate of the net annual value of the hereditaments, that is to say, of the rent at which the same might reasonably be expected to let from year to year," &c.:

Held, that the rent referred to in that section must be considered to be the rent which a tenant would be expected to give from year to year for premises in their existing condition, and, according to their actual capacity to be used beneficially, and not the rent which a person would pay if the property were let for a reasonable term of years, and with a prospect of their future increased value during the term.

Before the commencement of the American civil war, a cotton-mill furnished with the necessary machinery, situate at C. in L., had yielded large returns and been assessed at an annual value of 260l. Sub-

Q. B.]

REG. v. OVERSEERS OF TOWNSHIP OF CASTLETON, LANCASHIRE.

[Q. B.]

sequent to the war the business declined to such a degree that the owners determined to cease to work the mill. They accordingly dismissed all their workmen, with the exception of the fireman. This latter person they have since only employed to attend to the machinery and keep it in fit order to be used on the return of more favourable times. It was admitted that, should the war cease, the mill would recover its former value. It was further admitted that the rateable value of the mill to be used as a warehouse for storing machinery was 141l. 10s.:

*Held*, that the mill was rateable; but the amount at which it was to be assessed was the latter sum, viz., its value as a warehouse for machinery.

This was a case stated for the opinion of the court with the consent of the parties. A rate was duly made on the 30th April 1863, for the relief of the poor of the township of Castleton, in Rochdale, and duly allowed.

In the said rate the apps were assessed as follows:

Name of occupier.	Description of property.	Name and situation.
Staley & Wilkinson	Mill.	Dichin Green.
Gross estimated value, 210l. Rate at 2s., 21l.		

The mill mentioned in the assessment was at the time of making the rate a cotton-mill and premises connected therewith, situated at Dichin Green. At the time of making the rate the apps. were the owners, and so far as hereinafter stated the occupiers of the mill. The mill was furnished with a steam-engine about forty nominal horse power with a suitable steam-boiler for generating steam to work the engine and warm the mill. The mill was filled to its full capacity with all the machinery necessary for the purposes of a cotton-mill. Shafting connected with the steam-engine ran throughout the mill for the purpose of turning the machinery; steam pipes from the boiler were carried through all the rooms of the mill for the purpose of warming them.

Before and up to the time of the mill being stopped the machinery in the mill was used for spinning cotton. Such machinery was in some instances fixed to the floors in order to its steadier working, while in other instances it was merely placed on the floors of the mill. According to the custom of the trade this spinning machinery was in the nature of tenant's machinery or fixtures.

Shortly after the commencement of the present civil war in America, the business of the apps. fell off very much, and the apps. were compelled to reduce the hours of labour, and at length in Jan. 1862, in consequence of the continuing badness of trade, the apps. determined to work up all the cotton they had, and to close the mill and discontinue business therein until a great improvement in the trade should take place.

Accordingly in Jan. 1862 they finished the working of the cotton, and then discharged all their workpeople, except the fireman whom, and whom alone, they have since employed on the premises at a considerable reduction in his wages, for the purpose only of keeping the steam in the mill, and turning the engine and machinery for the purposes and in the manner hereinafter mentioned; and since that time they have not had any goods whatever in the mill, nor have they ever worked the same except to keep the mill and machinery in repair and ready for use upon the revival of the trade. Ever since Jan. 1862 the rooms of the mill have been kept constantly warmed by means of steam passed from the boiler through the steam pipes. Steam has been constantly kept up in the boiler, which has been from time to time cleaned for the purpose of keeping the same in proper condition. The steam-engine has been worked at least one

hour every day except Sundays; the shafting throughout the mill has been turned daily by the steam engine; every part of the machinery has remained in its proper place and has been cleaned from time to time as required. Those parts of the machinery known as the carding engines, twenty-four in number, have occasionally been turned by means of the steam-engine; and in short, since Jan. 1862 all parts of the mill and machinery have been constantly kept in perfectly fit condition to be used on the revival of the trade. For the purpose of so keeping the same in order, and for this purpose only, the apps. have been compelled to continue the services of their fireman. But all this has been done to keep the machinery in order, as the same would otherwise have been much depreciated and would in time have become worthless as working machinery. The gross and rateable value, and the amount of rate of the mill, &c., as appears in the said assessment, is made up of three items and in manner following:

	Estimated gross value.	Rateable value.	Rate.
Steam at 2l. per horse-power .....	80	64l. 0	6 8
Building of mill .....	176	141 10	14 3
Office .....	5	4 10	0 9
	£261	£210 0	£21 0

The assessment, in fact, is made upon the engines and mill as if the same were in full work and operation as a cotton-mill.

The office is a detached building standing separate from the mill and having a distinct entrance, and the apps. admit their liability to be rated for it. It is admitted that, prior and up to the commencement of the present war, the average rateable value of the mill, as mentioned in the said assessment, was 210l., composed of the three distinct items mentioned, and that such rateable value will be at least as great when the trade revives.

The questions for the opinion of the court are:

1. Whether, under the circumstances stated in the case, the apps. were rateable at all to the said rate for anything but the office, and if so, for what?

2. If the apps. were rateable for the said mill and engine, or either of them, were they rateable as if the same were in full work, or were they rateable on the said mill as if it were a mere warehouse for storing machinery, or were they rateable on the mill and engine to the extent of the rent which might have been reasonably obtained if the same had been let to a tenant from year to year?

The rateable value of the building of the mill used as a warehouse for storing machinery is, for the purpose of this case, agreed to be 141l. 10s.

*Joseph Kay* appeared to argue on behalf of the resps., but the Court called on

*Holl* for the apps.—The mill cannot be made the subject of a rate. Real property can only be rated at the net annual value incident to its occupation, and by the 6 & 7 Will. 4, c. 96, s. 1, the net annual value of hereditaments is declared to be "the rent at which the same may reasonably be expected to let from year to year, free of usual tenant's rates and tithe commutation charge, if any, and deducting therefrom the probable average annual costs of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent." Here the facts found show that the mill has become useless as a mill, and that it is maintained at a loss to the owners. It therefore not only does not at present produce any profit to the occupiers, but would not, if offered for lease, be likely to obtain a tenant. There is consequently no value that can be assessed. Nor is the question affected by the fact that the mill is provided with machinery:

*Res v. The Southampton Docks Company*, 14 Q. B. 587;

Q. B.]

REG. v. OVERSEERS OF TOWNSHIP OF CASTLETON, LANCASHIRE.

[Q. B.]

*Reg. v. The Birmingham Gas Light Company*, 6 Ad. & El. 634; and

*Reg. v. Haslam*, 17 Q. B. 220,

establish undoubtedly the principle that buildings to which machinery is attached are liable to be rated in respect of such machinery; but those decisions were based on the ground that the premises had acquired an increased value from the possession of the machinery, and that such increased value was the true criterion by which the assessment was to be regulated. But in the present case the machinery gives no additional value to the mill; it can only be regarded as furniture placed there for safe keeping, and it has never been decided that furniture was liable to be rated. It will indeed be contended that there is a probability that the mill will hereafter become valuable, and that such prospective value cannot be excluded from consideration. But the judgment of Lord Ellenborough in *Rex v. Bedworth*, 8 East, 389, shows that such a proposition cannot be sustained, and that it is only the annual value during the period for which the rate is made that can be computed.

*Joseph Kay* for the resps.—The amount at which the overseers have assessed the mill is correct. The Parochial Assessment Act, in addition to the enactment referred to, has a proviso to the effect that “nothing therein contained shall be construed to alter or affect the principles or different liabilities (if any) according to which different kinds of hereditaments are now by law rateable.” According to these principles, the test should be, not what the property may let for one year, but what would be its value for a reasonable term of years. This is shown by the case of *Rex v. Merfield*, 10 East, 219, where it was held that saleable underwoods, although only cut down once in twenty-one years, must be rated not at the time merely when they were cut down and produced actual value, but every year, according to the annual average value. Here the mill may soon again become valuable. A tenant, therefore, although he would probably not give anything for the mill for the current year, would pay a fair rent for a reasonable term of years; and it is at this rent that the assessment should be made.

BLACKBURN, J.—The question involved in this case, although undoubtedly one of general importance to a large number of persons, nevertheless does not present any great difficulty. It appears that the mill, the subject of the rate, was formerly, while trade was in a flourishing condition, of considerable annual value to be worked as a cotton-mill. It was fixed therefore at a high annual rent, and the occupier rated accordingly. Times have since changed, and trade has declined to such an extent that it has become a loss to carry it on; it is no longer worked as a cotton-mill, and money is actually being expended to maintain the machinery in a fit state for the resumption of operations on the return of more favourable times. On what principle then is the mill to be rated? The Parochial Assessment Act lays down the rule that property shall be rated “at the rent at which the same might reasonably be expected to let from year to year after deducting the probable average annual costs of repairs and other expenses,” with a proviso upon which reliance has been placed by Mr. Kay. Now, with reference to this proviso, I may remark in passing, in the words of Lord Denman, in *Rex v. Capel*, 12 Ad. & Ell. 411, that “it is very inartificial and loose to a degree which renders the discovery of a definite meaning to all its parts extremely difficult.” But at any rate I do not consider that it can govern the present case, as there is nothing here which affects relative liabilities. Applying, then, the principle that the value is to be reckoned

at the rate at which the premises might reasonably be expected to let from year to year, how is this mill to be rated? Now it is manifest that the mill, under existing circumstances, could only be worked at a loss, and that therefore a tenant would give nothing for it to work it as a mill. In this sense, therefore, the mill would not be rateable at all, as there would be nothing to rate. Mr. Kay, however, says that, as it is probable that cotton-mills will soon recover their old value, and yield their former high returns, a tenant would still give a large rent, if he could obtain the mill for a term of years, and thus render it profitable; and that the rent he would thus give should form the amount upon which the rate should be levied. But this would be to alter the language of the Act, and to substitute the words “let for a reasonable term of years” for the existing expression “let from year to year.” I do not think, therefore, that this construction can be sustained. If it were admitted, then the effect would be that a person who took a lease of minerals for a term of years would be liable to be rated while he was only driving his shafts. The Legislature never contemplated such a result, but only designed that the rate should be levied upon the rent which would be given for the property *rebus sic stantibus*. In fixing the price at which property is to be sold, future possible profits may indeed fairly be considered; but they cannot form an element in the estimation of the value from year to year. It is not the subsequent, but the present, annual value which is contemplated by the Act. And this is the interpretation which the Court of Ex. have given to the expression in the recent case of *The Attorney-General v. The Earl of Sefton*, 2 Hurl. & C. 362: “Future increased value might form a very proper element in estimating the price at which the property might be sold, but cannot be regarded in assessing the amount of rating.” But while I cannot adopt the principle suggested by Mr. Kay, I equally differ from Mr. Holl in the opinion that the property is not rateable at all. The probable rent is to be computed according to the subject-matter, and the real value of the premises to be assessed. If things are so affixed as to become part of the building, then we must regard them as if they were permanently built into it. But if they are not so affixed, still their presence would affect the yearly value, and a tenant who hired the premises would certainly take their capacity for use into account. Their present state for beneficial use, and all their capacities, must be embraced in the calculation. It must also be considered how they would be let to a tenant who possessed the means of working them profitably. There are many persons to whom a certain kind of premises would be worthless, while there are others to whom they would be exceedingly valuable. Take the case, for instance, of a railway. To an ordinary individual it would yield nothing; but by a company with their carriages, engines, stock and other appliances, it is worked beneficially. So here we have a mill with machinery which would be valuable to one with a capacity to use it. It is obvious, therefore, that it is property for which rent would be given by a millowner. But, if it be regarded further as a mere warehouse, in which machinery might be fitly and safely stored, it is still property for which a rental might and would be paid. And as the sum which would be paid for such a purpose has been agreed upon, I think that is the amount at which the mill should be rated.

SHAW, J. concurred.

*Judgment for the resps.; but the rateable value to be reduced to 141l. 10s.*

Q. B.]

HAYWARD v. OVERSEERS, &amp;c. OF BRINKWORTH, WILTS—COE v. WISE.

[Q. B.]

THOMAS HAYWARD (app.) v. THE OVERSEERS OF THE POOR OF THE PARISH OF BRINKWORTH, WILTS (resps.)

*Poor-rate*—6 & 7 Will. 4, c. 96, s. 1; and 25 & 26 Vict. c. 103, s. 15—*Net annual value of hereditament*—*Actual rent paid*.

*In assessing premises to the relief of the poor under the 6 & 7 Will. 4, c. 96, s. 1; and 25 & 26 Vict. c. 103, s. 15, the overseers should proceed on the estimate, not of the rent actually paid for the premises by the occupier, but of the rent at which they might reasonably be expected to let from year to year.*

*Three farms, situate in the parish of B., were let at a certain sum annually. They might, however, reasonably have been expected to let, and might have let, at a larger sum. The overseers assessed their occupiers to the relief of the poor at the rent actually paid by them :*

*Held, that they were wrong; that they should have adopted the larger sum, viz., the rent at which the farms might have been reasonably expected to let, as the estimate of the net annual value; and that the rate must be amended.*

This was a case stated for the opinion of the court under the provisions of stat. 12 & 13 Vict. c. 35, s. 11.

It was an appeal against a poor-rate. The rate so appealed against was made by the resps., in accordance with the valuation lists made and signed by the resps., and approved by the assessment committee of the union of Malmesbury, Wilts, within which the parish of Brinkworth is situated, pursuant to the stat. 25 & 26 Vict. c. 103. The rate was made in the form shown in the schedule annexed to the last-mentioned statute, and the several sums inserted in the column in the said rate headed "Gross estimated rental," as representing the gross estimated rental of the several properties rated, represented the rentals at which the several properties were actually let to the occupiers, and such rentals had been ascertained and paid by reference to the returns of the rentals of the said several properties made under schedule A of the Income-Tax Assessment Act, and were identical in amount with the rentals of the said several properties contained in the said column, and the app. and G. Adey, J. Spencer and R. Matthews were respectively assessed in the said rate in respect of farms hereinafter mentioned, at a rateable value estimated on the basis of the actual rentals paid by them respectively to their respective landlords, and ascertained in manner aforesaid. The farm occupied by the app., and in respect of which the rate appealed against was made, contains 146a. 1r. 7p., and by the rate appealed against the app. was rated in respect of his said farm, on a gross estimated rental of 300l. per annum, which was the rent paid by him to his landlord, and was a rack rent.

The farm of the said John Adey, and in respect of which he was rated in the rate appealed against, immediately adjoins that of the app., and contains 244a. 3r. 7p., and is of the same quality and of at least the same yearly value per acre as that of the app. In the rate appealed against the said John Adey is rated in respect of his said farm at a gross estimated rental of 400l. a-year, which is the rent paid by him to his landlord. The said farm of the said John Adey at the time of the making of the valuation list and the said rate would readily have let and reasonably might be expected to let from year to year at a rent of more than 400l. a-year; and on a comparison of the annual values of the said respective farms of the said John Adey and the app., estimated with reference to the rents at which the same might reasonably be expected to let

from year to year, the said John Adey is in the said rate rated at 9s. less than the app. In like manner the said J. Spencer and R. Matthews are rated in the said rate in respect of their farms at a rateable value estimated on the basis of the rentals paid by them to their landlords, although at the time of the making of the valuation lists and the rate the farms would readily have and might have been expected to let from year to year at more than the said rentals respectively; and on a comparison of the annual values of the farms of J. Spencer and R. Matthews and the app. respectively, estimated with reference to the rents at which the same might reasonably have been expected to let from year to year, J. Spencer and R. Matthews are in the said rate rated at 15s. and 11s. per acre less than the app.

Upon these facts it was contended by the app. before the justices that the rate was unfair and unequal, inasmuch as it was based upon the rents actually paid by the said J. Adey, J. Spencer, and R. Matthews; and that such rents did not represent the annual value of their respective farms as defined by the 1st section of the 6 & 7 Will. 4, c. 96, and the 15th section of the 25 & 26 Vict. c. 103, and that the said rate ought to be amended by increasing the amounts at which the said J. Adey, J. Spencer and R. Matthews were rated in the rate, in proportion to each of the annual values of their respective farms; but the justices overruled these objections and decided that the said J. Adey, J. Spencer and R. Matthews were properly rated on the basis of the rentals actually paid by them to their respective landlords, and on this ground made the order confirming the said rate.

The question for the opinion of the Court is,

Whether, under the circumstances, the justices were right in making the said order, or whether the said order ought to be quashed and the rate amended as contended by the app.

Kingdon (with whom was Greville Howard) appeared for the appa.

Herbert Saunders appeared to argue for the resps.; but in answer to a question from the Court, admitted that he could not hope successfully to sustain the principle on which the rate had been calculated.

BLACKBURN, J.—I think that the case is perfectly clear, and that the rate must be amended. The Legislature has stated that the estimate according to which the rate shall be calculated shall be, not the actual rental paid, but the rent at which the premises might have been reasonably expected to let from year to year. The rent actually paid is no doubt *prima facie* the estimate, but it is not conclusive. Here the premises might have been let at a larger sum than that demanded by the landlords; and the rate, therefore, should have been calculated on that amount.

SHEE, J. concurred.

*Judgment for the app. that the rate be amended.*

Appa.' attorneys, Price, Bolton and Filder.

Resps.' attorneys, Bower and Son.

Tuesday, May 24, 1864.

COE v. WISE.

*Public commissioners—Works by—Damages from—Liability.*

*Persons intrusted with the performance of a public duty, discharging it gratuitously, and themselves taking no personal part in its performance, and having no funds at their disposal out of which compensation for injury arising from the negligent acts of persons*

Q. B.]

COE v. WISE.

[Q. B.]

employed by them can be made, are exempt from the liability in respect of such negligence.

The defendant was clerk to a body of commissioners constituted under certain Acts of Parliament for improving the drainage and navigation of the middle level of the Fens. Such commissioners did not, and could not, personally execute and maintain the works, and it was necessary that they should appoint others to do so. The works gave way, and the property of the plt. was thereby injured, and upon the trial the jury found that the plt. had sustained damage by the absence of due care and skill on the part of the commissioners in respect of the maintaining of a certain sluice erected by such commissioners. The funds which the commissioners were empowered to raise are by the statute to be applied to "executing and completing the several works of drainage and the several other works, matters and things required by the Acts to be made, done or executed by the drainage commissioners and for the general purposes of carrying the Acts into execution;" and there were no powers for the appropriation of funds for the payment of damages:

*Held (Blackburn, J. dissentiente), that the action could not be supported.*

In this case an action had been brought by the plt. against the deft., who was clerk to the commissioners for carrying into execution the 7 & 8 Vict. c. 106 (local) being "An Act for improving the Drainage and Navigation of the Middle Level of the Fens," for injury done to his land by the inundation thereof by the tidal waters of the sea, occasioned by the failure of certain works made and erected by the said commissioners under the above-mentioned statute.

At the trial before Erle, C. J. the jury, in answer to certain questions put to them by the learned judge, returned certain answers, whereupon he directed a verdict to be entered for the plt., reserving leave to the deft. to move to enter it for the deft.

Sir F. Kelly, Q.C. having accordingly moved and obtained a rule nisi,

Keane, Q.C., D. Brown and Phear showed cause.

Sir F. Kelly, Q.C., O'Malley, Q.C., Newton and Metcalfe in support.

(The judgments of the learned Judges are so copious and comprehensive that it is unnecessary to give the arguments of counsel.)

*Cur. adv. vult.*

MELLOR, J.—The deft. in this case was the clerk to the commissioners for carrying into execution the Act 7 & 8 Vict. c. 106, being "An Act for improving the Drainage and Navigation of the Middle Level of the Fens." The plt. was the proprietor of lands which were submerged and damaged by an inundation of the tidal waters of the sea, occasioned by the failure of certain works made and erected by the commissioners under the provisions of the Act above mentioned. The cause was tried before Lord Chief Justice Erle, at Norwich. The jury, in answer to questions put to them by the learned judge, found that the plt. had sustained damage, in the first place, by the absence of due care and skill on the part of the commissioners in respect of the maintaining of a certain sluice erected by such commissioners; in the second place, by the absence of such due care and skill in not providing remedies against mischief after the sluice was destroyed; and in the third place, by reason that the puddle wall was not made. And the question is whether or not, upon these findings of the jury in connection with the evidence given in the case and the summing up of the judge, the commis-

sioners are liable for the negligence and improper conduct of the contractors' agents and servants employed by them to make and maintain the works which they were authorised and required to construct "and maintain" under the provisions of the above-mentioned Act, there being no finding by the jury that the commissioners had negligently or improperly employed unskilful or incompetent contractors or agents in the making or maintaining of such works, or had any notice or knowledge that the bank referred to in the 137th section of the Act had been constructed without a puddle claywall, in or near the centre thereof, as required by that section. Upon the best consideration which I have been able to give to this case I am of opinion that the commissioners being trustees for public purposes, and acting without reward, and deriving no tolls or profits from the works so made and executed, not possessing any means of raising funds except for the specific objects of the Act, are not liable in this action. I do not deny that trustees or commissioners acting for public purposes without reward and without income may render themselves liable in their representative character (*Sutton v. Clarke*, 6 Taunt. 34; *Boulton v. Crowther*, 2 B. & C. 709 to 711; *Hall v. Smith*, 2 Bing. 158) by acts or damages negligently committed or made under their direct order, or with their direct sanction, in cases in which they have the power of reimbursing themselves out of rates or otherwise; but I doubt whether all the cases in which it has been decided that trustees or commissioners may so become liable in the absence of any such power of reimbursement can be reconciled with the authority by which I consider myself bound. Each case must depend upon the particular provisions of the statute under which commissioners or trustees are empowered to act; but it never could, as it appears to me, have been contemplated by the Legislature that a body of commissioners gratuitously acting in the execution of a public trust could be liable in an action for the negligence or want of skill of contractors and agents whom, in the very nature of things, they were obliged to employ, and whom they employed honestly believing them to be competent and skilful, without at the same time making provision for enabling them to raise funds to answer claims arising from the employment of such agents or servants. The duty imposed upon the commissioners in this case was not only to make, but also to maintain the works; and if it was an absolute duty incumbent upon them under all circumstances, they have failed in the performance of it, but such failure was not owing to any negligence or unskilfulness on their part, but was simply due to the negligence and unskilfulness of the contractors and agents whom they employed, believing them to be competent and skilful. The words of the section which impose the duty must have a reasonable interpretation in connection with the scope and subject of the Act and the constitution of the body of commissioners who were authorised to carry its provisions into effect. It would not have been sufficient that the commissioners could make or maintain the works in question otherwise than by the employment of contractors and agents, and the real obligation resting upon them, as it appears to me, was *bona fide* to employ such contractors and agents as they believed to be skilful and competent. Had it been intended to impose upon them the duty of maintaining the works in any other sense, I should have expected to have found in the Act some provision for levying rates to meet the possible consequences of failure. I can find no such provision, and I am drawn to the conclusion that the duty imposed upon the commissioners by the Legislature was not an absolute duty to maintain the works under all contingencies, but merely to take reasonable measures

Q. B.]

COR v. WISE.

[Q. B.]

and to exercise due care and skill in appointing proper agents and contractors for that purpose. There are cases, such as the *Hitchin Bridge Company v. The Local Board of Southampton*, 8 E. & B. 800, in which the commissioners have been held liable in their representative character for actual negligence admitted on the record, without it also appearing that they had funds out of which they could reimburse themselves in respect of damages and costs. But, in the case of *Ruck v. Williams*, 27 L. J. 329, Ex., which followed, and professed to be in a great measure governed by it, it appears to have been assumed by some of the judges that in each case the commissioners had the means of reimbursing themselves out of rates; and it is to be observed, that in the *Hitchin Bridge Company v. The Local Board of Southampton*, Lord Campbell and Wightman, J. rely upon sect. 139 of the Act, which empowered the board to render amends, as implying that an action might be maintained against the board for a wrong. The cases upon this subject are not all easily reconciled, but those which establish the liability of trustees or commissioners acting gratuitously in the execution of a public trust may be classed as follows:—First, cases of individual liability, where trustees or commissioners had exceeded or abused their power; secondly, cases in which the duty or obligation imposed upon such trustees or commissioners has been violated by reason of directions or orders given by them for the doing of the very acts from which damage to others has resulted; thirdly, cases of commissioners, trustees, or corporations, authorised to construct or maintain works for trading or the like profitable purposes, such as dock trustees, corporations acting as proprietors of gas or waterworks and the like, in which cases, although they may act without reward, yet the subject of their incorporation or constitution is to make and maintain works yielding profitable returns either by tolls and dues, or payment for services rendered, and in their very nature were substitutions on a large scale for individual enterprise. There is really no sound distinction between such bodies and ordinary trading corporations, such as railway and canal companies, banking companies and market companies. It is true that, in cases like *Gibbs v. The Liverpool Docks*, 27 L. J. 321, Ex., and *Penhallow v. The Mersey Docks*, 3 H. & N. 184, and 30 L. J. 329, Ex. Ch., the trustees, although receiving tolls and dues for the use of their works, were themselves unsalaried, and the surplus of the profits earned from time to time was paid over to public objects; still they were constituted and incorporated for the very purpose of earning profits by the use which was to be made of their works. To the extent of their earnings from the works so made and maintained, it would have been justly impolitic to exempt them from a liability to which all individual owners of similar works are subject. They kept open their dock to the trading public for reward when it was in a dangerous condition, and inasmuch as they had the means of knowledge that it was so, and took no measures to obviate the danger, the maxim *respondet superior* was properly applicable to such a case. *Penhallow v. The Mersey Docks* does not govern the present case, which falls within the reasoning of *Hull v. Smith*, 2 Bing. 156; *Duncan v. Findlater*, 6 Cl. & F. 894; and *Holliday v. St. Leonard's, Shoreditch*, 4 L. T. Rep. N. S. 406, and other similar authorities. The commissioners are authorised, for public works, to erect and maintain great works in drainage and navigation. They derive no other profits from the execution and maintenance of the works than a share in the beneficial results anticipated therefrom, and funds for their construction and maintenance are raised by rates imposed upon the districts supposed to be benefited thereby; but no business is authorised to be

carried on for profit, nor are any tolls authorised to be taken for any use of the works. The object is public, although the direct benefit is local. It is not in any respect analogous to lading or carrying or affording dock accommodation for profit. The commissioners have no property except such as is strictly incident to the machinery for making and maintaining the works and raising the necessary rates, and they have no power to levy a rate for any other purpose. In trading and carrying corporations it is reasonable that the funds to be earned should be applicable to all consequences of their business; but here the only funds authorised to be raised are strictly limited to the construction and maintenance of the works. This appears to me to amount to a strong intention that it was never contemplated by the Legislature that the commissioners were to be liable under circumstances like the present. Most of the cases on this subject are reviewed by the Court of C. P. in *Holliday v. St. Leonard's, Shoreditch*, 4 L. T. Rep. N. S. 406, in which Byles, J., who tried the case of *Whitehouse v. Fellowes*, 4 L. T. Rep. N. S. 177, so much pressed in the argument before us, explains that in that case, "the debts were personally cognisant of and parties to the works which caused the injury," and so distinguished it from the case under consideration. It is not necessary for me to examine the authorities in detail; but it will be found that all those which establish the liability of trustees, commissioners, or persons clothed with the gratuitous execution of a public trust are included in one or other of the classes above referred to. As was said by Lord Cottenham in *Duncan v. Findlater*, "cases may possibly be supposed in which the funds raised by a statute would be liable for acts done strictly in pursuance of the directions of the statute; but none in which such funds would be liable for acts done without the authority of the statute. It was, however, strenuously contended on the part of the plt. that although a judgment in his favour might be fruitless owing to the absence of any funds out of which it could be satisfied, or the means of raising any, that he was nevertheless entitled to our judgment, and he argued that various provisions of the statute 7 & 8 Vict. c. 106, proved that it was contemplated that actions might be brought against the commissioners for acts, &c. done by them and expressly excepted them from personal liability, except in cases of wilful neglect or default, and in all other actions or suits directed that execution on any judgment or decree should be executed against the goods and chattels of the commissioners belonging to them by virtue of their office. There may be cases in which, although there are no existing funds or means of raising any to satisfy judgments, it is no answer to say an action is brought on a debt or contract expressly authorised to be entered into, or for an act within the scope of the authority of the commissioners to do, and to which they might lawfully apply their funds if they had any (*Palkster v. The Mayor of Gravesend*, 9 C. B. 774, and *Rendall v. King*, 17 C. B. 479); but I do not consider them as analogous with the present. With a view to see how the argument urged on the part of the plt. applies to the present case, it may be well to consider the effect of the provisions referred to which provide for the indemnity of the commissioners out of the moneys to be raised by virtue of the said Acts. By sect. 19 it is enacted that nothing in any deed or contract by the said Act authorised to be made by the said commissioners for the purposes of the said Act should charge or affect the persons of the commissioners or their own lands, &c., with or for the performance of anything contained in any such instrument, but that all damages, &c. in any action in consequence of such instrument or which such commissioners should otherwise be put to by

[Q. B.]

COE v. WISE.

[Q. B.]

virtue of the said Act should be discharged out of the moneys to arise by virtue of the said Act, &c., unless such suit or damage, &c. should have arisen in consequence of the wilful neglect or default on the part of the commissioners incurring the same. Then by sect. 20 it is enacted, that in all actions, &c. in respect of any matter or thing relating to the execution of the act by or against the said commissioners, it should be sufficient to state the names of two of the said commissioners or their clerk as plt.-or deft.; and then by sect. 21 it provides that executions are to be executed on the goods and chattels of the commissioners by virtue of their office; and sect. 22 indemnifies the commissioners or clerk in whose name suits may be brought or defended out of the moneys in the hands of the treasurer against all costs and suits, and enacts that no such commissioner or clerk shall be personally liable for payment thereof, unless the action should have arisen in consequence of his own wilful neglect or default. It appears to me that these clauses are strong to show the nature of the liability which the commissioners may be called upon to bear in acting in the execution of this Act. They must necessarily enter into deeds, and instruments, make contracts and employ agents. The statute, therefore, provides that all liability to arise in consequence of such instruments, or which any commissioner shall otherwise be put to, shall be discharged out of the moneys to arise by virtue of the said Acts, unless the same be the consequence of "wilful default or neglect." These are the only provisions which regulate the indemnity of the commissioners, and it cannot be supposed that the Legislature could have contemplated any other liability than that arising out of the execution of the deeds and instruments, and the employment of contractors and agents, for the execution of the work, and raising the necessary funds, or a liability arising out of the wilful neglect and default of the commissioners. The former liability was imposed on the funds to be raised under the Act. The latter was to be borne by the individual commissioners. There is no third course apparently contemplated by the Act, and I think that its provisions tend to show that the remedy of the plt. must be against the commissioners personally, inasmuch as they have been guilty of no wilful default or neglect, nor, under the circumstances, can it be against them, in their corporate capacity, because they have no funds which they can apply nor the means of raising any to answer for damages arising to the plt., or any of the grounds of nonfeasance or neglect imputed to the deft. In my opinion, therefore, the rule should be made absolute.

BLACKBURN, J.—In this case I have come to a conclusion different from that of my Lord and my brother Mellor, and I think that the rule to set aside the verdict for the plt. ought to be discharged. The action is against the clerk of the drainage commissioners for carrying into execution the statute 7 & 8 Vict. c. 105, for improving the drainage and navigation of the middle level of the Fens, as representing the drainage commissioners. The declaration, after referring to the 137th and 138th sections of the Act, which authorise the drainage commissioners to make a certain cut, and by which, amongst other things, it is enacted that the drainage commissioners shall "make and maintain a good and substantial sluice of brick and stone, at or near the opening of the cut, to exclude the tidal waters," alleges that the cut and sluice were made, and then sets forth, by way of breach, that the drainage commissioners "so carelessly, negligently, unskillfully and wrongfully conducted themselves in and about, *inter alia*, making and maintaining the said sluice good and substantial," that in consequence the tidal

waters burst in and flooded the plt.'s land. The material plea was, not guilty. On the trial before the Lord Chief Justice of the C. P. it was proved that the sluice did give way, and the tidal waters broke in, flooding the plt.'s land and occasioning much damage. There was much evidence given as to the cause of this accident. The Chief Justice left several questions to the jury. Their finding, so far as bears on the present point, was, that the damage to the plt. was not caused by the absence of due care and skill on the part of the defts. in respect of making the sluice, but they also found that it was caused by the want of due care and skill on the part of the defts. in maintaining the sluice. It is on this latter finding that I think the plt. entitled to retain his verdict; and I therefore omit noticing any other part of the verdict. The drainage commissioners, from the nature of their body, could not do anything in the nature of maintaining the sluice, except through the instrumentality of their officers, and the surveyors, engineers and other agents acting for them; and it was argued on behalf of the plt., that, therefore, the finding of the jury must be understood as meaning that the defts. had negligently chosen incompetent persons to whom they had entrusted the superintendence and maintenance of the works; but, on looking at the evidence and summing up, I think that the finding cannot be so understood. I think it must be understood as a finding that the sluice might, by due skill and care, have been maintained, and that due skill and care were not applied to maintain it. It was negligence on the part of those whose duty it was to cause due skill and care to be applied for that purpose, and if, as the plt. contends, that duty is cast on the drainage commissioners, it was negligence in them. The question whether that duty is imposed on the drainage commissioners depends on the true construction of the 7 & 8 Vict. c. 105; and into that question I will inquire afterwards. On the other hand, the defts.' counsel contended that, even if the duty was cast on the drainage commissioners for public purposes, as such (it was said) they were not liable for any acts and defaults of those employed by them, and so, it was argued, they could not be liable for a failure to maintain the sluice, a failure which could not have arisen except from a default of their engineers and surveyors, and other persons in their employment who ought to have seen the defects in the sluice, and prompted the commissioners to take the proper steps to remedy them. I do not, however, agree that such is the law with regard to public commissioners. There are, no doubt, several cases which were cited during the argument, in which it has been said that public bodies are not responsible for the acts of those they employ; but all those cases were of the kind in which the liability of the employer depends upon the standing towards those who actually do wrong in the relation of master and servant. They are all cases in which the act authorised by the public body was in itself lawful, but those who were employed to do that act were, in the course of the employment, guilty of negligence, from which the plt. suffered. These decisions, or at least the greater part of them, might be supported on the ground that the relation of master and servant did not exist between the body sued and the person guilty of negligence, for the master is liable for his servants, because he selects them, and has control over them, and in many cases a public body has not this selection, and a control over the officers whom it is obliged to employ. But this explanation does not apply to *Holliday v. St. Leonard's, Shoreditch*, 4 L. T. Rep. N. S. 406, in which the Chief Justice of the Court of C. P. gives as the *ratio decidendi* that "persons entrusted with the performance of a public duty discharging it gratuitously are exempted from



Q. B.]

COK v. WISE.

[Q. B.]

liability for the negligent acts of those employed by them," which seems to me to express in other words that there is an exception from the general rule that masters are responsible for the negligent acts of their servants when the master falls within the class somewhat indefinitely styled trustees for public purposes. I should therefore, if the drainage commissioners were sought to be charged for the collateral negligence of their servants, act upon that decision, leaving it to the plt., if so advised, to call on a court of error to examine the foundation of this doctrine, and to inquire how far it is founded on principle or liability established by authority. But the doctrine in question has, as it seems to me, no bearing on the present case, as the drainage commissioners are not sought to be charged for the collateral negligence of their servants, but for the nonperformance of a duty which was, it is alleged, imposed by Act of Parliament on the drainage commissioners themselves. In *Duncan v. Findlater*, 6 C. & F. 894, which was much relied on by the defts., the point raised by the bill of exceptions, on which alone the H. of L. decided, was, whether the jury were properly directed "that road trustees on a public road are liable for any injury which might happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees." It would appear to have been at least doubtful whether the persons by whose negligence the injury was occasioned were not the servants of a contractor, and it certainly does not at all appear that they were the servants of the trustees; so that no doubt the exception was well founded. Cottenham, L.C., however, in giving judgment in the H. of L., intimates an opinion that a body by Act of Parliament created and endowed with funds for a particular purpose can never as such be liable to pay damages, inasmuch, as either the act was justified by the statute under which the body acted, or was a wrong for which the trustees who ordered it might be responsible as individuals, but for which the trustees as such could not be liable, on the grounds that such liability would have the effect of diverting the trust-funds from the statutable object. This, however, was not the decision of the H. of L. It was merely an opinion of the L.C., but though delivered in a Scotch case, not an English one, is entitled to great respect and weight, but which is not binding on us as a decision. And there have subsequently been several express and positive decisions in our own courts opposed to the opinion thus intimated by Lord Cottenham, which, as it seems to me, establish that such a body may in their corporate capacity be guilty of a wrong for which judgment will go against them. Amongst these are the *Hitchin Bridge Company v. The Local Board of Southampton*, 8 E. & B. 801; *Ruck v. Williams*, 8 H. & N.; *Whitehouse v. Fellowes*, 4 L. T. Rep. N. S. 177; and *Brownlow v. The Metropolitan Board of Works*, 6 L. T. Rep. N. S. 187, which last case has been recently affirmed in the Ex. Ch. In all these cases the plt. obtained judgment for damages against public companies or quasi-corporate bodies for acts done by them in excess of their powers. The respective bodies corporate did not do the acts personally in one sense, for a body corporate never can literally do anything itself, but the wrongful acts complained of were the personal acts of the corporations, in the sense that the corporations directed those acts to be done, and were not merely fixed with the unauthorised and unintended negligence of their servants. In the present case the charge against the defts. is not one of malfeasance, but one of neglect of a duty imposed on them. In this

respect it very closely resembles *Penhallow v. The Mersey Docks*, 3 H. & N. 184. There the defts. were a public body who kept open a dock. It had been held by the Ex. Ch., in the previous case of *Gibbs v. The Trustees of the Liverpool Docks*, 3 H. & N. 164, that the law cast upon them the same duty that it would have cast upon any other body keeping open a dock or canal, namely, "to take reasonable care so long as they kept it open for the public use of all who might choose to navigate it, that they might navigate it without danger to their lives or property." The issue at the trial was, not guilty; whether the Mersey board had neglected this duty. The Chief Baron directed the jury that if the defts., by their servants, had the means of knowing the state of the dock, and they were negligently ignorant of it, the defts. were liable. This ruling was held right in the Court of Ex. Ch. The H. of L. may yet reverse that decision; but, whilst it stands, it seems to me to reduce the inquiry in the present case to that one question, whether the statute 7 & 8 Vict. c. 106, has imposed on the drainage commissioners a duty to take due care that the sluice was maintained, and unqualifiedly is a duty which the law cast upon the Mersey board to take due care that their docks were reasonably safe. Now sect. 138 is in the following terms: "That the said drainage commissioners shall make and maintain a good and substantial sluice of brick and stone at or near the entrance of the said cut into the river Ouse, with two or three openings and water ways, and which shall not be less than 50 feet, and with doors to each of the said openings of sufficient height to exclude the tidal waters." Nothing has been pointed out on the argument, and I have not myself discovered anything, to qualify this enactment, which certainly seems to me to cast upon the drainage commissioners the duty to maintain this sluice. The common law gives a right of action against those neglecting a duty cast upon them to those who in consequence sustain damage. I entirely assent to the position, that if the Legislature have shown an intention to prohibit this right of action in the present case, that will effectually prevent it, and I agree that such an intention need not be shown in the express words if it can be collected from the whole Act. But I think that the onus lies on the defts. to show that it was intended to prevent the right of action, and not on the plt. to show that it was intended to give it. Now, the commissioners are a large and fluctuating body, whom it would be very difficult to sue at common law as a body, and it would be very harsh and impolitic (for the reasons given in *Hall v. Smith*, 2 Bing. 156) to make the individual commissioners responsible out of their private funds for the default of the body; but the Legislature, being aware of this, have (as is now almost universally the case in actions of this sort) provided, by sect. 30, that the commissioners may be sued by their clerks in respect of anything relating to the execution of the Acts; and, by sect. 22, that execution on any judgment thus obtained against them shall be executed against the goods and chattels belonging to such drainage commissioners by virtue of their office. It certainly seems to me that if it were necessary to show affirmatively an intention on the part of the Legislature that judgment might be obtained and execution issued against the commissioners as a body, these sections would go far to show it. It is very true that an execution under the 21st section which would be a sufficient remedy for any judgment for a small sum will prove perfectly inadequate to meet such a very large liability as is involved in the present claim, and that the effect of a judgment against the drainage commissioners will probably be to make them insolvent. That, however, does not show that the Legislature intended to



Q. B.]

COE v. WISE.

[Q. B.]

take away the right to obtain judgment, and is not a ground on which we can, as I think, refuse to give the plt. the judgment he is entitled to. He will, no doubt, wish to raise the question whether he cannot compel the drainage commissioners to make a rate for the purpose of liquidating his claim. I do not mean to express any opinion, now, pre-judging the question at all. I think it premature to do so, and that we should, as in the *Hitchin Bridge Company v. The Southampton Local Board*, 8 E. & B. 30, give judgment for the plt. without deciding that question at all; but even if it were decided against the plt. it would not, in my opinion, afford any ground for depriving him of the right to obtain what he can by an execution under sect. 21, and of the benefit he may derive from his improved position before a committee in case there be any further litigation on the subject. For these reasons I think that the rule should be discharged.

COCKBURN, C. J.—This is an action brought against the defts. as commissioners of the drainage of the middle level of the Fens for injury sustained by the plt. by reason of the defts. not properly constructing and maintaining a sluice, which as such commissioners they were bound under the Act of the 7 & 8 Vict. c. 106, to make and maintain at a point where the waters of the middle level, after being conveyed by the cut across the marsh and district are discharged into the river Ouse; as also for omitting to make a puddle clay wall along the line of the embankment as required by the Act of Parliament. By the finding of the jury the defts. were absolved from all charge of omission or negligence in respect of the original construction of the sluice; but the jury found that there had been a want of due care and skill on the part of the defts. in respect of maintaining the sluice and in respect of providing remedies against mischief after the sluice was destroyed. The jury also found, as the fact was, that there had been an omission to construct the puddle clay wall; but as the disaster which gave rise to the present action arose not so much from the absence of the puddle clay wall, as from the giving way of the sluice, this finding became of minor importance. As regards each of these heads of default, however, the question for our decision on the leave reserved at the trial is, whether the case ought not to have been withdrawn from the jury on the ground that, on the admitted facts with reference to the circumstances in which the defts. as commissioners of the drainage are placed, they were in point of law exempt from liability. The effect of the decisions in the cases of *Hall v. Smith*, 2 Bing. 156; *Duncan v. Findlater*, in the H. of L., 6 Cl. & F. 894; and *Holliday v. St. Leonard's, Shoreditch*, 11 C. B. 192, is to establish the position that persons intrusted with the performance of a public duty discharging it gratuitously and themselves taking no personal part in its performance, and having no funds at their disposal out of which compensation for injury arising from the negligent acts of the persons employed by them can be made are exempted from the liability in respect of such negligence. The question in the present case is whether the defts. as commissioners of the drainage of the middle level are so circumstanced as to be entitled to immunity within the rule referred to. The cases cited are binding upon us, and if the present case falls within them the defts. will be entitled to our judgment. The defts. are commissioners appointed and acting under the Acts of the 50 Geo. 3, c. 125, and 7 & 8 Vict. c. 106, for improving the drainage and navigation of the middle level of the Fens. Their powers and functions in respect of the drainage are entirely distinct from those which are incidental to their office as commissioners of the navigation; and it is as commissioners

of the drainage that they are sought to be made liable in the present action. The drainage commissioners appointed under these Acts took no part personally in the original construction of the works, nor have they ever done so as regards the maintenance of the works, or management of the drainage. They are not persons specially named or selected for the purpose. Every landowner in the district is, as such, a commissioner; nor is there any option on the part of persons duly qualified to decline the office. It is, of course, impossible that such a body of persons can themselves personally execute the duties cast upon them by the Acts of Parliament; all that they can do is to appoint competent persons by whom those duties may be performed. Accordingly, it was left to the jury whether there had been want of due care on the part of the defts. in selecting the persons employed by them; and whether there had been want of due care and skill on the part of the persons so employed. Reading the verdict by the light of the evidence, we must take it that it was upon the latter hypothesis that the verdict against the defts. proceeded. This case therefore stands clear of the decisions in *Whitehouse v. Fellowes*, 4 L. T. Rep. N. S. 177; *Southampton and Hitchin Floating Bridge Company v. Southampton Local Board of Health*, 28 L. J. 41, Q. B.; and *Ruck v. Williams*, 3 H. & N. 308, in which the negligence imputed to the defts. was of a personal character. In none of these cases was the negligence for which the defts. were sought to be made liable that of their servants only; in all of them the fact was, or was assumed to be, that the defts. had themselves personally interfered in the work, and they have been themselves guilty of the negligence complained of. The defts. are therefore so far within the rule as laid down by Erle, C.J., in *Holliday v. St. Leonard's, Shoreditch*, as to the immunity of persons exercising public duties, that they are appointed by the Act of Parliament for the discharge of duties which they cannot themselves personally execute, and in the performance of which they are therefore compelled to employ others. It is however contended, on the part of the plt., that the defts. are not commissioners appointed for a public purpose, so as to come within the rule entitling such persons to exemption from liability. In support of this proposition it is urged that the drainage of the district in question is matter of local rather than of general or public concern; its sole purpose being to drain and improve the lands within that district alone. That case is therefore said to come within the principle of the decisions in *Reg. v. Badcock*, 6 Q. B. 787, and *The Birkenhead Dock Trustees v. The Overseers of Birkenhead*, 2 E. & B. 148, in which it was held, that property vested in trustees for the benefit of a local district is rateable to the relief of the poor in the parish in which it is locally situate, as not being specially appropriated to public purposes to be exempt from rateability. It does not, however, appear to me that these cases which are decided with reference to rateability alone are at all conclusive upon the present point. All property from which a benefit or profit arises ought, under done is within the statute it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it, and this is clear on the legal presumption that the act creating the damage, being within the statute, must be a lawful act. On the other hand, if the thing done is within the statute, either from the party doing it having exceeded the powers conferred on him by the statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct? Cases may possibly be supposed in which the funds raised by a statute would be liable for acts done strictly in pursuance of the

Q. B.]

COE v. WISE.

[Q. B.]

directions of the statute, but none in which such funds would be liable for acts done without the authority of the statute." It is true that in the present case there are no prohibitory words such as occur in the section of the General Turnpike Acts, and which were therefore present in *Duncan v. Findlater*; but it appears to me that where a statute directs the fund to be raised, and expressly directs its application to specific purposes, this has, by implication, the effect of prohibiting the application of the fund to any other purpose. Now, these commissioners are directed to execute and maintain the works specified by the Acts, and they are empowered to levy taxes prescribed by the Acts on lands within the district. The purposes to which the funds thence arising are to be applied are set forth in the 30th and 38th sections of the 50 Geo. 3, and the 237th section of the 7 & 8 Vict. c. 106. In the two former the fund is specifically appropriated to the purposes therein referred to. The language of sect. 237 of the 7 & 8 Vict. is somewhat more general. It directs that after defraying the expenses of the Acts, the funds shall be applied to "executing and completing the several works of drainage, and the several other works, matters and things required by the Acts to be made, done, or executed by the drainage commissioners, and for the general purposes of carrying the Acts into execution." It is on the concluding words of this section alone that it can be contended that damages recovered in an action for default or negligence, could be paid out of the fund to be raised by the commissioners. But I am of opinion that such a charge cannot properly be considered as one of the general purposes of carrying the Acts into execution. It cannot be that the Legislature contemplated that the commissioners, or those employed by them, would be guilty of a breach of duty or negligence in the discharge of their duty. And this view is confirmed by the circumstance, that by the 217th section of the 7 & 8 Vict. c. 106, provision is made for compensation "where any person or body, at any time after the said drainage commissioners, or any person employed or authorised by them, shall have begun to carry this Act into execution, shall happen to sustain any damage or injury in his lands, tenements, or hereditaments, goods or chattels, by or in consequence of any act of the said commissioners for drainage, or their agents, workmen, or servants for which no recompence or satisfaction is hereby otherwise provided." A positive appropriation of the funds to be raised by the commissioners being thus made by the Act, this appropriation, as I have before said, has by implication the effect of negating the authority of the commissioners to apply the funds in payment of damages. Besides this, the Act contains in sect. 239, a provision for the reduction of the tax which the commissioners are empowered to levy to half or one-third of the amount so soon as the works should be executed and the debts discharged. Such a provision was held in *Rex v. Liverpool*, 7 B. C. 61, to be a ground for holding that the dock rates and duties authorised to be taken by Act of the statute 43 Eliz. c. 2, to contribute to the relief of the poor. To this liability an exception has, however, been established in the case of property devoted to public purposes. But the propriety of this exception has, in recent times, been questioned, on the ground that every such exception necessarily throws an additional burden on other property in the parish; and the tendency of modern decisions has been to confine the exemption within the narrowest possible limits, and to restrict it to those cases in which the purpose to which the property is appropriated is public in the largest sense of the term; that is, where it is held for the benefit of the entire public as distinguished from any portion of the

public, however extensive. This rule does not appear to me to be applicable to the case of trustees or commissioners acting for an extensive district in a matter of general, and not individual concern. The drainage of an extensive district without which a vast tract of arable land would be reduced to the condition of marsh and fen, and would thus be drawn from the producing power of the country, is, I think, sufficiently a matter of public and general concern to entitle those who are entrusted with the construction and management of the works necessary for such a purpose to the character of public commissioners, and to the immunity to which it is now settled that trustees or commissioners for public purposes are entitled. In like manner it was contended for the plt. that one of the conditions of the immunity of persons employed for a public purpose being, according to the rule laid down by Erle, C.J., in *Holliday v. St. Leonard's, Shoreditch*, that the service should be gratuitous, this condition was not satisfied in the present case, inasmuch as the commissioners, although receiving no salary or other direct remuneration for their services, yet as owners of land within the district receive a benefit from the employment of their land by the drainage. But a remote and indirect benefit of this kind incidentally arising from the works, and not received by the commissioners as a remuneration for their services, is not, as it seems to me, sufficient to take the case out of the rule as to the immunity above referred to. In my judgment, however, the main criterion in these cases is, whether there is any fund at the disposal of public trustees or commissioners available for the payment of damages in respect of injury occasioned by negligence. Not indeed that I feel the force of the reasoning of Best, C.J. in *Hall v. Smith*, but no one would undertake a public duty without remuneration if liable for the negligence of servants, inasmuch as it is not pretended that public trustees or commissioners can be made to answer in damages out of their own private funds. The ground on which my judgment proceeds is, that it being admitted that public trustees or commissioners cannot be made liable in their individual character, the fact that the Legislature has appropriated the funds in their hands to specific objects, so as to exclude their application to the payment of damages, leads fairly to the inference that the trustees or commissioners cannot be held liable in their aggregate or quasi-corporate character. In *Holliday v. St. Leonard's, Shoreditch*, Byles, J. says: "Here the debts are public officers acting gratuitously and compulsorily, and having no funds out of which the damage could be paid; and the cases show that under such circumstances, being guiltless of personal negligence, they are not liable." The absence of any such funds was strongly insisted on by Lord Cottenham in his judgment in *Duncan v. Findlater*. He there says: "It is impossible to suppose that the framers of this statute contemplated that any part of this fund would be appropriated for the purpose of affording compensation for any act of the persons who might be employed under the authority of the trustees. If the thing Parliament were not even rateable to the relief of the poor. Lord Tenterden, in giving judgment, says, 'The statute under which the dock rates in question are levied does not indeed contain an express direction that the rates shall be applied to the purposes specified and no other; but it directs that certain burdens shall be discharged, and that then the rates shall be lowered, and therefore any application of these rates to other purposes not specified would be a direct violation of the statute. We were pressed on the argument with the authority of the decision in the case of *Scott v. The Mayor of Manchester*, 2 Ex. 204. But the present case is obviously distinguishable, inasmuch as there the

Q. B.]

KNOWLDEN, DRON AND OXFORD v. THE QUEEN.

[Q. B.]

trustees were in the receipt of profits beyond the amount necessary for the primary and immediate purpose of the statutory powers and applicable to the benefit of the town of Manchester. The debts were thus in the nature of a trading corporation. In the present case the taxation is imposed expressly for the execution of the works, without any provision directing the application of the surplus (if any) to any ulterior purpose, or to the benefit of any one. It has, indeed, been suggested that, whether there be funds applicable to the payment of damages and costs recovered in an action or not, the plt. who has sustained an injury is still entitled to bring his action and to proceed to judgment and execution, although it may be known all along that such a proceeding must necessarily be barren of any profitable result. It appears to me that such a position is untenable. It would be to bring the law into contempt to suffer an action to be maintained where, if the plt. succeeds, the judgment cannot possibly be satisfied either by taking the person or property of the debt., or by any other means. A result so absurd in itself is a strong ground for applying the principle of that immunity to such a case. But besides this, if such an action were allowed to be maintained, property which *ex hypothesi* cannot be applied in compensation of the injury complained of, might be taken in execution on the judgment. If that judgment were obtained against the commissioners, funds in their hands, or property necessary for the execution of their powers, might be taken in execution under it; and this, although the Act of Parliament under which the public trustees or commissioners were appointed might have expressly prohibited the application of the funds to any other purposes than the purposes of the Act. Besides which the debts in such an action would necessarily be put to expense in defending it, and would either be compelled to pay those expenses out of their own pockets, to which it is admitted they ought not to be liable, or would pay them out of the public funds, which on the hypothesis ought not to be applied to such a purpose. The cases of *Gibbs v. Trustees of the Liverpool Docks*, 3 H. & N. 164, and *Penhallow v. The Mersey Docks*, 7 H. & N. 239, may appear to militate against this view, inasmuch as in these cases the debts. were held liable for negligence, although the rates and tolls are payable by them, being appropriated by the Acts, and there was held no fund available to satisfy the judgment. It may be observed that the point as to the absence of funds to satisfy the judgment does not appear to have been taken by counsel or to have been adverted to by the court. But assuming that this difficulty would not have altered the decision in the cases referred to, the present case may be distinguished from them on the ground that the class of actions on which it appears the plt. in those cases succeeded was the personal negligence of the debt., the trustees being held liable not upon the ground of any default or negligence in the execution of their duty under the Act, but for the wrongful act of keeping the dock open, and inviting vessels to enter it when it was in an unfit and dangerous condition. The distinction between those cases and the present is, that which I have already pointed out as distinguishing this case from *Whitehouse v. Fellowes*, namely, that the debts. are here sought to be made liable, not for their own default, but for that of persons in their employ. It is true that by the declaration the debts. are charged with breach of duty in not constructing and maintaining the works, but the form in which the declaration is framed cannot alter the substance of the thing, or enlarge the liability of the debts. As we have seen, the commissioners cannot discharge their duty personally; they are obliged to employ contractors, engineers

and other servants for the purpose, and the question left to the jury, although in form general as to whether there had been due care and skill in maintaining the sluice, or in providing remedies where the sluice was destroyed, which at first sight might appear to have had reference to the debts. themselves, came under the direction and observations of the learned judge in effect to be whether there had been due care and skill on the part of the debts. servants. The case appears to me therefore in all respects to fall within the principle of the decisions in *Duncan v. Findlater* and *Holliday v. St. Leonard's, Shoreditch*, by the authority of which we are bound, and I am consequently of opinion that the debts. are not liable, and that this rule should be made absolute. (a)

Rule absolute.

Attorney for the plt., T. M. Wilkin, Lynn.

Attorney for the debt., F. J. Wise, March.

Wednesday, June 1, 1864.

KNOWLDEN, DRON AND OXFORD v. THE QUEEN.

Pleading—Vexatious Indictments Act—Averment of conditions of—Recognisance—Conspiracy.

In indictments for offences within the provisions of the Vexatious Indictments Act, it is not necessary that it should appear upon the record that the conditions imposed by that Act, or any of them, have been complied with.

A., B. and C., charged with a conspiracy to defraud members of a friendly society, were bound over before a magistrate to appear at the next session of the Central Criminal Court to plead to such indictment as might be preferred against them in respect of the said charge. At the next session a true bill was found against them upon the said charge, but was postponed until the following session. At the following session a second indictment was found, charging A., B., C., and D., a fourth person not charged before the magistrate, with the same conspiracy:

Held, that as A., B. and C. had been once bound over by a magistrate, and the subject-matter of both indictments was the same as that mentioned in the recognisance, the debts. might be tried and convicted thereon.

Writ of error on the conviction of John Knowlden, John Dron and Thomas Oxford, on an indictment preferred and found by the grand jury at the October Sessions 1863 of the Central Criminal Court. A fourth person, Charles Alfred Coombe, was charged in the said indictment. The charge was a conspiracy to defraud divers members of a friendly society called the Perseverance Life Assurance and Sick Fund Friendly Society. The three prisoners were each sentenced to eighteen calendar months' imprisonment with hard labour.

Upon the face of the assignment of error the following facts appeared:—

On the 19th Aug. 1863, at the Southwark police court, Knowlden and two sureties were bound by recognisance whereby, after a recital as follows: "Whereas the said J. Knowlden (with others) was this day charged before me the said magistrate for that they did unlawfully conspire, confederate and agree together to cheat and defraud, against the peace," &c., he was bound over to appear at the next ensuing session of the Central Criminal Court, and surrender and plead to such indictment as might be found against him by the grand jury for or in respect of the charge aforesaid, and take his trial upon the

(a) This case was partly argued also before the late Mr Justice Wightman.

Q. B.]

KNOWLSEN, DRON AND OXFORD v. THE QUEEN.

[Q. B.]

same, and not depart the said court without leave, then the said recognisance to be void.

Oxford and Dron were bound over in similar recognisances on the 22nd Aug. 1863.

On the 19th Aug. 1863, before the same police magistrate, the prosecutors and witnesses entered into recognisances whereby, after reciting that the three plts. in error were that day charged before the said magistrate with a conspiracy to cheat and defraud, against the peace, &c., they were bound over to appear at the next ensuing session of the Central Criminal Court, and there prefer or cause to be preferred a bill of indictment against the three plts. in error for the offence aforesaid, and duly prosecute the said indictment and give evidence thereon.

At the September session of the Central Criminal Court, which was the next ensuing session after the 22nd Aug., an indictment for conspiracy to defraud several members of the above friendly society was preferred and found against the three plts. in error alone by the grand jury.

On the application of the counsel for the prosecution, the trial thereof was postponed until the ensuing October session on the ground of the absence of a material witness, and the said recognisances entered into by the plts. in error were accordingly *duly respited* until the said October sessions.

On the 24th Oct. the Solicitor-General gave his consent as set out below to a fresh indictment being preferred against the three plts. in error and Charles Alfred Coombs. Accordingly on the 26th Oct. the indictment was found on which the plts. in error were tried and convicted.

That indictment was in the ordinary form, and did not state on the face of it that it had been preferred by leave of a judge or the assent of the law officer of the Crown. The plts. in error, on being called upon to plead to the indictment, refused to do so, and the Court directed a plea of not guilty to be entered for them on their behalf.

The prisoners were not tried upon the first indictment found at the September session, which remains on the files of the Central Criminal Court undisposed of.

#### Assignment of error:

That at the time of the presenting and finding of the indictment, neither the prosecutor nor any other person prosecuting the indictment were or was bound by recognisance, to prosecute or give evidence, but that certain recognisances entered into by the prosecutors had been discharged and fulfilled, so far as they might be discharged and fulfilled, by the presenting and finding of an indictment at the September Sessions 1863 of the Central Criminal Court, when the three plts. were charged with a conspiracy jointly one with another, and not with the said Coombs, which said indictment has never been quashed, and is now pending; and the plts. further said that they were not committed or detained in custody, or bound over by recognisances to appear to answer the indictment found at the October sessions, nor was the last-mentioned indictment preferred or found with the consent or by the direction of a judge of a Superior Court, or by the direction of the Attorney or Solicitor-General, nor were the provisions of the statute 22 & 23 Vict. c. 17, in any way complied with.

And the plts. further assigned that, contrary to the said statute, they were not, nor were any of them, bound by recognisance to appear to answer to the indictment preferred in October, but that they were bound by recognisance before a police magistrate to appear to the September indictment, in which Coombs was not charged, which offence was another and different offence to that which the plts. were bound over to appear to answer.

And the plts. further assigned that, on the 24th Oct. 1863, Her Majesty's Solicitor-General signed a written direction to the effect following, to wit:

Central Criminal Court, October Sessions 1863.

Rsg. v. JOHN KNOWLSEN, THOMAS OXFORD, JOHN DRON AND CHARLES ALFRED COOMBS.

I direct an indictment to be preferred against the above-

named Charles Alfred Coombs, at the Central Criminal Court, for a conspiracy to defraud.

(Signed) R. P. COLLIER, Solicitor-General.  
Dated 24th Oct. 1863.

And that thereupon the indictment on which the plts. were found guilty was presented and found, and that there is no sufficient allowance and authorisation of the said indictment by consent in writing.

The plts. further assigned error in this, that it did not appear upon the record and proceedings that the said indictment was authorised and allowed, as is provided by the said statute, by the consent in writing of a judge of the Superior Courts at Westminster, or of Her Majesty's Attorney-General or Solicitor-General, so as to be lawfully presented and found by the said jury.

Joinder in error.

*Giffard* (Besley and Kydd with him) for the plts. in error.—The conviction cannot be sustained. The 22 & 23 Vict. c. 17 renders it necessary that certain conditions precedent should be complied with before an indictment for conspiracy should be presented to or found by a grand jury. Those conditions ought to be entered on the record, and it must appear that they have been fulfilled. In this case it should appear that the plts. in error were bound over by recognisance to answer the indictment on which they were convicted, or that the indictment was preferred by the direction or leave of a judge or law officer of the Crown. [BLACKBURN, J.—How is it with respect to criminal informations? The 4 & 5 Will. & M. c. 18 was passed to prevent malicious informations in the Court of Q. B., and sect. 2 says, that the clerk of the Crown shall not, without express order of the court given in open court, exhibit, receive, or file any information, yet the record never shows on the face of it that such order has been made. The rule in criminal pleading is, that where there is general jurisdiction and a qualification subsequently put on it, it is not necessary to notice the qualification on the record.] Under that Act the Court of Q. B., whose information it is, gives the leave. In a *qui tam* action to recover a penalty for acting as a commissioner under the Public Health Act (11 & 12 Vict. c. 63), s. 133, it was held necessary to aver in the declaration the consent of the Attorney-General to the proceedings: (*Hollis v. Marshall*, 27 L. J. 285, Ex.) [BLACKBURN, J.—There the statute which imposed the penalty also imposed the condition upon which proceedings for the recovery of it might be taken.] The 22 & 23 Vict. c. 17, says that the grand jury shall not find any indictment in the specified misdemeanors, unless the conditions have been complied with. In pleading, where place or any particulars as to the character or person are essential, they must be averred. So in bankruptcy it was essential to set out all the ingredients which went to make out the bankruptcy. Each element of the offence must be stated on the record:

*Reg. v. Fearnley*, 1 Leach, 426;

*Macdonald's case*, Foster's C. L. 59.

The 22 & 23 Vict. c. 17, takes away the whole jurisdiction of the grand jury, unless the conditions have been complied with. [CROMPTON, J.—Your argument must go the length that in every indictment for obtaining money or other property by false pretences you must aver a commitment by a magistrate, or leave of a judge or law officer of the Crown.] If the record does not show that, it is doubtful whether the liberty of the subject has been legally taken away or not. Secondly, as to the error in fact. The indictment preferred and found at the October sessions against four persons was another and different one to that found at the September sessions. [COCKBURN, C. J.—The recognisances bind them to answer the charge, not any particular

Q. B.]

KNOWLSEN, DRON AND OXFORD v. THE QUEEN.

[Q. B.]

indictment.] If so, the three were not bound over to answer a charge along with Coomba. The authority given by the Act was exhausted by the preferring and finding of the first indictment at the September sessions. [BLACKBURN, J.—What are we to understand by the statement of the recognisances being *duly respited* to the next sessions? That appears to me to be the material point.] The recognisances apply to different persons. They cannot be construed to mean that the prosecutor may prefer a charge of conspiracy against four persons.

The *Solicitor-General* for the Crown.—The recognisances were properly respited: (*Lord Drummond's case*.) The words of the recognisance are to prosecute or give evidence against the person accused of such offence. Respiting means, that the time for esteating the recognisances shall be enlarged. It is immaterial as regards the recognisances whether the charge is against three or four persons. It is not necessary that all the persons charged with the conspiracy shall be convicted. The indictment on which the plts. in error were found guilty meets the charge mentioned in the recognisances. Then, as to the averment on the record of the conditions of the statute having been complied with, this is similar to the case of criminal informations, in which it is not necessary to aver that leave of the court has been obtained pursuant to the 4 & 5 Will. & M. c. 18, s. 2. The rule is laid down in Paley on Conv. 195 (edit. 4). Again, this is not matter for a writ of error; the application should be to quash the indictment, or for a *certiorari*, on the ground that the conditions of the statute have not been complied with:

*Reg. v. Mansell*, 8 E. & B. 54.

*Giffard* in reply.—In *Reg. v. Heane*, 9 L. T. Rep. N. S. 719; 38 L. J. 154, M. C., the Court said that they would not quash the indictment, but leave the party to his writ of error.

COCKBURN, C. J.—I am of opinion that our judgment should be for the Crown. As regards the first question, whether the condition required by the 22 & 23 Vict., as a condition preliminary to the presenting to and finding of the indictment by the grand jury must appear on the face of the record, it appears to me that it is not necessary. It is true that, in general, whatever is necessary to give jurisdiction must appear on the face of the record, but that rule is subject to the qualification pointed out by my brother Blackburn during the argument. Here it is not a condition attached to the jurisdiction of the grand jury over the offence. The moment the condition is complied with, the grand jury are seised of the matter, and the offence need only be stated on the indictment in the usual form. Nothing could be more inconvenient than that matters of this description should be stated on the record, for it would follow that they might be put in issue, and then it would be necessary in every case within the Act to try the question whether the accused had been committed or bound over to answer the subject of the indictment. That could not have been the intention of the Legislature. No doubt there ought to be in some way enough evidence to satisfy the grand jury that the condition of the statute has been complied with, but when that is done, the grand jury exercise the same jurisdiction as they exercised before the Act. Where the parties and the prosecutor have been bound over to prefer the indictment the accused must be aware of the fact, or, if he has any doubt, the fact may, on inquiry, be readily ascertained. Supposing a prosecution to have been improperly instituted, and a deception practised on the officers of the court as to the preliminary condition having been complied with,

there can be no doubt that redress can be had in some way; whether by application to the judge before the trial to quash the indictment, or whether when it comes to the party's knowledge at a later period by some other proceeding, it is not necessary now to decide. It is enough to say that redress can be obtained in some way. I think, therefore, that, with reference to the first question, the argument of the deft. fails. As to the other point of error in fact, it was urged in the first place that the prosecution upon which defts. were convicted was not the same prosecution as that to which the recognisances entered into relate, because the prosecutor was bound over to prosecute on a charge of conspiracy against three persons, whereas the indictment, on which the prisoners were tried and convicted, was a charge of conspiracy against four persons. In substance both indictments were for the same offence, and the subject-matter of the conspiracy was the same, and the only variation was that there was an additional conspirator charged. But inasmuch as two or more out of a larger number of persons charged with a conspiracy may be convicted, the fact that an additional person was added on the indictment on which the prisoners were found guilty makes no difference. Then it was further said that the recognisances of the accused to appear and answer the charge were no longer in existence. In the first place it is questionable whether the recognisances were not still in existence, for although fresh ones were not entered into at the September sessions, yet the accused had never appeared according to the exigency of the recognisances, which for the benefit of all parties, instead of being esteated at the September sessions, were enlarged or respited until the next sessions. I doubt whether that is not keeping the recognisances alive for the purpose of the second indictment. Whether that is so or not, I think that, the accused having been bound over to appear and take their trial on a charge of conspiracy, the condition of the statute was complied with so long as the indictment was preferred for the same offence as they were bound over to meet. The words of the statute are large enough to meet that construction of it, and the purpose and object of the Act being to protect persons against vexatious indictments, as soon as the parties have gone before a magistrate who has bound them over, that object has been gained. If that has been done by the magistrate, or an order of a judge has been obtained to present the indictment to the grand jury, the statute has been satisfied. I therefore think our judgment should be for the Crown.

CROMPTON, J.—I am of the same opinion. I do not think it necessary to hold that it is indispensable that in all cases within the Act there should be on the record an averment that the indictment has been preferred by the assent of a judge or the law officers of the Crown. There is a general jurisdiction in the grand jury to find a bill of indictment; and this enactment is a direction in effect to the grand jury not to act in the particular cases specified until the things required by the Act have been done. This Act is to prevent vexatious indictments for certain misdemeanors. It is different to an Act which creates a penalty not to be incurred except under certain circumstances, in which case it must be shown on the record that those circumstances have happened. The cases referred to upon the statute of 4 & 5 Will. & M. are very much in point. After the Revolution of 1688 the proceeding by way of a criminal information was very much abused, and that statute was passed to prevent the vexatious abuse of that process, and it enacted that the coroner and attorney of the Crown should not file.

[Q. B.]

GARDINER v. COLYER.

[Q. B.]

any criminal information in certain cases without the express direction of the court given in open court. The Crown officer is placed very much in the same position as the grand jury, but it has never been deemed necessary to state on the face of a criminal information that the statute has been complied with. In the present case the accused has the means of inquiry, and practically there is no real difficulty in the case. The officer of the court has every commitment sent to him, and he knows whether there has been a committal or not in each case. Through his office the indictment must pass on its way to the grand jury, and it is very much like a direction to him to take care that an indictment shall not be presented to the grand jury until the condition of the statute is complied with. The practice in modern times under the statute 4 & 5 Will. & M. in the case of criminal informations is not to aver compliance with the conditions of that statute, on the record, and I cannot think that in this case the matter ought to appear on the record. It is not necessary to consider what the exact remedy may be when the statute has not been complied with. It is said that a writ of error will lie. Supposing that to be so, yet I am of opinion that there is no ground of error assigned in this case. The parties were both before the magistrate, and the accused knows whether the magistrate committed him or not for trial. It is also clear that the prosecutor was bound to give evidence against the party accused of this offence. The offence of which the prisoners have been found guilty is the same offence. Then as regards the indictment being found at the subsequent sessions, it is the same offence, though the case stood over until the next sessions for which the prisoners were bound over. If the recognisances had been discharged at the September sessions, it would have been different. It is no answer to say that the accused did not appear at the September sessions. The only difficulty that struck me was, whether the two indictments were the same prosecution, and I think that they were practically the same. Therefore, both grounds fail.

BLACKBURN, J.—I am of the same opinion. The Vexatious Indictments Act puts as a condition, that before any bill of indictment for any of the offences specified shall be presented to or found by the grand jury, certain things shall be done. It does not alter the nature of the offences or the general jurisdiction of the grand jury. If the things required constituted any part of the offence, then they would be a matter of trial before the petty jury; but that is not so—they are only a condition put on the general jurisdiction of the grand jury to find a bill of indictment in the cases specified. It is precisely the same as the case of vexatious criminal informations. It has never been the practice to aver in a criminal information that leave has been obtained to prefer it, but the mode of pleading remains the same as at common law before the 4 & 5 Will. & M. passed. I therefore think the first objection made a bad one. If a bill of indictment were improperly preferred and found, it may be that the more convenient course, when the fact was discovered, would be to apply to the court before the trial to quash it, and I think the court would have jurisdiction to quash it or any part of the indictment as to which the statute was not complied with. Or it may be a question whether the case falls within the statute or not, as in *Reg. v. Heane*, where it was doubted whether the case was one of perjury or not, in which case it might be, that one court might entertain the view that it was not within the Vexatious Indictments Act, and another might hold that it was, and in such case, perhaps, the deft. might plead to the jurisdiction. I am also inclined to think that error

in fact would lie, but I do not desire to express an opinion on that without further consideration. It is not necessary to decide what is the proper course to pursue, for here the condition of the statute has been complied with. As to the recognisances: the prisoners were bound to appear at the next sessions to an indictment for this conspiracy to defraud this benefit society. The condition and the spirit of the Act have been fulfilled, which was to prevent vexatious indictments being preferred, and that object was fulfilled as soon as the accused were bound over by the magistrate to answer the charge. It may be that a fresh charge would not be right, but the fact of four persons being included in the indictment, whereas three persons only were implicated before the magistrate, does not vary the offence. I am of opinion, therefore, that judgment must be for the Crown.

SHEE, J.—I am of the same opinion. The Legislature must be taken to know the mode in which indictments are usually preferred, and that they pass through the hands of the officers of the court to the grand jury. I think that the statute is nothing more than a direction to those officers to take care that no bill shall be presented to the grand jury unless the requisitions of the statute have been complied with. I think the Legislature might have had in view the 4 & 5 Will. & M., for the Act of 22 & 23 Vict. contemplates the same evils. I think that if it came to the knowledge of the court that a bill of indictment had been found without the requisites having been complied with, it might be treated as a nullity and as if it had not been found, and that the court might quash it. As to the recognisance, the question in my opinion is, not whether the indictment is the same, but whether the offence is the same. Here the offence is the same and the facts are the same, and the only difference is that a fourth person is charged in the second indictment. And I think that the accused have been bound by recognisances within the meaning of the statute to appear to answer this indictment. I therefore concur in the judgment of the court.

*Judgment for the Crown.*

Tuesday, June 7, 1864.

GARDINER v. COLYER.

*Lease—Construction—Reservation of right of sporting.*

*In an indenture of lease the lessor granted to the lessee the right of sporting over the land demised, and certain other lands "in common with the lessor, his heirs and assigns, and any friend of his or them."*

*Held, that the privilege might be granted to several friends to sport at the same time.*

Action for breach of a covenant for quiet enjoyment of a lease.

The declaration stated a demise of land to one W. Dray,

Together with the right, in common with the deft, his heirs and assigns, and any friend of his or them, of shooting on, in and over the premises and hereditaments thereby demised, and also in and over the several closes, pieces and parcels of land comprising the farm called Hampton Court Farm, then in the occupation of John Allen, under a lease granted to him by the deft, and contemporaneously with the now recited indenture.

*Averments:*

That Dray assigned the lease to the plt, and that afterwards and during the term, J. Allen, G. Davis, A. Halse and W. Brown, claiming through and under the deft, the right jointly so to do, and having the authority of the deft, so to do (such persons not being the heirs or assigns, nor any one of them being the heir or assign of the deft) jointly entered the said premises and hereditaments by the said recited indentures

Q. B.] LONDON AND NORTH-WESTERN RAIL. CO. v. SURVEYORS OF TOWNSHIP OF SKERTON. [Q. B.]

demised to the said W. Dray, and also into and upon the several closes, pieces, or parcels of land, comprising Hampton Court Farm, in the pursuit of game.

Demurrer to the declaration.

*Manisty* Q. C. in support of the demurrer.—By the 1 & 2 Will. 4, c. 32, s. 11, where the lessor or landlord has reserved to himself the right of killing the game upon any land, he may authorise any other person or persons who shall have an annual game certificate to enter upon such land for the purpose of pursuing and killing game. The lease does not abridge the right this statute gave to the deft. as a lessor who had reserved the right of sporting. But, independently of the statute, under this reservation or grant the deft. was at liberty to authorise several persons to sport at the same time:

*Wickham v. Harker*, 7 M. & W. 68;  
*Doe v. Lock*, 2 A. & E. 705.

*R. A. Fisher* contra.—The declaration disclosed a breach of the deft.'s covenant for quiet enjoyment, independently of the right of shooting or sporting claimed or asserted by him. It is consistent with the breach assigned, that the deft. entered the lands, not in virtue of any right or claim of shooting reserved by the demise, but as a trespasser. The deft. should have set forth his right in a plea specially. Assuming that the point is raised by the pleadings, the right to enter the lands demised to shoot or sport was restricted and reserved to one friend in company with the deft. at one and the same time or simultaneously with the plt.; "any friend" is to be read as "a" or "any one" friend of the deft.'s, not a plurality or promiscuous number of his friends. Although in the 8 & 9 Vict. c. 16, s. 36, enabling a creditor to take proceedings by *sci. fa.* against "any of the shareholders," it has been decided to mean any number, that was by reason of their previous liability. But here the privilege granted is purely personal and limited to the deft. and "a" friend—a kind of *delectus personarum*. Lord Denman, in *Doe dem. Douglas v. Scott*, 2 Ad. & E. 705, 745, says: "The privilege of hawking, hunting, fishing and fowling is not either a reservation or an exception in point of law, it is only a privilege or right granted to the lessor." Consequently, the privilege here is to be strictly and literally construed. The right of sporting set forth in the grant in *Wickham v. Hawker*, 7 W. & M. 68, was more extensive in terms, by reason of the words "or otherwise." If a plurality of friends were permitted to exercise the right, the plt. might be deprived of his right of sporting altogether by the destruction of all the game upon the premises by the deft. and his friends.

COCKBURN, C. J.—I am of opinion that our judgment must be for the deft. The declaration does not negative that the persons who went sporting on the premises with the consent of the landlord were his friends, and we must therefore take it that they were so. The question then arises, whether the deft., by virtue of the right reserved in the lease, is entitled to send more friends than one at a time on the land. On the true construction of the lease I am of opinion that he was. The demise is of a farm to the plt., with the right to sport over it, and also over other lands of the deft. in common with the deft., his heirs and assigns, and any friend of his or them. This means that he may grant permission, not indeed to any one, but to friends of his to whom he might have granted it if he had not demised to the plt. It would have been easy, if it had been intended to limit the right to a single friend at a time, to do so by words plainly expressing that meaning. The words used would be commonly understood to mean a plurality of friends. All doubt is removed

by the fact that the right of sporting granted and also reserved in this lease has reference, not only to the premises demised to the plt., but to other lands over which the plt. would have no right except for this grant. I think the lessee did not intend to do anything more than to grant to the tenant a right of sporting in common with him, not to divest himself of any part of his right to sport himself, and to take any friends with him.

CROMPTON, BLACKBURN and SHEE, JJ. concurred.

*Judgment for the deft.*

Attorney for the plt., W. May.

June 8 and 11, 1864.

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY (apps.) v. THE SURVEYORS OF HIGHWAYS OF THE TOWNSHIP OF SKERTON (resps.)

*Highway—Repair of—8 Vict. c. 20, ss. 46-65—Approaches to a railway bridge—Road lowered—Liability of railway company to repair.*

The 8 Vict. c. 20, s. 46 (*Railways Clauses Consolidation Act*) provides, that when the line of a railway crosses a road or highway, either the road shall be carried over the railway, or the railway shall be carried over the road, by means of a bridge of the height and width and with the ascent or descent by that or the special Act provided; and that the immediate approaches and all the necessary works connected therewith shall be maintained at the expense of the company.

A railway company, in constructing a bridge over a highway, lowered the highway in order to bring it to a proper level below the bridge:

*Held*, that the road thus lowered did not constitute an immediate approach or necessary work within the meaning of the above section, and that the company were therefore not bound to keep it in repair.

This was a case stated under the 20 & 21 Vict. c. 48. The apps. are the lessees of the Lancaster and Carlisle Railway, and for the purpose of this case may be considered as the Lancaster and Carlisle Railway Company.

On the 12th Dec. the apps. were summoned, under the provisions of the Railways Clauses Consolidation Act (8 Vict. c. 20, s. 65), before the justices of Lonsdale, in the county of Lancaster, for the non-repair of the immediate approaches on each side of the bridge constructed by the apps. for the purpose of carrying their railway over a certain public highway in the township of Skerton, leading from Lancaster to Morecombe, the said approaches being a work executed in the construction of the said railway. Prior to the construction of the railway, the highway was repairable and repaired by the resps. A plan which accompanied the case showed the railway and the approaches in question, and how the bed of the original highway was altered and lowered by excavation nine feet deep, in some parts, by the apps., at the time of the construction of the railway bridge, for the purpose of enabling the public to pass under it. It was not shown in evidence that the company had made good the damage done by them to the surface of the road, or to the road, at the time of their interference with it. The surveyors the resps. have never since repaired the *locus in quo*, neither have the apps. The railway was formed about the year 1850. The company admitted the non-repair of the highway and of the approaches to the bridge, but contested their liability to keep them in repair after their works had been finished. The justices made an order for the company to repair the said approaches, subject to the following case.



Q. B.] LONDON AND NORTH-WESTERN RAIL. CO. v. SURVEYORS OF TOWNSHIP OF SKERTON. [Q. B.]

The original Lancaster and Carlisle Railway was authorised by an Act of Parliament (7 Vict. c. 37), entitled "An Act for making a railway from the Lancaster and Preston Junction at Lancaster to or near to the city of Carlisle."

This Act received the Royal assent the 6th June 1844. The bridge in question was built under the provisions of the Deviation Act (8 & 9 Vict. c. 83), hereinafter referred to. By sect. 270 it is enacted, with respect to the crossing of roads,

That, except as therein provided, if the line of railway cross any turnpike road or public carriage way, then either such turnpike road or public carriage way shall be carried over the railway, or the railway shall be carried over such road by means of a bridge of the height and width and with the ascent or descent by the Act in that behalf provided, and such bridge or other necessary work connected therewith shall be executed at the expense of the company.

The Railways Clauses Consolidation Act (8 Vict. c. 20) received the Royal assent on the 8th May 1845. By sect. 1 it is enacted,

That the Act shall apply to every railway which shall by any Act which shall thereafter be passed be authorised to be constructed, and the Act shall be incorporated with such Act, and all the clauses and provisions of the Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to undertakings authorised thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act.

By sect. 46, with respect to the crossing of roads, or other interference therewith, it is enacted,

That if the line of the railway cross any turnpike road or public highway, then, except where otherwise provided by the special Act, either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width and with the ascent or descent by that or the special Act provided; and such bridge, with the immediate approaches and all other necessary work connected therewith, shall be executed, and at all times thereafter maintained, at the expense of the company.

By sect. 58 it is enacted,

If in the course of making the railway the company shall enclose or interfere with any road, they shall, from time to time, make good all damage done by them to such road.

In the same session of Parliament the Lancaster and Carlisle Company obtained an Act (8 & 9 Vict. c. 83), to enable them to alter the line of such railway, and to make a branch therefrom, and for other purposes relating thereto. To this Act the Royal assent was given on the 21st July 1845. The bridge in question and a considerable length of railway on each side of it were constructed; and the highway in question was lowered and interfered with under the provisions of the last-mentioned Act.

By sect. 1 of this Act it is enacted,

That all the powers to take lands, and all other the powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters and things contained in the said recited Acts, except such of them or such parts thereof respectively as are repugnant to this Act, or as are by this Act expressly repealed or altered, or otherwise provided for, shall extend and be construed to extend to this Act; and shall operate and be in force in respect to the objects and purposes thereof as fully and effectually, to all intents and purposes, as if the same powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters and things were repeated and re-enacted in this Act.

There is no express provision in this Act for incorporating the Railways Clauses Act. There is no further provision in this Act as to making or maintaining roads or other works.

In 1859 the Lancaster and Carlisle Railway Company obtained another Act (22 & 23 Vict. c. 124), intituled "An Act for authorising the Lancaster and Carlisle Railway Company to make new works and to make arrangement with other companies, and to raise further funds, and for other purposes."

By sect. 2 it is enacted,

That the Lands Clauses Consolidation Act 1845, and the Railways Clauses Consolidation Act 1845, save so far as any

of the clauses and provisions thereof respectively are excepted or varied by this Act, are to be incorporated with this Act.

The question for the opinion of the court is whether the apps. are bound to keep in repair the public highway in question under their line and the immediate approaches thereto. If so, the order of the justices is to stand; if not, it is to be quashed.

*Bovill, Q.C.* for the resps.—The justices were right in holding that the obligation to repair was imposed on the resps. The bridge and approaches were constructed at a period subsequent to the passing of the Railways Clauses Consolidation Act. By the 1st section of that statute it is enacted that its provisions shall be applicable to the construction of future railways; and by the 46th section, after showing how bridges over highways with their ascents and descents are to be formed, it is provided that the immediate approaches and all other necessary works connected therewith shall be maintained at the expense of the company. Here the alteration and excavations of the road were necessary to the construction of the bridge in question. The duty therefore of keeping them in a proper state was thrown on the company. And this has been decided in the cases of

*The North Staffordshire Railway Company v. Dale*, 27 L. J., N. S., 147, M. C.;

*Leach v. The North Staffordshire Railway Company*, 1 L. T. Rep. N. S. 832; 29 L. J., N. S., 150, M. C.

*A. S. Hill* for the apps.—In determining the extent of the obligations imposed on the company, this special Act as well as the Railways Clauses Act must be considered. Now by the 2nd section of the former Act their duty is limited to the construction of the work necessary in the formation of bridges. They are bound to make, but not to keep in repair, such works. But further conceding that the question must be governed by the public Act, it is manifest, from the language employed, that it was the intention that its provisions as to keeping approaches in repair should apply to approaches to roads carried over railway bridges, and not to those passing under them. The company, therefore, in the present instance, are not bound to repair.

*Bovill* replied.

*Manley Smith* (as *amicus curiæ*) referred the court to two Irish decisions on the statute:

*The Waterford and Limerick Railway Company v. Kearney*, 12 Irish C. L. R. 224; and

*Fosberry v. The Waterford and Limerick Railway Company*, 18 Irish C. L. R. 494.

*Cur. adv. vult.*

June 11.—The judgment of the Court (Blackburn, Mellor and Shee, JJ.) was now delivered by

BLACKBURN, J.—The question in this case was upon the construction of the Railways Clauses Act. The fact was, that the company had, in carrying a railway bridge over a highway, lowered the highway in order to bring it to a proper depth below the bridge; and the question raised was, whether or not the railway company were, under the Railways Clauses Consolidation Act, bound to keep in repair the slope for the road under the bridge, the descent from the road being part of the approaches to the bridge and works connected with the bridge under the terms of the statute. The case was argued by Mr. Bovill and Mr. Staveland Hill; and we were rather inclined at the close of the argument to hold that the true construction of the Act was to cast upon the railway company the burden of maintaining the road. At the close of the argument Mr. Manley Smith, as *amicus curiæ*, informed us that there were two decisions in the court in Ireland upon the construction of the statute and we took time to look into those



Q. B.]

REG. v. THE CORONER OF STAFFORDSHIRE—WALLINGTON v. WILLES.

[C. P.]

decisions, which we find are precisely upon the very point. In the first, the *Waterford and Limerick Railway Company v. Keurney*, 12 Ir. Com. L. Rep. 224, two of the learned judges, Fitzgerald and O'Brien, JJ., were of opinion that upon the true construction of the Act it was not to cast the burden of the maintenance of the road under those circumstances upon the railway company. Hayes, J. differed in opinion from them, and, so far as that decision went, it was two judges to one; but it was a decision of the Irish Court. Subsequently, there was a second case upon which this point arose, that of *Foeberry v. The Waterford and Limerick Railway Company*, 13 Ir. Com. L. Rep., where the question was raised before the Irish Court of C. P., and there, after considering the matter carefully, the full court (the Chief Justice and Ball and Keogh, JJ.) gave reasons, agreeing with the Irish Court of Q. B., in holding that the railway company were not liable at all; and Christian J. gave a somewhat different reason for his opinion, but he also agreed in the result that the railway company were not bound to repair the road under the circumstances. And I am bound to say, looking at the reasons given in that very carefully considered case in the C. P., they seem very strong reasons for the opinion that court entertained. We know that the decisions and opinions of law courts in England of co-ordinate jurisdiction are not final as those of courts from which there is no appeal, and they would not be binding on us, but still they are judgments which we are bound to treat with great deference and respect; still, if we take a different opinion, we should be bound to act on our own opinion, instead of considering the reasons given by those courts. The decisions given in the Irish courts are, of course, still less binding upon us; but we cannot say clearly, in this instance, that we ought to decide the other way. We think we ought to pay considerable respect to their opinions, and that upon this Act, which is very obscurely worded, though the inclination of our opinion would lead us to construe it the other way, yet the case is not sufficiently free from doubt to induce us to decide contrary to what they have decided upon the matter in that court. We, in deference to their opinion, and without attempting to say we think they are wrong, though it turns the balance where we have considerable doubt, must give judgment in this case in favour of the railway company, who were the apps., and consequently must decide that the magistrates were wrong. It is not a case in which costs can be given.

*Judgment for the apps., without costs.*

Monday, June 18, 1864.

REG. v. THE CORONER OF STAFFORDSHIRE.

*Coroner's inquisition—Evidence not upon oath.*

The Court refused to quash a coroner's inquisition on the ground that evidence was received not upon oath, there being no mala praxis, and no mischief having resulted, and the jury having found their verdict upon the other evidence only.

Rule nisi for a certiorari to quash an inquisition upon the body of a person whose death was caused by a boiler explosion at the ironworks of Messrs. Johnson, at Wolverhampton. A verdict of manslaughter was returned.

The ground of the motion was, that at the inquest the evidence of a boy, aged eleven, was taken, but not upon oath. From the affidavits on the other side, it appeared that the coroner in summing up told the jury to disregard his evidence, and that there was no reliance to be placed upon it; that the jury were of that opinion, and found their verdict upon the other evidence before them only.

D. D. Keane, Q. C. and W. J. Payne showed cause on behalf of the coroner, and T. Jones on behalf of the Crown.—This is not a case in which the court is bound to interfere *ex debito justitiae*. Here there is no defect on the face of the inquisition, and no corrupt or indirect conduct on the part of the coroner, and the jury say they did disregard the evidence:

Jarvis on Coroners, 264 and 318, 2nd edit.;  
Howell v. Lock, 2 Camp. 15;  
Stanlack's case, 1 Vent. 181;  
Michael Barclay's case, 2 Sid. 90.

Macnamara in support of the rule.—It is conceded by the other side that the boy's evidence was illegally taken. That was contrary to 4 Edw. 1, st. 2, "De Officio Coronatoris." An inquisition *felo de se* carries with it the forfeiture of all goods and chattels and condemns to an ignominious burial. And as such consequences attach to it an inquisition, taken upon illegal evidence ought not to be allowed to stand good. It may be evidence in another proceeding:

Re Culley, 5 B. & Ad. 280;  
Jones v. White, 1 Stra. 67;  
2 Taylor on Ev. 1411;  
Com. Dig. "Officer" G. 13;  
2 Burn's Just. "Coroner," 42;  
6 Vin. Abr. "Coroner," A. B.

COCKBURN, C. J.—I am very far from saying that if it had appeared that any actual mischief had resulted from the admission of this evidence, which was clearly irregularly taken on the inquest, this court would not have interfered. This is an application, however, which it is in our discretion to grant, and no mischief having been caused, and there being abundant evidence to sustain the inquisition, and the jury having disclaimed being influenced by it as to their verdict, I think we ought not to interfere.

The rest of the Court concurred.

*Rule discharged.*

#### COURT OF COMMON PLEAS.

Reported by W. MAYO and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Thursday, June 2, 1864.

WALLINGTON (app.) v. WILLES (resp.)

Local Government Act 1858, 21 & 22 Vict. c. 98.

By sect. 65 of the Local Government Act 1858 it is enacted, that "memorials under sect. 120 of the Public Health Act 1848 shall be addressed to one of Her Majesty's principal Secretaries of State," and by sect. 81, that "all orders made by such secretary shall be binding and conclusive."

Held, upon an appeal under this Act, that the interest upon expenses incurred by a local board of health ran from the time the amount due was ascertained, and not from the time of the first demanding, and that the decision of the Secretary of State as to the amount of the claim for expenses and interest thereon was final.

This was a case stated for the opinion of the court by justices under 20 & 21 Vict. c. 43.

#### CASE.

In the year 1852 the parish of Leamington was, by a provisional order of the General Board of Health, confirmed and made absolute by the Public Health Supplemental Act 1852, created a district for the purposes of the Public Health Act 1848, and the said Public Health Act, with the exception of sect. 50, was applied to and put in force within the said district.

On the 21st Sept. 1858, two streets within the district of Leamington, called respectively Russell-terrace and Farley-street, and which were not at

C. P.]

WALLINGTON v. WILLES.

[C. P.]

the time highways within the meaning of the said 69th section of the Public Health Act 1848, were not sewered, levelled, paved, flagged, channelled, metalled and made good to the satisfaction of the local board of health for the said district. Thereupon the local board, by notices in writing to all the owners within the meaning of the said Act, of the premises fronting, adjoining, or abutting upon the whole of the said streets respectively, required them respectively within one calendar month from the service thereof, to sewer, level, pave, flag, channel, metal and make good so much of the said streets respectively as their said premises respectively fronted or adjoined to, or abutted upon. Copies of the notices thus served on the resp. are hereto annexed and marked B and C. Such notices were not complied with by any of the said owners, and the local board thereupon executed the works mentioned or referred to in the said notices respectively, and incurred certain expenses in so doing.

The resp. was and is the owner of certain lands abutting upon the said street, called Russell-terrace, and also of certain other lands abutting upon the said street called Farley-street, and the proportion of the respective expenses calculated, according to the frontage of her said lands respectively, and settled by the surveyor under the said Public Health Act 1848, as due from her, was 642*l.* 12*s.* 3*d.* in respect of her lands abutting on Russell-terrace, and 92*l.* 2*s.* 6*d.* in respect of her lands abutting on Farley-street, making a total of 734*l.* 14*s.* 9*d.*

The local board have not at any time declared the said expenses to be private improvement expenses within the meaning of the Public Health Act 1848.

On the 21st Dec. 1859, payment of the sum of 734*l.* 14*s.* 9*d.*, being the aggregate of the above-mentioned proportions, with interest to that day, was duly demanded by the said local board of the said resp. On the 26th Dec. 1859, the resp. duly addressed to the Right Hon. Sir George Cornwall Lewis, Bart., the then Secretary of State for the Home Department, a memorial under the 120th section of the Public Health Act 1848, and the 65th section of the Local Government Act 1858, stating the grounds of her complaint against the said local board and appealing for relief in respect of the said sum of 734*l.* 14*s.* 9*d.* claimed by the said local board from her. She also duly gave notice in writing to the local board that she disputed the amount of the proportions of the expenses so settled by the surveyor as above mentioned. Thereupon the local board took the matter into consideration, and on the 20th Feb. 1860 they reduced the former proportion or sum to 618*l.* 7*s.* 3*d.*, the latter still remaining at 92*l.* 2*s.* 6*d.*, making a total of 705*l.* 9*s.* 9*d.*, and duly gave notice of this decision to the resp.

Within seven days after the receipt of this last-mentioned notice the resp. duly addressed to the said Secretary of State a second memorial under the sections before quoted, stating the grounds of her complaint against the said local board, and appealing for relief in respect of the said sum of 705*l.* 9*s.* 9*d.* claimed by the said local board from her. After an inquiry into the subject the Right Hon. Sir George Grey, Bart., the present Secretary of State for the Home Department, made an order thereon, dated the 20th Nov. 1863, to the following effect, namely, "that the resp. should in full of all demands pay to the said Leamington Local Board of Health the sum of 679*l.* 7*s.* 1*d.*, in respect of the works carried out by the said board." The said Sir George Grey also made a further order or certificate of the costs of the inquiry dated the same day. After the making of these orders, resp. on the 17th Dec. 1863 duly tendered to the collector of the said local board of health the sum of 679*l.* 7*s.* 1*d.*

awarded by the said Secretary of State, but the collector, acting under instructions from the said board of health, refused to accept the same, and the said board have since commenced proceedings under the said Public Health Act for the recovery in a summary manner of the said sum of 679*l.* 7*s.* 1*d.*, and also of interest thereon after the rate of 5 per cent. per annum from the said 21st Dec. 1859, to which they claimed to be entitled.

Accordingly, upon the 8th Jan. 1864 an information was laid before Charles Milward, Esq., one of Her Majesty's justices of the peace in and for the county of Warwick, by the app. Richard Archer Wallington, who was and is clerk to the said board, and who laid such information as such clerk and on behalf of the said local board.

The said information afterwards, on the 20th Jan. 1864, came on to be heard before us the undersigned justices of the peace in and for the said county assembled and acting together, and the respective parties appeared before us.

It was admitted that the said local board of health were entitled to the said sum of 679*l.* 7*s.* 1*d.*, but it was contended on behalf of the resp. that she was not liable to anything more than that, and that the question of interest was included in the order of the Secretary of State, which was made binding and conclusive under the said 81st section of the Local Government Act 1858: while on behalf of the local board it was contended that they were entitled to interest by force of the 62nd section, and that the Secretary of State had no power to entertain the question of interest.

Evidence was adduced before us on the part of the app., that the said notices to make the streets had been given and demand made for the expenses as above set out. That the resp. had duly memorialised the Secretary of State as above mentioned, and that, after inquiry into the subject, the Right Hon. the present Secretary of State for the Home Department made an order thereon dated the 20th Nov. 1863, and also a further order or certificate of the costs of the inquiry dated the same day.

After hearing the case we the said justices considered the said order of the Secretary of State was conclusive upon us, and we ordered that payment of 679*l.* 7*s.* 1*d.* be made by Mrs. Willes to the said local board in full of all demands in respect of the matters set forth in the said information.

The questions for the opinion of the court are:

1. Whether our decision was or was not right in point of law.

2. If the said local board are entitled to any interest in addition to the sum awarded by the Secretary of State, from what day or time, and on what sum is such interest claimable?

If our said decision was right, our order as made is to stand good; if not, we request the court to remit the matter to us in order that we may make a proper order in accordance with their decision.

Given under our hands this 22nd day of Feb. 1864.

JOHN P. GUBBINS.

E. WHEELER.

*H. Lloyd*, for the apps., contended that the resp. was bound by sect. 62 of the Local Government Act 1858 to pay the interest demanded, and that such interest was to run from the date of the demand by the local board, and not from the date of the order made by the Secretary of State.

*Markby*, for the resp., who contended that the interest only ran from the time that the amount to be paid was ascertained, was stopped by the Court.

*ERLE, C.J.*—I am of opinion that our judgment should be for the resp. The 120th section of the Public Health Act 1848, which gives the power of appeal from the local board to the general board,

Priv. Co.]

FALKLAND ISLANDS COMPANY v. R.

[Priv. Co.]

speaks only of expenses incurred by the local board in executing the necessary works, and as no mention is made of interest a claim for such cannot be made under that section. Then follows the Local Government Act 1858, by the 62nd section of which it is enacted that expenses shall be a charge upon the premises in respect of which they have been insured, and shall bear interest at the rate of 5 per cent. And by the 65th section the appeal shall be to the Secretary of State instead of to the general board; and as this provision follows that relating to the payment of interest, it is clear to my mind that it was the intention of the Legislature that the Secretary of State should adjudicate upon the whole claim, including interest.

WILLIAMS and BYLES, JJ. concurred.

*Judgment for the resp.*

Attorneys for resp., *Bell, Steward and Lloyd*,  
for *Baker and Brown*, Warwick.

### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,  
Barrister-at-Law.

*Saturday, July 23, 1864.*

(Present—The Right Hon. Lord KINGSDOWN, Sir  
E. RYAN and Sir J. ROMILLY, M. R.)

FALKLAND ISLANDS COMPANY v. R.

*Wild animals—Right to capture—Grant from Crown—  
Lease from Crown.*

*A grant of land in fee by the Crown, and also a licence  
to depasture cattle on Crown lands (which is in sub-  
stance a lease), carries with it the right to capture and  
appropriate all wild animals found on such land.*

*Where cattle had been introduced into an island, and in  
course of time many escaped and lived in a wild state:*

*Held, in construing a grant by the Crown of the lands,  
these wild cattle were to be treated as animals feræ  
nature.*

This was an appeal from an order of the police court of Stanley, in the Falkland Islands, dated the 26th Feb. 1862, as to the right of the Falkland Islands Company to hunt and kill wild cattle on their lands. A penalty is imposed by the local statutes on all who, without lawful cause, hunt, kill, or wound wild cattle.

The Falkland Islands Company, in 1859, obtained from the Crown a grant in fee of the southern peninsula of the East Falkland Islands, with the power to hunt, catch, kill, or tame all live stock upon the same.

In 1860 the company also obtained a grant of 160 acres as follows:

Know ye, that for and in consideration of the sum of 96l sterling to us paid by the corporation of the Falkland Islands Company, we of our special grace, certain knowledge and mere motion have given, granted, and do by these presents, for us, our heirs and successors, give and grant unto the said corporation and their successors all that lot or parcel of land, situated on the western shore of Port Salvador, north of the Rio Pedro, containing one hundred and sixty acres, and numbered 2 D, and more particularly described as to metes and bounds in the official plan or survey made by Arthur Bailey, Esq., surveyor, in the month of Jan. 1860, which plan or survey is now of record in the office of our Surveyor-General of the Falkland Islands and their dependencies. To have and to hold the said lot or parcel of land, and all and singular the premises hereby granted, with the rights, members and appurtenances, unto the said corporation and their successors for ever, he and they yielding and paying for the same to us, our heirs and successors, one peppercorn of yearly rent on the 1st Jan. in each year, or so soon thereafter as the same shall be lawfully demanded: Provided, nevertheless, that it shall at all times be lawful for us, our heirs and successors, or for any person or persons acting in that behalf by our or their authority, to resume and enter upon

possession of any part of the said lands which it may at any time by us, our heirs and successors, be deemed necessary to resume for making roads, canals, bridges, towing paths, or other works of public utility or convenience, and such lands so resumed to hold to us, our heirs and successors, as of our and their former estate, without making to the said corporation and their successors any compensation in respect thereof, so nevertheless that the lands so to be resumed shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such resumption shall be made of any lands upon which any buildings may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings: and provided also, that it shall at all times be lawful for us, our heirs and successors, or for any person or persons acting in that behalf by our or their authority, to cut and take away any indigenous timber, and to search, dig for, and carry away any stones or other materials which may be required for making or keeping in repair any roads, bridges, canals, towing-paths, or other works of public convenience or utility: and we do hereby save and reserve to us, our heirs and successors, all mines of silver and gold and other precious metals, and also all mines of coal in or under the said land, with full liberty at all times to search and dig for and carry away the same, and for that purpose to enter upon the said land or any part thereof.

There was also licence for depasturing cattle on the said lands.

The company, after obtaining these grants, used the lands for breeding and depasturing cattle. In 1860 the governor received a copy of new rules and regulations, and, among other things, a licence was to be granted on payment of a fixed sum empowering the holder to kill wild cattle. The company considered they had the right to kill the cattle. But the Government maintained the contrary, and, having summoned the company's manager for hunting and killing the cattle without a licence, the magistrates at the police court ordered the company to pay a large sum by way of penalty. The present appeal was then brought, and a special case was stated, and the question put to the Judicial Committee of the Privy Council was, whether, having reference to the rights of the apps. with regard to the said wild cattle, the proceedings and order are correct in point of law.

Sir H. Cairns, Q.C. and C. E. Pollock for the apps.

The Attorney-General (Palmer) and Melvill for the resps.

Authorities cited:

*Sutton v. Moody*, 1 L. Raym. 250;  
Year Book, 12 Hen. 8;  
1 Bl. Com. 420;  
*Morgan v. Bissell*, 3 Taunt. 55;  
Bac. Ab. "Leases," K.

Judgment was delivered by

Sir J. ROMILLY, M. R.—The question referred by Her Majesty to their Lordships is not, as is stated in the special case, whether, having reference to the right of the apps. with regard to the wild cattle, the proceedings and order of the governor, and of the chief or stipendiary magistrate referred to in the special case, are correct in point of law, but "whether under the freehold or leasehold grants, or either of them, made to the Falkland Islands Company, as set forth in the petition for leave to appeal, the company and their agents are entitled to kill and destroy wild cattle found on the lands, the subject of this grant." Prior to the year 1846 the whole of the soil of the Falkland Islands, and the absolute possession and dominion of all wild cattle and wild stock upon those islands, were the sole and exclusive property of Her Majesty, and such property and dominion still remain vested in Her Majesty, except so far as she may have granted any portion of this right to others. On behalf of the apps., the Falkland Islands Company, it is contended that Her Majesty has granted to them the exclusive right of killing wild cattle which may be found on the land sold by the Crown to the apps. during the period of their lease. In 1859 and 1860

grants of land of 160 acres each were made by the Crown to the Falkland Islands Company in fee, with a proviso securing to the Crown the right of re-entering on the land for the purpose of making roads, canals and other works of public utility, the right to cut timber, and to search for and carry away stones or other materials which might be required for making or keeping such works in repair, and also reserving to the Crown all mines of gold, silver, precious metals and coal, with full liberty to search for and carry away the same. There is no other reservation in the grant. Incidental to the grant of the land was granted a licence or lease to depasture stock on 10,000 acres, the limits of which were strictly defined in the instrument for a term of twenty years, in consideration of an annual rent of 10*l.*, subject to the same reservation as the grant of the land in fee-simple. Their Lordships are of opinion, that though this is entitled a licence to depasture stock, it is in law a demise of the land therein contained, to which the ordinary rights of a lessee attach, and consequently that the land thereby demised, subject to the rights of the Crown and the performance of the condition contained in the licence, belong to the Falkland Islands Company as their exclusive property during the period of the lease. It is not disputed that the law prevailing in the Falkland Islands must be considered to be the common law of England, modified only by such statutes as apply to these islands. Their Lordships are also of opinion that by the common law of England the grant of the land in fee-simple of the lots of 160 acres, and the demise of the lots of 10,000 acres, confers upon the grantees and lessees thereof the exclusive right of killing and taking all game, beasts of chase, and animals which are properly *feræ naturæ*, which may at any time be upon their land, so long as such animals may be and remain upon the land so granted or demised. It is contended, on the part of the Crown, that the wild cattle are not animals that come within this description; that it is matter of history that the Falkland Islands, when first taken possession of on behalf of Her Majesty, contained no such animals as wild cattle, horses, swine, or goats; and that these animals, which were not indigenous in the island, have been introduced by Her Majesty's subjects into the island; that some which escaped or were turned loose have bred, and have increased so prolifically as to have overrun these islands, but that they are only wild in the sense that they are not restrained by fences and boundaries; that such being the origin and nature of the animals they cannot properly be termed animals *feræ naturæ*. Their Lordships consider that it is not necessary for them to determine this question in the present case, because it appears to them that so far as regards any question between the apps. and the Crown this question was determined between them in settling the terms of the agreement entered into between the Secretary of State for the Colonies and the apps., which ended in a grant made to them by the Crown on the 8th Sept. 1859. Her Majesty's Emigration Commissioners were empowered to enter into the negotiation with the Falkland Islands Company, and to settle the terms of the grant on behalf of Her Majesty, and in doing so the Emigration Commissioners agreed with the Falkland Islands Company that the wild cattle should be treated as animals *feræ naturæ*, in which no property could be acquired until killed or taken. The Falkland Islands Company proposed that the grant should be made in these words:—"The Governor of the said Falkland Islands should grant the said company all that peninsula, &c., together with all live stock upon that peninsula, and upon the islands aforesaid." In reply to this the Emigration Commissioners stated that the words "together

with all livestock, &c.," would imply a property on the part of the company in any wild cattle which might be on their land. Now, the words in the heads of the agreement inclosed in the Colonial-office letter to you of the 20th Aug. are "the grant to carry the right to kill and tame wild cattle within the granted territory." The commissioners understand the intention of the Secretary of State to have been to allow the company the privilege of hunting and killing wild cattle which might be at any time on their land, but not to interfere with the general principle that wild cattle being *feræ naturæ* no property in them can be acquired. The alteration should therefore run "together with the power to hunt, kill, or tame all live stock," &c. This was assented to on the part of the company, and the words suggested by the Emigration Commissioners were accordingly adopted. Their Lordships, therefore, are of opinion that this must be treated as one of the terms of basis of the negotiation on the faith of which both the subsequent grants and licences to depasture cattle were applied for and made, and that it consequently follows that where the grants were made by the Crown to the company, it must be taken to have been treated on both sides that the wild cattle were to be considered as animals *feræ naturæ*, in the absence of any expression or reservation to the contrary. If this be correct, then their Lordships are of opinion that the Ordinance passed by the local legislature in 1853 does not affect the right of the apps. The 37th section of that Ordinance did not prevent Her Majesty from granting plots of land on any terms that might be thought fit; and the words "without lawful cause" and "unlawfully," which are introduced into that section, seem to have been expressly inserted for the purpose of saving the rights of any person who might be so entitled. Their Lordships, therefore, are of opinion that in the absence of any reservation to the Crown of any right of killing or taking wild cattle on the lands granted or demised, it must be held that the right of killing and taking such cattle while on the lands granted or demised is included in such grant and demise, and is not prohibited by the 37th section of the Ordinance of 1853. And they will humbly recommend Her Majesty accordingly.

*Judgment for apps.*

Apps.' solicitors, *Bischoffe, Cox and Bompas.*  
Resp.'s solicitors, *Solicitors of the Treasury.*

### ROLLS COURT.

Reported by H. E. Youg, Esq., Barrister-at-Law.

Thursday, June 30, 1864.

THE ATTORNEY-GENERAL v. THE HOSPITAL OF ST. JOHN, BEDFORD.

*Charity—Adowson—Trusts of—The Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 71.*

Where the court was satisfied, upon the evidence adduced, that certain charitable trusts were originally—viz., on or before A.D. 1280—impressed upon lands belonging to a hospital; that those trusts still remained untouched; that the master and the corporation of the hospital still existed, although some of the objects of the trusts had disappeared even prior to A.D. 1444; and although the corporation of the town of B. had subsequently acquired certain rights over the appointment of the mastership of the hospital, to which an advowson had always been attached: it was Held, that the acquisition by that corporation of their rights could not be assumed to have been for their individual benefit; that such acquisition did not supersede the prior and existing charitable trusts; that the hospital was a charity in the proper and ordi-

[ROLLS.]

ATTORNEY-GENERAL v. THE HOSPITAL OF ST. JOHN, BEDFORD.

[ROLLS.]

any sense of that word; and that it and its property must be dealt with accordingly:

*Held, also, that the charity was within the Municipal Corporation Act (ubi supra), and that the corporation of the town of B. had no power to sell or dispose of the advowson.*

The facts of this case, the nature and effect of the arguments and the authorities cited in it, will sufficiently appear from the judgment of the M. R., *infra*.

The Attorney-General, *Hobhouse*, Q. C., and *T. H. Terrell* appeared for the informant.

*Baggallay*, Q. C. and *Wickens* for the defts.

THE MASTER OF THE ROLLS.—In this case an information has been filed by the Attorney-General, against a corporation called the Master and Co-Brethren of the Hospital of St. John the Baptist, at Bedford, against the Rev. Henry Pearce, the master of the Hospital, and rector of the parish of St. John the Baptist, in Bedford, and against the corporation of the town of Bedford, praying a declaration that the whole of the lands belonging to or in the possession of the first-named defts., belong to the hospital, and are subject to the trusts of the hospital as declared by Robert de Parys; and that no part thereof belongs to the rectory of the said parish, or to the master of the said hospital, otherwise than as such master; and that a scheme may be settled for the application of the rents of the property. The information asks, in effect, for a declaration that the property of the hospital is subject to a charitable trust; and for a scheme for the better administration of the property itself, and for the better application of the income to be derived from it. Those objects are opposed by the corporation of Bedford on the ground that this hospital is neither a charitable corporation nor a charity in the ordinary sense of the word; but that the property or the principal part of it belongs to the rectory of St. John's, which is united with and inseparable from the mastership of the hospital; and that the advowson, or perpetual right of presentation to that rectory, belongs to and is vested in the corporation of the town of Bedford. The questions which I have to determine are: whether the whole or any part of the property belonging to the hospital was given for charitable purposes; and, if not the whole property, but a part only of it, then what part was so given? The first evidence produced of the original transactions is to be found in an entry in an ancient book of memoranda made on the 23rd Jan. 1400, and which professes to give an account of the charter of endowment of Robert of Parys, in the year 980. If that be a true account of a genuine document, it is difficult to discover any means by which to avoid concluding that the original foundation of the hospital was for charitable purposes, in the strict and ordinary meaning of the word. The original charter is not now produced; but if the document to which I am referring be correct, it was in existence in Jan. 1400; for, in the words of the entry at the foot of the memorandum, it is stated that the original letters of the foundation of Robert of Parys were then seen, examined and handled, and found to be under seal and free from all suspicion and defect. Some doubt is thrown on the date of that document. In the copy to which I have referred, the document is stated to bear date in the year 980. I was of opinion that either the date was miscopied, or a very serious doubt was cast upon the genuineness of the original document itself. I have, however, examined the evidence on this point very carefully, and I have come from it to the conclusion that the charter is an authentic document. I think that the date was erroneously altered by the copyist

from 1280 to 980. By that instrument, then, the copy of which appears to be professedly given in the exact words of the original, Robert of Parys is styled the founder of the new hospital, "*Fundator Novi Hospitalis*." Those, I think, are the words used. According to that document, the hospital was endowed and established for the support of two or three brethren—of whom the more advanced was to be the master—and also for the relief of free-born inhabitants of the town of Bedford in needy circumstances, to be presented to them for that purpose. It provides for their mode of living and their dress. It appears, however, by that document that, although Robert de Parys is styled *Fundator Novi Hospitalis*, three other persons had endowed the hospital with possessions, but who were all then dead. It appears also by other documentary evidence, which I have examined, that the hospital had really been founded in the reign of Hen. II. I cannot, however, allow that circumstance to destroy the statement made in the charter, or the unavoidable conclusion to be drawn from it. Robert de Parys had the power to declare what were the objects for which the hospital was founded, and the laws by which it was to be regulated. Proceeding then upon that conclusion, and considering the account of the objects of the original foundation to be correct, it follows that, if that charter has not been lawfully superseded by any subsequent act or proceeding, the whole hospital was given, at that time, for charitable purposes, and that its possessions were intended to be so applied. It also follows as a necessary consequence, that the subsequent endowments, unless otherwise specified by their respective grantors, were to be applied for the same purposes. That view is confirmed by many later endowments, which were made "*Deo et Hospitali Sancti Johannis Baptistæ et fratribus ibidem Deo servientibus*," and in some, "*In sustentationem pauperum prædicti hospitalis*." The taxation of Pope Nicholas, in the time of Edw. I., omits all notice of eleemosynary institutions; and this hospital is not mentioned, although its existence at that time is proved incontestably. From the earliest time that any mention is made of the parish of St. John, it appears to have been attached to the hospital itself. If both the great and small tithes were taken by the master and brethren, and if they performed the ecclesiastical and parochial duties attached to the parish, the question whether it was a rectory or a vicarage was not a matter that would be kept very distinct. It was practically immaterial. The earliest notice of it amongst the papers before me is an entry in the episcopal records of Lincoln, in the year 1209. It is there entered among the benefices belonging to the archdeaconry of Bedford, as a "*vicarage, in the Church of St. John, Bedford, which belongs to the brethren of the same town*." If the great tithes were taken by the master as parts of the endowments of his office, that would be quite correct; but, as the parochial duties would be performed by the master, or by one of the brethren, the distinction between a rectory and a vicarage might easily have faded away. Accordingly we find that in the return made in the Rolls for the augmentation office, there is this statement: "*The Hospital of St. John, in Bedford, was founded by Robert Parys; to the intent to find a master and a priest to sing and pray for the soul of the said Robert Henry St. John and others which should be thereafter benefactors to the said hospital. The church of the said hospital is the parish church of itself; and there belongeth to the same about eighty-nine houseling people, and the said master and incumbent of the said hospital is the parson, and serveth the cure there; and there is none other parson or curate to minister unto said parishioners there at times of visitation*

but the said master and chaplain." Then it proceeds to give the value of the lands, and afterwards says: "There hath been no lands, tenements, or other hereditaments derived from the said hospital, since the 4th day of Feb. in the 27th year of the King's reign; albeit, as it is said, the predecessors of the incumbent there hath put away of the possessions which sometime did belong or were parcel of the said possessions, but in whose time, or what the value thereof was, or the intent thereof, cannot be known." For nearly a hundred years from 1280 to 1374, the master was regularly elected by the brethren, which is a clear proof of the existence of such persons as brethren, either residing in or belonging to the hospital up to the year 1374, when John Appeland was elected. When he vacated the office of master does not appear; but it is after an interval of seventy years that the next appointment of master is recorded. That took place in June 1444. That was on the presentation of the mayor of Bedford. From that time to the present the presentations have always been made by the mayor of Bedford. How that right became vested in him does not appear. It might have happened that the first mayor who appointed a master was one of the brethren of the hospital; and that subsequently that right was supposed to be vested in the mayor, in that character. It may have been that during the time of Henry the Sixth's reign the brethren had disappeared, and the mayor then assumed a function which no other person was capable of performing. It may also have been by some grant from the Crown. If it was by royal grant, all trace of it has disappeared. We are therefore left to speculate as to the most probable mode by which the patronage became vested in the mayor. The subsequent appointments during the remainder of the reign of Henry the Sixth seem to have partaken of the agitation which was then pervading the country; and from the beginning of June 1444 till the end of Aug. 1461, when Edward the Fourth was king, a period of seventeen years, no less than nine elections of masters of the hospital took place: a clear proof that some of the vacancies were compulsory. Down to the election of John Strynger, which took place in Henry the Eighth's reign in 1530, the master took an oath to observe the ordinances of the hospital. Since that time the oath has been discontinued. The presentation was made by the mayor, or by the mayor and burgesses. The person selected was appointed sometimes to the mastership alone; sometimes he is styled master or rector, and sometimes the presentation is to the hospital or parish church. In all cases the mayor presents *ratione officii*, and nowhere does it appear that the mayor was a brother of the hospital; but up to that time, that is, to the appointment of Strynger in 1530, the trusts of the original foundation are strongly impressed on the hospital and on its possessions. Nothing that has occurred since removes, or indeed, in my opinion, tends to abrogate or diminish the trusts so imposed. It is not, I think, necessary to go into any detailed enumeration or consideration of the facts connected with the subsequent history of the hospital. The result generally may be shortly summed up to this effect: A person of the name of Conyers obtained a grant from Queen Elizabeth of the reversion in the right to nominate the master on the next vacancy on the assumption that the hospital was a charity which had become vested in the Crown, under the statute of Chantries, in the 1 Edw. 6. The interest of Conyers, such as it was, became vested in Williams, who was mayor of Bedford in the reign of James I., and he, and after him, several persons deducing title through him, claimed the right of nomination of a clerk to the mastership, as their private property under a grant from the

Crown. The decisions of the courts were uniformly against all such claimants. Divers of those cases have been reported. The first is *Cro. Eliz.* in 1588, reported 2 Cr. 790. Then again it appears to have been heard in 1616, in the reign of James I., of which copies of the record are produced; and again it was heard in the time of Lord Hardwick, in the reign of Geo. II. reported in *Willes' Reports*. Those cases do not, any one of them, regulate the case before me; but they are brought forward apparently to establish this conclusion, namely, that as Williams and his descendants endeavoured to fix a trust on this hospital, under which they claimed to be entitled, and as the court had in every case rejected the claims and decided against the trust, therefore there was no trust affecting the hospital. But the fact is, that the courts only decided that the trust on which the claimants relied, and which was necessary to support their contention, had no existence. The question, whether there existed a charitable trust which affected these lands of the hospital, in the sense in which it is now brought before me, never was raised. That appears by an examination of all the cases, and particularly by an examination of the case made, and decided in the Ex. in the reign of James I. What was raised in 1611 was this: a claim, apparently at the instance of Williams, was made to have a trust declared of these lands, belonging to the hospital, in such a way as that it should appear that the hospital was part of the possessions belonging to but concealed from the King; but no claim was made to the property of the hospital on the ground of its being a charity to be duly administered according to the trusts of its original foundation. In truth, if the decision had been the other way, and had established the particular trust insisted upon by Williams, it would have been fatal to the present case. It would have established the right of the Crown to the land, as forfeited under the statute of Chantries. The decision was adverse to the claims of Conyers and Williams, as indeed it must have been, having regard to the reported cases on this subject, which are collected in *Adams v. Lambert*, 4 Rep. 104, b. They were much considered in an information filed against the Fishmongers' Company, in the case of *Knesworth's Charity*, and *Preston's Charity*, 5 M. & C. 11, 16, where it appears by the whole current of authorities that if the primary object of a hospital was charity—the support, for instance, of a master and brethren—the adjunct of an injunction that they were to pray and sing for the souls of the founders and benefactors, did not taint the charity and render it all forfeitable to the Crown. Consequently, if the view that I take of this case be correct, and if it had in 1611 been proved that the hospital was originally founded and endowed for charitable purposes, and that the praying for the soul of a benefactor, or for the soul of the founder, was a mere adjunct, and not an essential part of the endowment, that would have been a complete answer to the claim of Williams, inasmuch as it would have removed the title of the Crown, under whose grant alone he could have derived any right, and under which alone he claimed. That is shown again in the case reported in *Willes*, 608. All that that case decided was, that, as between the corporation and a grantee from the Crown, the corporation was entitled to present. After a continued user of that right for upwards of 400 years, no one will now contest that right of the corporation. But that does not dispose of the question before me. That question is, did they exercise that right for their own individual benefit as a corporation, or as trustees of the charity of the hospital of St. John, and for the purposes for which that was founded? I was strongly pressed at the hearing with this argument—How did that right get to the corporation? whence

ROLLS.]

Re HACKNEY CHARITIES.

[ROLLS.]

did the mayor derive his right to present to the mastership? The right is not now disputed; and if you cannot trace the origin of the right, it must be assumed that they acquired it as they did the rest of their corporate property, for their own individual advantage. But in my opinion the error in that reasoning, which likens the acquisition of the right of presentation to the acquisition of other property, the original grant of which is lost, lies in this: that I have here evidence of the nature of the property, and of the trusts attached to it, anterior to the right of the corporation; and that the acquisition of that right does not of itself supersede or destroy the prior trusts. If I were compelled to answer the question I have put as above, as to the mode by which the mayor obtained the right of presentation to the mastership, I should be disposed to say that the right was acquired by unresisted usurpation during the troubles of the reign of Henry VI. But it is not necessary for me to answer that question. The trusts originally impressed on the lands, with which the hospital was endowed, remain untouched. The corporation of the hospital is still in existence and in use, and the master still exists; and although the brethren have disappeared, and as far as I can ascertain have had no existence since 1444, and possibly since some even earlier date, still the discontinuance of one or even of more of the objects of the charity will not destroy the trusts if there be no doubt as to the origin and existence of them. Besides which, the poor still exist who receive alms as heretofore. It is true that the church is not distinct from the mastership; but I have already stated how it appears to me that that arose. In all respects, therefore, this hospital and its lands possesses the qualities and are impressed with the obligations which belong to an eleemosynary institution, the principles and rules of which are to be found in the charter of Robert of Parys, in 1280. It is therefore, in my opinion, a charity in the proper and ordinary sense of that word, and its property must be dealt with accordingly by this court. In my opinion, this case is governed by the decision in the *Shrewsbury Grammar School* case, 1 M. & C. 632; and it falls within the 71st section of the Municipal Corporation Act, and not the 139th, and the corporation have not, in my opinion, any power under that Act to sell or to dispose of the advowson. There must, therefore, be a decree for a scheme to be settled by me in chambers for the future application of the revenues of the charity; and a declaration that no more leases are to be granted for lives, or otherwise than at a rack-rent. In settling the scheme I shall consider that the master is the principal officer of the charity. He performs the parochial duties belonging to the parish of St. John; but the whole subject of the scheme and the details of it, will have to be considered in chambers, and will be better done there; and respecting that I shall not therefore now insert any direction in the decree. I am of opinion that the costs of all parties must be taxed and paid out of the funds of the charity when there are any funds available for that purpose. Reserve further consideration with liberty to apply.

Solicitors, *Fearon and Clabon; Maples and Teesdale.*

July 26 and 28, 1864.

Re HACKNEY CHARITIES.

*Charity Commissioners—Order made by, in a contentious case—Appeal—Time for—Legal estate in charitable property.*

*Where the Charity Commissioners, without consulting counsel, made an order in a case submitted to them, and which was a contentious one within the Charitable Trusts Act 1860, s. 5, this court, on appeal, reversed a portion of the order, but directed the residue of it to stand over, to enable the parties to come to some arrangement between themselves.*

*Where inhabitants of a parish which is the object of a charity appeal from an order of the commissioners, neither their consent, nor that of the Attorney-General, is necessary to the appeal; secus, if a trustee, or a person acting in the administration of the charity, appeals; unless the gross yearly income of the charity exceeds 50l.*

*The time for appealing from an order of the Charitable Trust Commissioners runs from the end of that fixed for the publication of the notice of the order appealed from.*

*Where land was, in 1624, devised to the poor of the parish of H., to be distributed by the churchwardens for the time being of the said parish:*

*This Court was of opinion that the legal estate in the land was now vested in the churchwardens and overseers of the parish as a corporation.*

*Where, in 1679, a sum of 100l. was bequeathed "to the use of the poor of the parish of H. for the purchase of a piece of land," the rent to be bestowed in twopenny wheaten loaves of bread, and distributed every Lord's-day among the poor of the parish for ever; and a piece of land was accordingly purchased with the bequest, and conveyed to the then vicar and others of the inhabitants of the parish:*

*This Court was of opinion that the legal estate in that land was not now vested in the churchwardens and overseers of the parish as a corporation, because of the special trust attached to the bequest.*

This was an appeal petition, presented by two of the rated inhabitants of the parish of St. John, Hackney, and it prayed that an order of the Charity Commissioners, dated the 10th Nov. 1863, might be discharged or remitted for consideration. The facts of the case were shortly these:—

Valentine Poole, by his will dated in the year 1624, devised a piece of land called the Buttfild, partly freehold, and partly copyhold, unto the poor of the parish of Hackney, to be distributed by the churchwardens for the time being of the said parish. There had been no admission to the copyhold part of the land since 1808.

In the year 1671, Sir Stephen White conveyed a piece of land, called Raven Leys, to trustees and their heirs, upon trust to permit the churchwardens to receive the rents and dispose thereof for the relief of the poor of the said parish as should be directed by two or more of the inhabitants of the parish, other than the churchwardens, to be yearly chosen for that purpose by the parishioners at a vestry meeting, on Easter Tuesday.

Sir Stephen White, by his will dated in the year 1679, bequeathed to the use of the poor of the parish of St. John, Hackney, the sum of 100l. for the purchase of a piece of land; the rent to be bestowed in twopenny wheaten loaves of bread, and distributed on every Lord's-day among the poor of the said parish for ever. The 100l. was laid out in the purchase of four parcels of land in Hackney Marsh; and those parcels were, in 1680, conveyed to the then vicar and others of the inhabitants of the parish.



ROLLS.]

Re HACKNEY CHARITIES.

[ROLLS.]

By the 59 Geo. 3, c. 12, "An Act to amend the laws for the relief of the poor," s. 17, it was in effect enacted,

That all buildings, lands and hereditaments which should be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish by the authority and for any of the purposes of that Act, should be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively and their successors in trust for the parish; and such churchwardens and overseers of the poor, and their successors, should and might, and they were thereby empowered to accept, take and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands and hereditaments, and also all other buildings, lands and hereditaments, belonging to such parish.

By the 3 Geo. 4, c. 72, "An Act to amend and render more effectual two Acts passed in the 58th and 59th years of his late Majesty, for building and promoting the building of additional churches in populous parishes," s. 11, it was in effect enacted,

That it should be lawful for the commissioners (in the said Acts mentioned) in every case in which they should be of opinion that it would be expedient to divide, or in which the said commissioners should have divided any parish or place into two or more distinct and separate parishes, district parishes or chapelries, for ecclesiastical purposes, under the provisions of the therein recited Acts, to apportion, if the commissioners should, in their discretion, think it expedient, among such separate divisions of any such parish or place so made separate or district parishes or chapelries for ecclesiastical purposes, any charitable bequests or gifts which should have been made or given to any such parish or place, or the produce thereof; and in any such case to direct that the distribution of the proportions of such bequests or gifts, or the produce thereof, as should be so apportioned to any such separate division of any such parish, should be made and distributed by the spiritual person serving the church or chapel of any such separate divisions, or the church or chapel wardens or select vestry of any such separate divisions, either jointly or severally, as the commissioners might in their discretion (regard being had to the nature of the bequest or gift, and the application thereof) think expedient.

In 1824, the parish of St. John, Hackney, was, by an Order in Council, duly divided, for ecclesiastical purposes, into three district parishes, called Hackney, West Hackney, and South Hackney, and each division was constituted a distinct rectory.

In 1833, the Commissioners for Building New Churches apportioned the charities of Hackney; and gave Poole's charity and White's charity, in different shares, to each of the three divisions, and directed them to be distributed by the respective rectors, churchwardens, and vestries for the time being of the divided parishes.

The instrument of apportionment also provided that the apportioned charities should be applied and distributed, in all respects, according to the original trusts thereof, and as the same were then distributed, except so far as the mode of distribution was thereby expressly varied.

By the 16 & 17 Vict. c. 137, "An Act for the better administration of charitable trusts" (the Charitable Trusts Act 1853) s. 32, it was in effect enacted that the district courts of bankruptcy and the County Courts should have jurisdiction in cases of charities, the gross annual incomes of which for the time being did not exceed 30*l.*, and by sect. 44, that a statement in any certificate or order of the Charity Commissioners, that the gross yearly income did or did not exceed 30*l.*, was to be sufficient evidence of the amount of the gross annual income of such charity for the purpose of determining the jurisdiction. By sect. 47 the secretary of the board was made the treasurer of public charities, and constituted a corporation sole; and

By sect. 48, where land held upon trust for any charity was vested in any persons other than persons acting in the administration and application of the rents, or where there were no trustees, the court having jurisdiction under the Act might order the land to be vested in the treasurer of public charities and his successors. But no such vesting order was

to be made in respect of land vested in a corporation without the consent of the corporation, or in respect of copyholds without the consent of the lord of the manor.

By the 18 & 19 Vict. c. 124, "An Act to amend the Charitable Trusts Act 1853," s. 15, it was enacted, that the two Acts should be read together, and the secretary of the board was made a corporation sole by the name of "the official trustee of charity lands," instead of the name of "treasurer of public charities."

By the 23 & 24 Vict. c. 136, "An Act to amend the law relating to the administration of endowed charities," and called "The Charitable Trusts Act 1860," s. 2, it was in effect enacted, that that and the two previous Acts should be read together; and by sect. 2 jurisdiction was given to the Board of Charity Commissioners to appoint trustees of any charity, and to vest real estate belonging thereto in the same way as the County Courts or the district courts of bankruptcy could under the Act of 1853. But by sect. 4, the board was not to make any order under the jurisdiction vested in them by any Act with respect to any charity of which the gross annual income (exclusively of the yearly value of any buildings or land used wholly for the purposes thereof, and not yielding any pecuniary income) should amount to 50*l.* or upwards, except upon the application of the trustees. And, by sect. 5, the board was not to exercise the jurisdiction thereby vested in them in any case which, by reason of its contentious character, or of any special questions of law or of fact which it might involve, or for other reasons, they might consider more fit to be adjudicated on by any of the judicial courts.

By sect. 7 a copy of every order was to be deposited in some convenient place for the space of one calendar month for public inspection.

By sect. 8 the Attorney-General, or any person authorised by him or by the said board, in the case of any charity, whatever might be the yearly income of its endowments; and any trustee or person acting in the administration of, or interested in, any charity of which the gross yearly income, to be calculated in manner therein aforesaid, should exceed 50*l.*, or any two inhabitants of any parish or district in which the same should be specially applicable, might, within three calendar months next after the definitive publication of any order of the said board, present a petition to the High Court of Chancery in a summary way, appealing against such order, and praying for such relief as the case might require; and,

By sect. 10, the jurisdiction vested by the Act in the said board was to be exercisable with reference to charities vested in any corporation sole or aggregate, who, either solely or jointly with any other person or persons, should also be the recipients of the benefit thereof.

No trustees had been legally appointed to either of the charities until the order now appealed from.

On the 10th Nov. 1863, the Charity Commissioners made the following order:

In the matter of the Charities of Valentine Poole and Sir Stephen White, in the parishes of Hackney, West Hackney and South Hackney, in the county of Middlesex. The Board of Charity Commissioners for England and Wales having considered an application in writing made to them on the 23rd Jan. 1862, in the matter of the above-mentioned charities, by the rectors and churchwardens of the several parishes of Hackney, West Hackney and South Hackney, for the purposes of the following order, and it appearing to the said board that the endowments of the said charities consist of the several hereditaments and sums of stock mentioned in the schedule hereto, and that the gross annual income of the said charities amounts to 30*l.* 12*s.* and 29*l.* 12*s.* respectively, or thereabouts, and upon public notice of the intention of the said board to make the order hereafter contained, having been given more than one calendar month previously to the date hereof, and no sufficient notice of any objection thereto or suggestion for the variation thereof having been received by the said board, do hereby order that the rectors and churchwardens of



[ROLLS.]

Re HACKNEY CHARITIES.

[ROLLS.]

the said several parishes of Hackney, West Hackney and South Hackney, and their respective successors in office, by virtue of and during their tenure of office, be and they are hereby appointed to be the trustees for the administration and management of the said charities, and that the legal estate of and in the several pieces of land and hereditaments comprised in the schedule hereto, and all other real estate (if any) belonging to or held in trust for the said charities or either of them, be and the same is hereby vested in the official trustees of charity lands, and his successors in trust, for the said charities respectively.

The schedule comprised the Buttfeld, the Raven Leys and the marsh land, and some stock arising from the sale of gravel from one of the fields. Notice of that order was posted on the 14th Nov., and expired on the 14th Dec. This petition of appeal was presented on the 12th March last. It stated the facts, to the effect already set forth, and also that the old parish of St. John, Hackney, was still undivided for all secular purposes, and was governed by a vestry and annually elected churchwardens and overseers. That the petition of appeal was presented on behalf of the vestry; and it charged that the order was wrong, as the legal estate in the trust premises was, by divers statutes, vested in the churchwardens and overseers for the time being of the old parish, who were the proper persons to act as trustees, and to administer the charities. It also stated that the land was of considerable value for building purposes, and when let on building leases would produce considerably more than 50*l.* per annum, and that under the circumstances there was a clear right of appeal; that an application had been made to the Attorney-General for his authority to appeal, but that he had declined to give it, and it had not been sanctioned by the commissioners themselves.

The petition then prayed that the order made by the Charity Commissioners on the 10th Nov. 1863 might be discharged, or remitted to them for their reconsideration; and that, if necessary, it might be declared that the lands in question were vested in the churchwardens and overseers of the original and entire parish, and their successors, for an estate in fee-simple by virtue of the 59 Geo. 3, c. 12, s. 17, as above stated.

It appeared that for some years past disputes had existed between the vestry of the united parish and the separate vestries of the ecclesiastical parishes, with reference to the charities in question, and an action at law arising out of the disputes was still pending. There was also a conflict of evidence as to the persons who had granted leases of the charity estates, but it appeared that each party had granted some.

*Selwyn*, Q.C. and *Prendergast* appeared for the petitioners, and contended that the legal estate in the charity lands was by the 59 Geo. 3, c. 12, s. 17, now vested in the churchwardens and overseers of the original parish:

*Doe v. Hiley*, 10 B. & C. 885;

*Ramball v. Munt*, 8 Q. B. 382;

*Churchwardens and Overseers of St. Nicholas, Deptford*, v. *Sketchley*, 8 Q. B. 394;

that the position of the legal estate was not affected by the division of the parish of St. John's or the apportionment of the charities under the 3 Geo. 4, c. 72, s. 11; that the churchwardens and overseers being a corporation, the legal estate could not be divested without their consent, which they did not give; and that the present case was clearly a contentious one, and one upon which the Charity Commissioner ought not, under the Charitable Trusts Act 1860, s. 5, to have made the order now in question. Lastly, the present petitioners, being inhabitants of the parish, had a right to appeal against the order of the commissioners, without either their sanction or that of the Attorney-General:

*Attorney-General v. Calvert*, 23 Beav. 248.

*Baggallay*, Q.C., and *Hitchcock* for the trustees appointed by the Charity Commissioners, argued that the petition was wrong in point of time (28 & 24 Vict. c. 136, s. 8); that either their consent or that of the Attorney-General was necessary: (16 & 17 Vict. c. 137, s. 44.) As part of Poole's land was copyhold, and as the trust of part of Sir Stephen White's was special, the legal estate had not become vested in the churchwardens and overseers, as contended:

*Attorney-General v. Lewin*, 8 Sim. 366;

*Re The Paddington Charities*, 1b. 629.

Moreover, the present churchwardens and overseers were not successors to those of the original parish, and therefore it was not now vested in them:

8 & 9 Vict. c. 70, s. 22;

18 & 19 Vict. c. 120;

19 & 20 Vict. c. 112;

*Re The West Ham Charities*, 2 De G. & Sm. 218;

*Ex parte The Incumbent and Churchwardens of Brompton*, 5 De G. & Sm. 626.

The order of the commissioners was right, and this appeal ought to be dismissed with costs.

*Hobhouse*, Q.C. (*T. H. Terrell* with him) appeared for the Attorney-General.

THE MASTER of the ROLLS.—I have a very strong impression on my mind that there is no difficulty about my jurisdiction in this case. I must own that I think the petitioners are entitled to appeal. By sect. 8 of the Act of 1860 the appeal must be presented within three calendar months next after the "definitive publication" of the notice of the order appealed from. By reference to sects. 7 and 8 it appears that those words must mean the final publication when the time for the receipt of suggestions and objections expires. The words "definitive publication" are not contained in the body of sect. 7, but they are found in the marginal note of that section. They do, however, occur in sect. 8. That being so, as the "definitive publication" was on the 14th Dec., and the petition was presented on the 12th March last, it was presented in due time. I am also of opinion that, by sect. 8, the authority of the Attorney-General is rendered unnecessary. Any trustee or person acting in the administration of, or interested in a charity, and who has therefore a personal or pecuniary interest, cannot appeal without the authority of the Attorney-General, or of the Board of Charity Commissioners, unless the gross yearly income of the charity exceeds 50*l.* But that restriction does not apply to two inhabitants of the parish. They may appeal whatever may be the income of the charity. With reference, however, to the merits of this case, there is considerable difficulty. I think it may be doubtful whether I have power to pronounce any decision as to the legal rights of the parties. It may also be a question whether I am not limited to the ascertainment of the validity or invalidity of the decision of the Charity Commissioners; whether I can grant all the relief the petitioners desire, or whether I ought not simply to discharge the order of the commissioners? This case is clearly a contentious one; and it was known to be such. It is true the commissioners are constituted the judges of what is to be considered a contentious case within the Act; but their decision is also made subject to appeal. They are prohibited from exercising their jurisdiction in any case involving special questions of law, or which they may consider more fit to be adjudicated upon by any of the judicial courts. The Attorney-General, after hearing the parties in this case, came to the conclusion that the commissioners had given a right decision in a contentious case. One opponent may not make a contentious case; but there was evidently a strong feeling in the parish upon the question involved in this petition. There

[IRELAND.]

Re REILLY—CONWAY v. RICHARDSON.

[IRELAND.]

are also conflicting Acts of Parliament to be construed and applied. There are, moreover, three classes of persons to be considered in this case: there are, first, those who hold the legal estate; then those who administer the charity funds; and last, those who receive the funds. To transfer the legal estate from the first class may be a very objectionable course to adopt, and may cause great dissension and more contention in the parish. I will therefore look into the various Acts before I give my final judgment.

July 28.—The MASTER of the ROLLS.—I have considered the statutes and the authorities cited in the arguments of this case, and I am of opinion that the Charity Commissioners have made a mistake as to the extent of their jurisdiction. Sect. 48 of the Act of 1853, which was incorporated in the Act of 1860, is the only clause that authorises them to make a vesting order. But that section provides that no such vesting order shall be made in respect of land vested in a corporation without the consent of the corporation, or in respect of copyholds without the consent of the lord of the manor. By the order appealed against, all the lands belonging to the two charities were vested in the official trustee. But, upon the authority of *Doe v. Hiley*, I consider that the legal estate was vested in the churchwardens and overseers as a corporation. That decision must be treated as good law, though it has sometimes been doubted. It follows therefore that the Charity Commissioners have no power to make a vesting order as to Buttfield and Raven Leys without the consent of the corporation; nor as to the copyhold part of Buttfield, without the consent of the lord of the manor. But they have power as to the marsh land, as there was a special trust annexed to the gift of that. Having regard to sect. 5 of the Act of 1860, I confess I am surprised that the commissioners should have thought fit to exercise their jurisdiction without the assistance of counsel. That was most desirable in a case which was clearly of a contentious character, and which involved many special questions of law. They have, in my opinion, exceeded their jurisdiction, and I think that part of their order, at all events, is invalid. There would, in my opinion, be great inconvenience in any such division of the charity property as is now sought. I will not, therefore, now make any order, but I will simply express an opinion, that the order of the Charity Commissioners cannot be sustained. I will direct the petition to stand over until the first petition day of Michaelmas Term, so that the parties may in the meantime agree upon the best course to be ultimately adopted.

Solicitors: R. Ellis; C. H. Pulley; Fearon.

### Ireland.

#### COURT OF QUEEN'S BENCH.

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

CROWN SIDE.

Monday, June 1, 1863.

Re REILLY. (a)

*Habeas corpus*—Costs.

Where a writ of *habeas corpus* had been allowed to go, and had been obeyed without argument,

Held, that the court had no authority to grant costs against the deft.

In this case a writ of *habeas corpus* had issued,

directing the deft. to bring up the body of — Reilly, a child in deft.'s custody. The writ had been allowed to go, and had been obeyed without any argument, and the child handed over to his mother, who had obtained the writ.

Purcell, for the prosecutor, applied for costs against the deft.

J. A. Curran, jun. appeared for the deft., and resisted the application for costs.

The following authorities were cited:

*Re Cobbett*, 14 M. & W. 175;

*Dodd's case*, 2 De G. & J. 510; s. c. 4 Jur. N. S. 291; Stat. 56 Geo. 3, c. 100, s. 8.

The Court held that they had no jurisdiction to grant costs under the circumstances.

Tuesday, Nov. 17, 1863.

(Before LEFROY, C.J., HAYES and FITZGERALD, J.J.)

CONWAY v. RICHARDSON.

Case stated by magistrates—Striking out—Costs.

Where a case stated by magistrates was struck out, it not having been transmitted, and notice of it not having been served as required by the statute, the Court refused to give costs against the appellant.

This was a case stated by the justices of Tyrone under the 20 & 21 Vict. c. 43.

Fetherston H. Lowry moved on notice that the case stated should be struck out of the Crown paper on the grounds that the app. had not served the resp. with a notice and a copy of the case stated within three days after receiving it from the justices, and had not within three days transmitted the case to the court. The affidavits of the resps. and the petty sessions clerk of Cookstown deposed that the justices signed the case on the 24th Oct., that by the direction of the app. it was forwarded by post, and the letter registered, to the attorney, who must have received it on the 26th. The resp. was not served with the notice or copy of the case until 2nd Nov.; and on the same day the officer of the court received the case. Counsel cited

*Morgan v. Edwards*, 5 H. & N. 415;

*Woodhouse v. Woods*, 29 L. J. 149, M. C.

M'Causland, Q.C.—The court having struck out the case from want of jurisdiction, cannot give costs:

*Fraser v. Fothergill*, 14 C. B. 298.

F. Lowry contra.—The app. by transmitting the case has brought himself within the jurisdiction; and per Alderson, B., in *Peters v. Shannon*, 10 M. & W., 214, every person who comes before a court is liable to the jurisdiction of the court as to costs. But the cases of *Carr v. Stringer*, 1 E. B. & E. 125, and *Reg. v. Padwick*, 8 E. & B. 704, are clearly in point, that where a case has been dismissed for want of jurisdiction the court has power to give costs. *Fraser v. Fothergill* is clearly distinguishable. The court never had any jurisdiction, and the resp. had done nothing to bring him within the jurisdiction.

LEFROY, C.J.—Strike out the case; the court says nothing about costs.

[IRELAND.]

M'DONALD v. BULWER.

[IRELAND.]

## COURT OF COMMON PLEAS.

Reported by J. FIELD JOHNSTON, Esq., Barrister-at-Law.

Nov. 5 and 6, 1862.

M'DONALD v. BULWER. (a)

*Trespass—Demurrer—Construction of 12 Vict. c. 16.*

*A justice's search-warrant by which a party is arrested must be founded on an information which discloses a charge of felony, or contains a statement of facts from which it may fairly be inferred that a felony has been committed.*

*And therefore where the information stated that A. B. had neglected to return a gun which had been lent to him, and for which he had been repeatedly asked, and that the person swearing the information had reason to believe it was in the possession of C. D., and nothing more; and the magistrate, knowing C. D. to be a pawnbroker and residing within his jurisdiction, issued a warrant, by virtue of which the pawnbroker was arrested, he was held to have exceeded his jurisdiction and to be liable in an action of trespass (following Lawrenson v. Hill, 10 Ir. C. L. R. 177.)*

*The 2nd section of the Justices of the Peace Protection Act, 12 Vict. c. 16, did not contemplate a case as where A. B. is plt. and C. D. def't., where there be technicalities to be adhered to.*

*And therefore a defence to an action of trespass under the circumstances stated above, that it was afterwards ordered in the same matter that the gun should be restored to the person who swore the information, and that that order had not been quashed or reversed, was held to be good on general demurrer, notwithstanding that the title of the information was different from the title of the certificate of the order.*

*A search-warrant, by which the property when found is directed to be brought together with the person in whose possession it is found, becomes, so soon as the property is so found, a warrant to secure the personal attendance of such party, and therefore falls within the provisions of the 12 Vict. c. 16, s. 2.*

The third count of the summons and plaint complained that the def't., on the 13th Sept. 1859, caused and procured the plt. to be arrested and taken into custody, and to be detained in such custody, and to be taken in such custody in and along divers public streets in the town of Athy to a court house, and there to be detained in custody for the space of four hours then next following. The fourth count complained that the def't. on the said 13th Sept. 1859, assaulted the plt. and unlawfully imprisoned him for four hours. To these, and to each of them respectively as a distinct defence, the def't. pleaded that at the respective times of committing the respective acts in said counts respectively mentioned the def't. was a justice of the peace duly assigned to keep the peace in and for the county of Kildare: and that on the 13th Sept. 1859, one Francis A. Mills, of Athy, in the said county, came before the def't. as such justice, and duly made an information upon oath before the def't., as such justice, in the words following, that is to say, that "he the said Francis A. Mills, about two months previous to the said 13th Sept. 1859, lent a gun to one Patrick Leonard; and that upon several occasions he the said Francis A. Mills asked the said Patrick Leonard to return the said gun to him, the said Francis A. Mills, but the said Patrick Leonard neglected so to do; and that he, the said Francis A. Mills, had reason to believe that the said gun was then in the possession of the plt. in the town of Athy," the said plt. then being a pawnbroker in the said town, and within the petty sessions district of

Athy, to the knowledge of the def't., whereupon the def't., as such justice, issued a search-warrant under his hand and seal, directed to one C. H. Lawson, then being a sub-inspector of the authorised constabulary of the said county, and authorising and requiring him, on receipt of the said warrant, to enter in the daytime with the necessary and proper assistance into the house of the plt. and make diligent search there for the said gun; and if the said constable should find the same, or any part thereof, to bring it together with the person in whose possession the same should be found before the def't. or some other of the magistrates, justices of the peace for the said county, to be further dealt with according to law, by virtue of which warrant the constable therein named entered the house of the plt., being situate within the jurisdiction of the def't. as such justice, in the daytime, to search for the said gun, and did accordingly search therefor and found the said gun in the possession of the plt., which gun the plt. then stated to the said constable had been pawned by the said Patrick Leonard, and was then held in pawn by him, the plt., as such pawnbroker, whereupon the said constable took the said gun and arrested the plt., using no unnecessary violence in so doing, for the purpose of bringing the plt. before the def't. or some other justice of the peace of the said county, to be dealt with according to law; and did accordingly bring him in such custody along the streets in the said county mentioned to the court-house of Athy, in the said county, before the def't. and one Benjamin Lefroy, then duly assembled at the petty sessions in the said court-house in and for the district of Athy, for the purpose of being dealt with by the said justices according to law, at which court-house the plt. was in due course of business of the said petty sessions in and for the said district, under and by virtue of the said warrant, detained for a short time in the custody of the said constable until the said plt. and the said gun should be dealt with according to law in respect of the premises. And the plea averred that the said several acts were respectively done after the passing of a certain statute passed in the 12th year of Her present Majesty, entitled "An Act to protect justices of the peace in Ireland from vexatious actions for acts done by them in the execution of their office;" and that the said respective acts so complained of were respectively done in the manner hereinbefore stated by the def't. in the execution of his duty as such justice of the peace for the county of Kildare, and with respect to a matter within his jurisdiction as such justice. The def't. pleaded a further defence to each of these counts respectively, which stated in addition to what was contained in the above plea that it was afterwards, to wit, on the 13th Sept. 1859, ordered in the same matter by the said justices that the plt. should enter into a recognisance to appear at the said court-house on the next day for holding the petty sessions at said court-house in and for the said county and answer the charge of having in his possession a gun which was feloniously and fraudulently pawned by the said Patrick Leonard, and that the said plt. having entered into such recognisance appeared at the said court-house according to the exigency of the said recognisance, whereupon an order was made in said matter and duly recorded by the justices of the peace for the said county then and there assembled in the presence of the plt., that the said gun should be restored to the said Francis A. Mills; and that said orders respectively were in full force and effect, and had not, nor had either of them, nor had the said warrant, been quashed or reversed. The plt. demurred to the first defence on the ground that the several matters therein alleged in fact showed that the acts complained of were done in a matter of

(a) From the Irish Jurist, by permission.

[IRELAND.]

M'DONALD v. BULWER.

[IRELAND.]

which by law the deft. as such justice either had not jurisdiction, or in which he exceeded his jurisdiction, and that the averment that the said acts were done with respect to a matter within his jurisdiction was an inference of law not only unsustained by the preceding averments, but contradicted by them. The plt. demurred to the second defence, for that the warrant was not the subject of a *certiorari*, and could not be quashed as it was not an adjudication; and neither of the orders was an order or conviction within the meaning of the 2nd section of the 12 Vict. c. 26.

*Byrne* (with him *Armstrong*, Serjt.) in support of the demurrers.—This first defence does not disclose any case of a criminal character sufficient to warrant the arrest of the plt. The 11th section of 26 Geo. 3, c. 43 (the Pawnbrokers Act) contemplates the law being put in motion by the pawnbroker. [MONAHAN, C. J.—The pawnbroker may arrest a party coming to pledge whom he suspects, but in this instance it was not the pawnbroker who arrested.] The 13th section requires a sworn information, which must state an unlawful pawning; but in this information there is no mention made of a pawnbroker nor of an unlawful taking, so that there was no subject-matter for the justice's jurisdiction; nor had he a right to arrest either the plt. or the person who pawned the gun. The gun was stated to have been lent, and the justice could do no more than issue a search-warrant. But supposing there was a subject-matter of jurisdiction so far as Leonard was concerned, there was such an excess of jurisdiction as justifies this action. The 1st section of the Justices of the Peace Protection Act, the 12 Vict. c. 16, requires that for any act done by a justice within his jurisdiction the action shall be on the case, and shall allege malice and want of probable cause; but what the deft. did here was not with respect to a matter within his jurisdiction. The 2nd section preserves the action of trespass where the matter was not within his jurisdiction, or where he has exceeded his jurisdiction. *Lawrenson v. Hill*, 10 Ir. Com. Law Rep. 177, is an authority in point, and decides that an information which discloses no criminal offence cannot be helped out by parol evidence, and that a general jurisdiction over the subject-matter of inquiry will not protect a magistrate from an action of trespass under this 2nd section if in the particular instance of issuing the warrant he acted without or in excess of jurisdiction. This case is indistinguishable from *Lawrenson v. Hill*. It was argued there that if there was jurisdiction at all the action did not lie. The cases of *Barton v. Bricknell*, 13 Q. B. 393, and *Leary v. Patrick*, 15 Q. B. 266, underwent a great deal of discussion in *Lawrenson v. Hill*, and in the latter of these there plainly was a subject-matter of jurisdiction. Lord Denman's observation in *Caudle v. Seymour*, 1 Q. B. 892, that the magistrate's "protection depends not on jurisdiction over the subject-matter but jurisdiction over the individual arrested," is pertinent to the present case; because so far as this information is personal it only points to the possession of the gun. It cannot be validated by subsequent evidence of facts (*Paley on Convictions*, 55); but the averment in this defence that the acts complained of were done with respect to a matter within the deft.'s jurisdiction as a justice is an inference of law not only unsustained by the preceding allegations of fact, but contradicted by them. With regard to the second defence, we cannot deny that the second order made—the order to restore the gun—was a judicial act, but we submit that in this 2nd section what the Legislature contemplated was judicial procedure against the person. Here the proceeding was against a thing, and the warrant is not the subject of a *certiorari* (*R. v. Lediard*, Say. Rep.

6), nor any other act than judicial acts: (*R. v. Lloyd*, Caldecott's Rep. 309.) The section requires that the order be made "in the same matter;" but the matter wherein the warrant was issued was a matter in which Francis A. Mills was complainant, and Patrick Leonard was deft., whereas the matter in which the alleged orders were made was a matter in which Francis A. Mills was complainant, and the present plt. was deft. The language of the information as well as its title, and the language used in the certificates of the orders, as well as their titles, show that it was not the same matter. The matter wherein the alleged orders were made was the matter of a complaint not begun till after the issuing of the warrant and the commission of the acts complained of. We submit that the deft. should produce the originals or certified copies of the information, warrant and orders upon the argument of this demurrer.

*H. P. Jellett* (with him *J. T. Ball*, Q.C.) contra.—It is sufficient if a legal offence can be inferred from the warrant: (*Cave v. Mountain*, 1 Mau. & Gr. 262.) A justice is not liable in trespass for having issued a search-warrant upon facts sufficient. There need not be a positive and direct averment upon oath that goods are stolen: (*Elsee v. Smith*, 1 Dowl. & Ry. 102.) What a search-warrant ought to contain will be found in 2 Hale's Pleas of the Crown, pp. 113 and 150. A criminal offence could not by any means have been inferred from the information in *Lawrenson v. Hill*; and it was on this ground that Pigot, C. B. held the magistrate was not protected from an action of trespass. By the 20 & 21 Vict. c. 54, s. 4, any bailee of property fraudulently converting the same to his own use is made guilty of larceny. What are the facts disclosed upon the face of this information? That a gun was lent two months previously, and was repeatedly asked for. It is not necessary to show that a jury must make this out to have been a larceny. All that is necessary is to show that the justice might fairly apprehend a larceny had been committed. *Cave v. Mountain* decides this case. [BALL, J.—There a felony was charged.] And here it was committed. A felony is only a conclusion of law. The facts amounted to felony. [MONAHAN, C. J.—The information does not charge a conversion of the property.] A neglect under such circumstances amounted to a refusal. Leonard was asked repeatedly. The magistrate may be sued in an action on the case for improvidently issuing the warrant, but he is not liable in trespass. A search-warrant is partly a ministerial and partly a judicial act: (*Webb v. Ross*, 4 Hurl. & Norm. 115.) With regard to the second defence, I submit the search-warrant will be held to have been against the person in whose possession the gun was. Therefore, the subsequent orders are truly stated to have been made in the same matter. The plt. seeks to avoid this consequence by insisting that we are to produce the originals or attested copies of these orders to be compared by the court on this demurrer. The records of an inferior court cannot be inspected: (1 Saunders's Rep. 8 b.) The plea contains an averment which states the information, and the plt. seeks to contradict the record on the argument of this demurrer.

*J. T. Ball*, Q. C.—As to the first defence, I admit there is no felonious charge in the information; but that is irrelevant. It might be otherwise, as between Leonard and the magistrate, but not where a pawnbroker was concerned. [MONAHAN, C. J.—The information does not state the plt. was a pawnbroker.] No; but every pawnbroker is amenable to the justices in whose district he is.

[IRELAND.]

M'DONALD v. BULWER.

[IRELAND.]

This man was not only a pawnbroker, but a pawnbroker within the deft.'s jurisdiction. Every search-warrant must contain an order to bring before the justice the person with whom the property is found. The pawnbroker tells the constable the gun has been pawned with him. [MONAHAN, C. J.—Would not that be making the validity of the warrant depend up *ex post facto* circumstances? I could understand that argument if the plea stated the constable had himself arrested the pawnbroker?] The 13th section of the Pawnbrokers Act has no word of felony in it; it is enacted "for the better enabling all persons to recover their goods and chattels." The object of that Act was the restoration of the property, not the detection of felony in the person pawning. Unlawfully, in that section, does not mean feloniously; it means improperly. No one but the owner of a thing can legally pawn it. The words of the Act ought rather to be strained to import what may be necessary to maintain the magistrate's jurisdiction. If the subject-matter upon which a magistrate is engaged be within his jurisdiction, he is protected from an action of trespass, and can only be sued in an action on the case for a malicious use of his authority. The whole controversy turns upon these words in the 1st section of the Justices' Protection Act, "with respect to a matter within his jurisdiction." These two sections, the first and second, were intended to provide for three cases. 1. Where the subject-matter is within the magistrate's jurisdiction. 2. Where the case is *ultra vires* of the magistrates. 3. Where there is excess of jurisdiction. There is no English case which decides that if there be jurisdiction, the magistrate is not protected. As to *Barton v. Bricknell*, there was no jurisdiction in that case to put a man in the stocks for two hours. Where the duty of a magistrate is not simply ministerial, he is not liable in an action unless he can be fixed with malice: (*Linford v. Fitroy*, 13 Q. B. 247.) [MONAHAN, C. J.—If neither the facts nor the charge authorised the act, can it be said to be within his jurisdiction? There is no statement that Leonard unlawfully got the gun, or pawned the gun, or that the gun was claimed by the pawnbroker *quod* pawnbroker. If neither the charge nor the facts amount to what would authorise a warrant, can there be jurisdiction?] Given a jurisdiction over the subject-matter, and a state of facts which convince the magistrate in his conscience that he has jurisdiction, he is to be protected except from an action for a malicious use of that jurisdiction. The question here is, must the court not take it that the facts were proved when the warrant states them? The warrant is legal on the face of it. To hold with the plt., the court must go behind the warrant:

*Brittain v. Kinnaird*, 1 Bro. & B. 482;

*Re Clarke*, 2 Q. B. 619.

[CHRISTIAN, J.—The information being deficient, the magistrate makes up for the deficiency by recitals in the warrant. BALL, J.—It seems to me that he has imagined persons, places and transactions.] The imagination was not greater than that instanced in *Brittain v. Kinnaird*. As to the second defence, it is founded on the following clause in the 2nd section of the Justices of the Peace Protection Act: "Nor shall any such action be brought for anything done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed." A search-warrant is not a warrant of decision, or of condemnation, or of punishment. What was the object of this warrant? It was to bring the man with whom the property was found, that the magistrates might adjudicate on whose property it was. This, and all

that followed, was subject to be quashed in the Court of Q. B. There that order must have stood or fallen by the facts. [MONAHAN, C. J.—In the case of wages being due, &c., a magistrate may order them to be paid. Now, I imagine he has no right to issue a warrant to bring a party before him, to the end that he may order him to pay the wages.] The clause never included such a case. It applies only where the warrant is a preliminary step. The magistrate could not take the gun from the pawnbroker without issuing a warrant, without bringing him before him to investigate the facts.

*Armstrong*, Serjt. in reply.—The doctrine laid down in *Lawrenson v. Hill* that a general jurisdiction is not sufficient, but that the particular thing done by the magistrate must be within his jurisdiction, was not new:

*Grady v. Hunt*, 1 Ir. Jur. N. S. 10;

*Newbould v. Colman*, 6 Ex. 189.

The facts disclosed here are insufficient to authorise this proceeding either under the 20 & 21 Vict. c. 54, or the Pawnbrokers Act, 26 Geo. 3, c. 43. There is no conversion of the property alleged. Innocence is compatible with all the facts, and the information would make a bad count in trover. The goods, not the person, may be taken under the Pawnbrokers Act, and that upon a sworn information that they were unlawfully obtained. There is none such here, and if there were, the jurisdiction is exceeded by directing the body to be taken. The 9 Geo. 4, c. 55, s. 56, requires the oath of a credible witness that a felony has been committed. The whole foundation is a felony charged. [MONAHAN, C. J.—How can that be when the section speaks of offences punishable upon summary conviction?] They are all felonies nevertheless: (1 *Nunn & Walsh*, 253.) As to the second defence, it is unnecessary to say anything about the warrant being quashed, for the 2nd section of the Justices of the Peace Protection Act does not require it. According to the plea, the warrant is a search-warrant, and search-warrants are not within the meaning of the Legislature in this section at all. The difference between warrants and search-warrants is old and clear. This 2nd section contemplates a person known and charged with an offence. How can there be a process to compel a party to appear where there is no *persona nominata*? The ordinary warrant to bring up a person charged with an offence, is the warrant meant in this section. What was the exigency of this search-warrant? Not to bring up any person in particular. Suppose, when the plt. was brought up, the gun had been ordered to be given back to him, what would be said of his going into the Court of Q. B. to quash that order, an order to get back his own property? Again, even if search-warrants were meant to be included, the subsequent order must be made in the same matter. There is no matter here. There is no debt. Until the order to restore the gun, no matter existed. We are out of this section altogether, but if not, then that section requires that the order be in the same matter; and the allegation in the plea that it was in the same matter makes no matter, for there was no matter to make it in.

*Cur. adv. vult.*

Nov. 21. — MONAHAN, C. J., having stated the facts and pleadings, delivered the judgment of the court.—To support the first of these pleas it has been argued that this warrant appeared to be an ordinary search-warrant; that if a felony is committed, and supposing the magistrate has reasonable grounds for believing that the stolen goods are in the custody of a certain person, it is his duty to issue a search-warrant, with a direction to bring the stolen property and the person in whose possession found; and if

[IRELAND.]

DOWDALL v. REV. JAMES HEWITT.

[IRELAND.]

this information contained a statement that a felony had been committed, or that from which it might fairly be inferred that a felony had been committed, no subsequent facts are wanted to justify what was done. But the word made use of in this information is "neglected." It is not stated that Leonard refused to restore the gun; it is not stated that the gun was stolen, nor is anything stated from which that might be inferred. It is not stated that the gun had been pawned without the knowledge or consent of the owner, from which there might be inferred facts which would give the magistrate jurisdiction. We were referred by the deft.'s counsel to the 20 & 21 Vict. c. 54, s. 4, which enacts that "if any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, he shall be guilty of larceny." But it is never said that Leonard converted the gun to his own use, i.e., it does not appear on the information; it does appear afterwards. The validity of the warrant cannot depend upon subsequent events. Mr. Ball preferred resting the case upon the Pawnbrokers Act. The 13th section of the 26 Geo. 3, c. 43, was passed "for the better enabling all persons to recover their goods and chattels," and requires a statement on oath that the goods were unlawfully taken, and that there was just cause to suspect they were knowingly and unlawfully taken to pawn. Does the information set out in this pleading contain these requisites? There must be an unlawful taking alleged: there is none here. Next it must appear that the property was pawned: that does not appear. Next, that the pawnbroker had knowingly taken them to pawn: *a fortiori* that does not appear. And grant that all these things were in it, where is the authority under this Act to arrest the pawnbroker at all? Unsuccessful as was the attempt to find a felonious charge, the endeavour to bring the case within the Pawnbrokers Act is more forlorn. It only remains to be seen whether, upon this state of things, an action of trespass can be maintained against the magistrates. This question depends upon the construction of the Justices of the Peace Protection Act (12 Vict. c. 16), the 1st section of which provides that every action to be brought against a justice for any act done within his jurisdiction, or with respect to a matter within his jurisdiction, shall be on the case as for a tort. No criminal offence is alleged in this information, and we have to determine what jurisdiction the magistrate had to arrest. *Lawrenson v. Hill* is a much stronger case than the present. In it the written information did not contain a charge of felony, but there was parol evidence which showed grounds for concluding a charge of felony. The Court of Ex. held that, since the written information did not contain a charge of felony, the magistrates either had no jurisdiction, or exceeded their jurisdiction. *A multo fortiori* must we so hold in this. We cannot distinguish this case from *Lawrenson v. Hill*. I confess that irrespectively of that case I entertain no doubt that if a magistrate, though acting *bonâ fide*, issue a warrant to arrest a man upon an information which contains no charge of felony, he exceeds his jurisdiction. We are bound by *Lawrenson v. Hill*, but into the cases there cited I shall not myself enter, because, independently of that case, I feel no doubt. The demurrer to the first defence must, therefore, be allowed. The second defence involves a question of greater difficulty. It states that it was afterwards ordered in the same matter that the plt. should enter into a recognisance to appear on the next day for holding the petty sessions, and that the plt. having appeared, an order was made in said matter that the gun should

be restored, and that said orders and warrant have not been quashed or reversed. This plea depends upon a clause in the 2nd section of the Justices' Protection Act, and it affords an answer to the present action. It is averred as a matter of fact, though I for one do not think much of the averment, that the order was made in the same matter. If it appeared otherwise I should not consider myself bound by the statement in the plea. I do not think this section contemplated a case as where A. B. is plt. and C. D. deft., where there be technicalities to be adhered to. The warrant is founded on the information, and it is—Search C. D., and bring the gun here. We think this was a warrant to bring C. D. before the magistrate. For what purpose? To be dealt with according to law, i.e., if a felony had been committed to send him to gaol, or to order the gun to be restored; because there is no doubt that though the magistrate had not jurisdiction to arrest, he could not have ordered the gun to be restored without first summoning the pawnbroker to show cause against his doing so. We think (however informal the complaint) that the order was an order made in the same matter. Very possibly the framer of this Act of Parliament did not contemplate such a warrant as was issued here, but the case of an ordinary warrant, where there is an option to issue a warrant to arrest or to issue a summons. We think in result and consequence that when the gun was found in this man's possession, this warrant became a warrant to secure his personal attendance. The demurrer to the second defence is overruled, and there being one good answer to the action, there must be

*Judgment for the deft.*

#### CONSISTORIAL COURT OF DUBLIN.

*Saturday, Dec. 5, 1863.*

THE OFFICE PROMOTED BY THE REV. LAUNCELOT  
DOWDALL v. REV. JAMES HEWITT. (a)

*Offertory—Proprietary chapels—Alms—Napier's Act.*

*The alms collected, whether at the offertory or during Divine service, in a proprietary chapel, not having a district assigned to it, belong as of right to the rector of the parish in which the chapel is situated, to be disposed of as he and the churchwarden shall direct, and that notwithstanding Napier's Act, 14 & 15 Vict. c. 72.*

The facts of this case will sufficiently appear from the judgment of the court. The question arose on the admissibility of the articles.

Dr. Walsh, Q. C., advocate for the promovent.

Dr. Ball, Q. C., advocate for the impugnant.

Dr. BATTERSBY, Q. C., V. G.—This is a suit promoted by the Rev. Launcelot Dowdall, rector of the parish of Rathfarnham, against the Rev. James Hewitt, incumbent or perpetual curate of Zion Church Rathgar, in the same parish, to compel the latter to pay over the alms collected in said church according to law, and that he may abstain from misapplying same in future. The pleading states these alms to have been collected at the "offertory" as sacramental alms. No such proceeding as this has been taken in Ireland before, except in the case of *Magee v. The Bishop of Cashel*, and, from the statements made on the last court day, it would appear that the present suit had arisen not so much from a desire to settle the right to this offertory, as from the circumstance that, upon Mr. Hewitt's

(a) From the *Irish Jurist*, by permission.

[IRELAND.]

DOWDALL v. REV. JAMES HEWITT.

[IRELAND.]

appointment to the perpetual curacy of Zion Church, he insisted on a title to discharge the duties of rector or some of them, throughout the whole parish of Rathfarnham, a title which Mr. Dowdall denied; and to prevent Mr. Hewitt getting a footing in the parish by having a district assigned to his church pursuant to the statute in that behalf, Mr. Dowdall refused to consent to the assignment of such district by the archbishop, and commenced this suit. If Mr. Hewitt made such claim, he mistook his rights; for, as a curate with a district, he could not go beyond it, and, not having a district, as the fact is, he could not perform any of the offices of a minister out of his chapel without incurring severe penalties. Mr. Dowdall, on the last court day, was willing that a district should be assigned to the Zion Church, and that the right to the offertory should be referred to the archbishop. Mr. Hewitt postponed until this day his assent or dissent from that proposition, and he now refuses it. The first question seems to be, what is the offertory? The term appears to signify both that part of the Communion Service which is read while the alms are being collected, and the alms then given. Rubrick, 2 Edw. 6, M. Gib. Cod. 474, it is said, "Whyle the clearks do sing the offertory, so many as are disposed shall offer to the poore mense's box, everyone according to his habilitie and charitable mynd." Ayliffe in his *Parergon*, 393, says: "It was always the custom for the communicants to offer something at receiving the Sacrament, as well for holy uses as for the relief of the poor, which custom is, or ought to be, observed at this day." Before the Reformation, it appears that the priests of proprietary chapels were in the habit of taking these offerings to themselves, to the prejudice of the incumbent of the parish; and to prevent this it was provided by a legateine constitution of Othobon, Cardinal Legate, 52 Hen. 3, A. D. 1267, quoted 1 Bolingbroke, E. L. 279, that—"When a private person desires a proper chapel and the bishop grants it for a just cause, yet he always uses to add, 'So that it be done without prejudice to the right of another.' And we, pursuing the same wholesome method, ordain and strictly charge that the chaplains ministering in such chapels as have been granted with a saving to the rights of the mother church, restore to the rectors of that church, without making any difficulty, all the oblations and other things which ought to come to the mother Church, if they had not intercepted them, and which, therefore, they cannot in justice retain. If anyone contemptuously refuses to do it, let him be suspended till he hath made restitution." The offertory was anciently for the use of the priest, but at the Reformation it was changed into alms for the poor: (1 Burn, E. L. 370; Ayliffe *Parergon*, 394.) Ayliffe says that this change was made by the statute 25 Hen. 8, which abolished altar oblations to the priests; but however this may be, it is clear that at this day, according to the Rubric, "Money given at the offertory shall be disposed of to such pious and charitable uses as the minister and churchwardens shall think fit, wherein, if they disagree, it shall be disposed of as the ordinary shall appoint." Now, who are "the ministers and churchwardens?" Are they those of the parish church only? or are they the officiating clergymen and churchwardens of every chapel, included in the words of the Rubric? The Act of Uniformity (17 & 18 Car. 2, c. 6), s. 1, reciting that "as nothing conduceth more to the honour of God, the settling of the peace of a nation, which is desired of all good men, nor to the advancement of religion, than an universal agreement in the public worship of the Almighty God, both Houses of Convocation had presented

unto His Majesty's Lord Lieutenant one book, hereunto annexed, intitled 'The Book of Common Prayer,' &c. Therefore, to the intent that the greatly desirable work of uniformity in Divine worship may be obtained, and that every person within this realm may certainly know the rule to which he is to conform in public worship and administration of sacraments, and other rites and ceremonies of the Church of Ireland," it enacts that all ministers shall be bound to say and use the Morning Prayer in such order and form as is mentioned in the said "book." And by sect. 2, "every minister shall openly, publicly, and solemnly read the Morning and Evening Prayer, by and according to said Book of Common Prayer; and after such reading, shall openly and publicly before the congregation there assembled declare his unfeigned assent and consent to the use of all things in the said book contained and prescribed, on pain of deprivation." Now, that "book," in the part relating to the Communion Service, provides that "whilst the sentences of the offertory are in reading, the deacons, churchwardens, or other fit persons appointed for that purpose, shall receive the alms for the poor, and other donations of the people, in a decent basin to be provided by the parish for that purpose." And, subsequently, that after divine service is ended, the money given at the offertory shall be disposed of as I before said. The law on this subject was fully considered and explained by Sir John Nichol, in the case of *Moysey v. Hillcoat*, 2 Hag. 30. That was a suit promoted in 1828 by Dr. Moysey, rector of the parish of Walcot, to compel Dr. Hillcoat, owner and officiating minister of the chapel of Queen's-square, licensed on the nomination of the said Dr. Moysey, to pay over to said rector the money collected at the offertory in said chapel. The licence of Dr. Hillcoat was nearly in the same words as that of Mr. Hewitt, except that the former authorised the performance of "all ecclesiastical duties belonging to said office," which authority is not included in the licence to Mr. Hewitt, and the latter also excepts baptisms and marriages. Dr. Moysey had himself acted as curate of the chapel, and as such received the various offerings while curate, which he afterwards claimed as rector from the succeeding curate. Dr. Hillcoat insisted that the sacramental alms received in the chapel had been constantly, since the opening thereof in 1735, at the uncontrolled disposal of the minister therein officiating and of the proprietors thereof. Sir John Nichol, p. 48, says: "*Primâ facie*, all parochial duties are committed to, and imposed upon, the parish incumbent, and all fees and emoluments arising from the performance of those duties, in like manner, belong to him. Of common right, all parochial dues, whether from tithes or other sources, belong to the presentee of the patron;" and at p. 49: "Chapels possess no parochial rights, unless acquired by a composition with the patron, incumbent and ordinary." "I am not aware of any chapels where the patrons or proprietors (forming themselves into a sort of joint-stock company) can appropriate a portion of the church dues;" (p. 53.) "The nomination appoints Dr. Hillcoat to perform the office of officiating minister of Queen's Chapel, &c. There is nothing that appoints Dr. Hillcoat to the exercise of all parochial rights, to the cure of souls, and to the occasional administrations, in all parts of the parish, and it does not grant anything which belonged to Dr. Moysey as rector, neither the parochial duties, nor the surplice fees, nor the power of interfering and intruding in all rights, duties and offices which had been committed to Dr. Moysey as incumbent of the parish;" (p. 54.) "The alms received during the reading of the offertory before the Communion are specially directed by the Rubric



[IRELAND.]

DOWDALL v. REV. JAMES HEWITT.

[IRELAND.]

to be collected in a decent basin, to be provided by the parish, which shows that the collection, wherever made, is a parochial matter, with which persons connected with a private chapel have no concern. Again, after the Divine service is ended, the money given to the offertory shall be disposed of to such pious and charitable uses as the minister and churchwardens shall think fit, wherein, if they disagree, it shall be disposed of as the ordinary shall appoint. These directions as to the 'parish' and the 'churchwardens' who are officers of the parish and not of the chapel, lead me to construe the 'minister' to mean 'the minister of the parish,' and they show that the Rubric intended that alms received at the Communion, as well as at private chapels in the parish church, should be at the disposal of the minister of the parish, and of the churchwardens, and should not belong to the officiating minister, nor to the proprietor of such chapel. In any view that I am able to take of this case, I cannot consider that this chapel has acquired any local rights at all encroaching on the parochial rights which belong to the parochial incumbent, beyond those to which he has directly and specifically consented, viz., the payment for accommodation by those who take pews. To the emoluments arising from those pews, Dr. Hilcoat, uniting both characters, of officiating minister and sole proprietor, is entitled; but to them he is limited. Here is no district, no chapelry which connects any particular inhabitant with this chapel; here is nothing carved out of the parish, nor out of the parochial rights of the rector. The general duties of the parish rest upon the rector; he is bound to perform them, and he is entitled to all the emoluments derived from them. This is the policy of the law, to keep these duties entire and simple, unless they have been subdivided and parcelled out by competent authority:" (p. 56.) In Watson's Clergyman's Law, 311, referring to the Statute of Uniformity, it is said: "If in reading the Morning and Evening Prayers the minister shall stand or sit when he is directed to kneel, or kneel or sit when he should stand, or shall read them in other order than is appointed, or shall omit anything that is appointed to be read on certain days, or misplace the prayers in reading them, or read in one day what is appointed to be read on another, or do not celebrate and administer the sacrament in such order and form as is appointed, he is punishable by law;" which shows that the Rubric must be implicitly obeyed. Mr. Hewitt's advocates admit that down to the passing of the Act 14 & 15 Vict. c. 72, in the year 1851, Zion Chapel would have been considered a proprietary chapel, as described by Sir John Nichol; but they say that this chapel, by sects. 2, 23 and 27, is made a perpetual cure and benefice, and the officiating clergyman therein a perpetual curate and incumbent, and therefore, that he had acquired within his chapel all the rights which the incumbent of the parish and churchwardens previously had. But the words "incumbent" and "benefice" confer no right or power, and whether perpetual or temporary, the clergyman of a proprietary church is not a complete incumbent with all the attributes of a rector. The latter can baptize and solemnise matrimony, when admitted and instituted, without any special licence: (Watson's Clergyman's Law, 314.) Mr. Hewitt can do neither, for these matters are expressly excepted from his licence, and he is but a curate, though a perpetual one, having authority to the extent of his licence but not further or otherwise. And even if he had a district assigned to his church under sect. 13, by sect. 14 it is provided that "nothing therein contained shall be construed to discharge the incumbent of any such parish, a portion of which shall be included in any such district, or any other ecclesiastical person having cure of souls within the same, or

his successors, from the cure of souls or other parochial duties in any such district, but which said cure of souls shall remain as heretofore." From which it plainly appears that the rector is not ousted of any of his rights by the appointment of a curate, though an independent one, to perform divine service within the chapel, or even beyond it to the extent of his district, if a district be assigned to him, which has not been done here. It is then urged that by sects. 25 and 27, chapelwardens may be elected, who shall have the like authority within the said church or chapel as churchwardens in the case of a parish church have, and shall be competent to recover by all proper means and proceedings the pew rents, and other dues belonging to the said church or chapel; and that therefore the curate and chapelwardens are entitled to receive and distribute the offertory. These sections, however, do not mention the offertory as the English Act does, and they appear to apply only to the ordering of matters within the church, and to the recovery of pew rents and such things as may be legally recovered, but not to the offertory, which is purely voluntary as a part of the ceremony, and cannot be recovered if refused by the communicants. It is to be observed, too, that, so far as appears upon the libel before the court, no chapelwardens of Zion Church have been appointed, and the claim of Mr. Hewitt is, to receive this offertory himself, and to distribute it amongst his congregation as he thinks proper, without the assistance or control of any churchwardens or chapelwardens. This would involve a state of things wholly unknown to the church. The congregation of Zion Church consists of the pewholders and the occupiers of free seats, without reference to, or any connection with, any particular parish or district. Mr. Hewitt cannot visit as clergyman, or go through any part of the parish in order to ascertain the state of the parishioners. Sect. 14 allows him "the care of the sick and other pastoral duties," only in case of a district being assigned to his church, and if he were to distribute the offertory where his licence confines him within his own chapel, he could only do so to such persons as might come there for alms, no matter from whence, unless he and his trustees and pewholders should think proper to divide it amongst themselves. A forcible argument against Mr. Hewitt's view of the statute arises from the English Act 8 & 9 Vict. c. 73, s. 6, which provides for the appointment of churchwardens for district chapelries, and enacts that money given at the offertory at such churches shall be disposed of by the minister and churchwardens of such church, in the same manner as the money given at the offertory at any parish church is by law directed to be disposed of by the ministers and churchwardens of such parish. There is no such provision in any Irish Act. Sect. 7 of the same English Act provides for the appointment of churchwardens for any new church without a district, and does not authorise them to interfere with the offertory, but enacts that if a district be assigned to such a church, they shall thenceforth have the same power as churchwardens appointed under the previous section; thus showing that the Legislature considered that, without express words to the contrary, the right of the rector and churchwardens to the offertory would continue in a parochial district, and that, in the case of a church without a district, it ought not to be taken from them. In the case of *Magee v. The Bishop of Cashel*, 9 I. E. R., 319, before Lord St. Leonards, it appeared to have been conceded by all parties, that offertory received in a proprietary chapel belonged to the incumbent and churchwardens of the parish, and not to the curates or trustees; but the case went off on another point. The case of *Reg. v. Poor Law Commissioners* 2 J. & S. 721, has been relied on

[IRELAND.]

Re HENDERSON—Re HEWSON.

[ASSESSED TAXES.]

as showing that the minister of a district church is the minister meant by the Rubric. It seems to me to point the other way, and to show that in such a case the rector of the parish continues rector of the district, with all his original rights and privileges, except only the right in the curate to officiate in the district. In that case the district of Grange-gorman was made a "separate and distinct district or parish," under the statute 7 & 8 Geo. 4, c. 43, ss. 23, 24, 25, 26; and by sect. 29 it was enacted "That every such district or new parish to be formed under the authority of that Act shall have all parochial rights by law appertaining to any parish for the purposes in that Act mentioned, and for all other purposes whatever in like manner, to all intents and purposes as other parishes may by law be entitled unto; and that every such district or new parish shall be discharged and exempted from all claims and charges whatsoever as part of any former parish or parishes, saving, nevertheless, to the rectors or incumbents of the several adjoining parishes and their successors, all their rights as rectors or incumbents of the respective portions of such districts." Napier's Act does not contain any such terms as the foregoing, nor does it anywhere profess to confer upon the curate a parish or parochial rights, and yet in that case it was held that under the Poor Law Act, 1 & 2 Vict. c. 56, which provides that in the appointment of a chapel, preference should be given to some clergyman of the Established Church officiating within the parish in which the workhouse should be situated, the rector or vicar of the original parish continued to be the principal clergyman "officiating" within the district or the parish, and the person responsible for the due administration of spiritual duties towards the inmates of the poorhouse, and that, upon the refusal of the perpetual curate, the curate of the parish was entitled to the appointment. The Court of Q. B., thus taking the same view of the subject as Sir John Nichol, I cannot see any privilege or power in a perpetual curate, under Napier's Act, which the curate before Sir John Nichol had not. Both derived authority from the bishop's licence, and from that only. Of the two, the licence of the former was, if anything, the more comprehensive; and I am bound by the authority of that eminent judge. But, taking the judgments of the two courts together, it is plain that both looked upon the incumbent of the parish as still continuing rector of that part of the parish within which the new church is, and, as such, minister for all matters not expressly taken out of his control by statute, which the offertory was not; and therefore he, as such minister, and the churchwardens of the parish, are the persons to dispose of the offertory, whether collected in the parish church or in other churches or chapels within the parish. On this motion the court has no power to do more than either admit the pleading to proof or reject it. But it is clear, and, indeed, admitted by the advocates on both sides, that down to the year 1851 the curate of a proprietary chapel could not interfere with the neighbouring parishioners, nor take to himself or for his own purposes the money contributed at the offertory. For the reasons already given, it appears to the court that the law continues the same now as it was before in the case of the curate of a proprietary chapel without churchwardens and without a district, such as Mr. Hewitt appears to be. The apparent object of the law is to leave the rector of a parish to discharge the duties of it upon his own responsibility and without the interference of other persons who might, perhaps, be gifted with more zeal than discretion; and for this reason even the bishop, without the consent of the incumbent, cannot authorise any clergyman to interfere in his parish. Whether the law in this respect be wise, it is not for this court to say;

but, being as it is, this motion must be refused with costs, and the libel admitted to proof, and a day assigned to Mr. Hewitt to answer it.

## DECISIONS OF THE JUDGES

ON

CASES RELATING TO THE ASSESSED TAXES.

Monday, Feb. 15, 1864.

(Before PIGOTT, B. and SHEE, J.)

Re HENDERSON.

*Inhabited house duty—Officers' apartment in a pauper lunatic asylum.*

*The steward of a pauper lunatic asylum appeals against an assessment for apartments occupied by him therein, rent free, in virtue of his office. The Commissioners relieve the app.*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, holden at the Sessions-house, Clerkenwell-green, on Wednesday the 26th Feb. 1864:

Mr. George Henry Henderson, steward of the Pauper Lunatic Asylum at Colney Hatch, in the parish of Friern Barnet, in the county of Middlesex, appealed against an assessment made on him for the year 1860, for inhabited house duty, schedule (B.), under the 14 & 15 Vict. c. 36, upon a rental of 60*l.*, duty 2*l.* 6*s.*, and claimed a total exemption therefrom.

The asylum was built by the justices of the peace for the county of Middlesex, pursuant to the Act of 8 & 9 Vict. c. 126, for the reception of pauper lunatics only, and the app., as the steward thereof, has certain furnished apartments within the said asylum assigned to him as an official residence, rent free, the regulations of the asylum making it compulsory for the steward to reside therein.

The apartments on which the assessment was made are within the building of the said asylum, and under the same roof, and form part and parcel of it, and have no separate external entrance.

By the 25th section of the above Act of 8 & 9 Vict. c. 126, it is enacted that no building erected for the purposes of a lunatic asylum shall be assessed to window duty, and the app. contends that, inasmuch as the inhabited house duty was imposed in lieu of such window duty, it was the intention of the Legislature that the asylum should be exempt in like manner from the inhabited house duty.

The Commissioners, referring also to the 48 Geo. 3, c. 55, schedule (B.), exemption, case 4, which does not, as in the case of the second exemption under schedule (A.) of the same Act (window duty), except from the benefit of the exemption the apartments occupied by the officers of the hospital, &c., and to case 2487, relieved the app.

Mr. Edward Thomas Boorman, the surveyor for the Crown contended that the Act referred to did not wholly apply in this case, inasmuch as the asylum itself was not assessed to the inhabited house duty, but only that portion of the building occupied by the officers as their official residences, and which he considered clearly liable to assessment, and, being dissatisfied with such determination of the commissioners, demanded a case for the opinion of Her Majesty's judges, which we, the major part of the commissioners present upon the hearing of the appeal, state and sign accordingly.

The cases of Dr. Tyerman and other officers of the asylum, whose apartments are similarly situated with those of the app., stand over to abide the decision of Her Majesty's judges in this case.

THOS. ELSON,  
WM. ANDERSON,  
RICHARD MORELAND,  
DANL. WILDBORE. } Commissioners.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

Re HEWSON.

*Inhabited house duty—Lunatic asylum.*

*Manager of a lunatic asylum for the reception and relief of persons of the middle rank of life appeals against an assessment. Some patients receive direct relief from the charity; some pay a little more than their actual cost; others pay higher rates. The Commissioners relieve the app.*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes, held at St. Stone, 1st April 1863:

## ASSESSED TAXES.]

## Re MONCKTON—Re DAW.

## [ASSESSED TAXES.]

J. D. Hewson, Esq., M.D., manager of Cotton-hill Lunatic Asylum, attended by the direction of the trustees to appeal against an assessment to the inhabited house duty on the said asylum for the year 1862-63, amounting to 7l. 10s on the annual value of 200l.

In the year 1814, 1000l. was left to the Staffordshire Infirmary to found a lunatic ward for the reception of persons of the middle rank of life, whose circumstances were not such as to enable them to pay the high rate charged in private asylums, but whom it was very desirable not to degrade to the rank of paupers.

The trustees of the infirmary handed the legacy over to the visitors of the county Pauper Lunatic Asylum, who appropriated a ward for the purpose of the charity, and to enable them further to increase its usefulness, subscriptions and donations were solicited, a few patients were admitted at remunerating rates, the profits derived from which were applied to the purposes of the charity. Upwards of 400 patients were relieved, at rates from 2s. 6d. to 15s. per week, from the opening of the charity in 1814 to the year 1848, when, in consequence of the urgent demands for increased accommodation for pauper lunatics, the separation of the two institutions was decided upon, and the Cotton-hill institution was built. The funds were derived from donations and from the amount paid by the visitors of the county asylum to the subscribers for their share in the said asylum, and from money borrowed by the trustees of Cotton-hill institution.

In the new building accommodation was specially provided for persons of superior rank, who were expected to contribute to the charge of maintenance according to their pecuniary ability.

In 1854 the new building was opened, with an annual income derived from subscriptions of about 180l. per annum; fifty patients were transferred from the county asylum to Cotton-hill, of whom twenty-one were receiving relief from charity.

At the close of the year 1862 there were 123 patients on the books, the average weekly cost per annum of whom had been 1l. 3s. 11d., of this number 64 have received direct relief from the charity, in sums varying from 1s. to 21s. 5d. per week: 35 were paying from 25s. to 30s. per week. Although this class paid a little more than their actual cost, still as they could not receive the same accommodation in private asylums at a less rate than 42s. per week, they, to a certain extent, benefited by the charity.

13 paid 42s.

7 paid from 2 to 3 guineas per week.

4 paid from 3 to 4 guineas per week.

During the last eight years 1857-7, 15s. 4d. has been appropriated to the relief of the poorer class of patients, and of this sum the amount for the last year was 1251l. 18s. 6d., whilst the amount of subscription was only 177l.

The apprs. contend that as no pecuniary profit arises to any person, and that as the asylum is maintained partly by charitable contributions, it comes under the exemption No. 4 of the Act 48 Geo. 3, c. 55, which exempts "any hospital, charity school, or house provided for the reception or relief of poor persons."

The surveyor, however, was of opinion that as the majority of the patients in the year 1862 cannot be regarded as poor persons in the meaning of the Act, the asylum does not come within the exemption, and is therefore rightly assessed.

The Commissioners having a doubt as to the liability of the asylum discharged the assessment upon the understanding that the surveyor demanded a case for the opinion of Her Majesty's judges, which we, the commissioners present, state and sign accordingly.

GEORGE FORD,

SAMUEL BURTON WRIGHT, } Commissioners.

W. J. LOCKER.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

## Re MONCKTON.

## Inhabited house duty—Town-hall.

*Town clerk of a borough appeals against an assessment for a town-hall. No person resides in the hall, which is complete in itself; but there is a wing built subsequently to the building of the hall, communicating therewith by a door in which the town crier resides for the purpose of taking care of the hall, and of carrying on his duties as billet master. The Commissioners confirm the assessment:*

## Commissioners wrong.

At a meeting of the commissioners of the land and assessed taxes, holden at the Town-hall, Maidstone, on the 26th March 1863:

Mr. John Monckton, town clerk of the borough of Maidstone, appealed against an assessment for the year 1862 to the inhabited house duty of 200l. on the corporation of Maidstone, in respect of premises occupied and used by them as a town-hall.

The town-hall of Maidstone formerly contained a council-

chamber, committee-room, and a court of justice; no person residing on the premises. A few years ago an adjoining house was pulled down, and a wing to the town-hall erected on the site thereof.

The town crier, who is also billet master, resides with his wife and family in rooms on the ground-floor of this new wing of the hall, for the purpose of cleaning and taking care of the hall, and also for carrying on his duty of billeting soldiers, &c., when requisite. The front room on the ground-floor of the wing of the building is used as a dwelling-room by the crier.

No reduction was made in the town crier's wages when the rooms were given to him. A door, of which the crier kept the key, was made from the crier's rooms into a passage leading to the court of justice, and by passing through that door and passage he reaches the court, and from thence he can get into the main staircase, and thence all parts of the building without going out of doors.

The various rooms in the town-hall are used by the town council for their meetings, and also for public meetings by the trustees of the poor, the pavement commissioners, and the magistrates. None of the rooms are used as offices by the town clerk or other official (except the billet master's office in the wing as above mentioned), nor are any of the rooms ever let for any purpose.

The town-hall would be quite perfect if the communication with the crier's apartment were stopped up; that communication having been made solely for the more convenient access of the crier to the town-hall.

On these facts Mr. Monckton contended that the town-hall was not an inhabited dwelling-house within the meaning of the Act, and therefore exempt from tax; and also that, if liable, 200l. was an excessive valuation.

The surveyor, on behalf of the Crown, submitted that the occupation by the town crier of the rooms in the wing above described, as a residence and office for billet master, such room having an internal communication with the entire building, made the whole town-hall liable to inhabited house duty, and cited case 2597 in support of this view.

The committee confirmed the assessment at 200l. Mr. Monckton, being dissatisfied with this decision, demanded a case for the opinion of Her Majesty's judges.

We, being two Commissioners present at the meeting, as above mentioned, do hereby state and sign such case accordingly.

Dated this 28th day of May 1863.

D. SCRATTON } Commissioners of Land  
EDWD. BEXTON } and Assessed Taxes.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

## Re DAW.

## Inhabited house duty—Office of commissioners of sewers.

*Clerk to commissioners of sewers, city of London, appeals against an assessment on the offices of the commission. For convenience of access to other offices there is an internal communication with the Guildhall, but no person dwells or has ever dwelt on the premises. The Commissioners relieve the appr.:*

## Commissioners right.

At a meeting of the commissioners for carrying into execution the several Acts of Parliament relating to the duties of assessed taxes in the City of London, on the 25th March 1863:

Mr. Joseph Daw, clerk to the Commissioners of Sewers for the City of London, appealed against an assessment for the duty on inhabited houses charged on the offices occupied by the said commissioners in the ward of Bassishaw for the year 1862, and rated at 200l. value.

The app. stated that the premises have been lately rebuilt expressly for the offices of the commissioners of sewers for the city of London; that they are in no way adapted for a dwelling-house, nor have they ever been so occupied. For the convenience of access to other offices of the commissioners adjoining the above in Guildhall, there is one internal communication on the first floor. That on the site on which the commissioners' offices are built formerly stood the town clerk's office, which was partly occupied as a dwelling; but that the town clerk's house has since been pulled down, and the present offices erected on the site thereof.

The surveyor submitted that the 5th rule of 48 Geo. 3, c. 55, schedule (B.) expressly provides that halls or offices belonging to any body politic or corporate that are lawfully charged with the payment of any other taxes or parish rates shall be assessed to house duty, and he contended that, as the premises in question are the hall and offices of a body corporate, and are assessed to parochial rates, the assessment to the house duty ought to be maintained. The surveyor further observed that the fact of an internal communication with Guildhall, which is clearly liable, and is assessed to house duty, does in fact extend the liability to an assessment to these premises also. The words of the rule being, "every hall or office whatever belonging to any person or persons, or to any bodies politic or corporate, or to any company that are or may be lawfully charged with the payment of any other taxes or

## [ASSESSED TAXES.]

## Re ENFIELD—Re S. AND G. HADFIELD.

## [ASSESSED TAXES.]

parish rates, shall be subject to the duties hereby made payable as inhabited houses.

The app. admitted that the premises in question were assessed to parish rates.

The Commissioners, having considered the facts of the case, were of opinion that the offices so occupied by the commissioners of sewers, which is a separate and distinct body to the corporation of London, although such offices have an internal communication with the Guildhall, no part of which is occupied as a dwelling, were not chargeable to the duty of inhabited houses, and discharged the assessment.

The surveyor demanded a statement of the case for the opinion of Her Majesty's judges.

EDMUND HODGSON,  
R. O. BUCKHALL,  
JOHN E. DAVIES,  
J. ROBERTS.

FIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

## Re ENFIELD.

*Inhabited house duty and male servants—  
Lunatic hospital.*

*Trustees of a lunatic hospital appeal against assessments for inhabited house duty and for four male servants.*

*The hospital is provided for lunatics, not paupers, paying sums the highest of which is only partially remunerative. Three of the male servants are employed in nursing and waiting upon the patients, the fourth as nurse and watchman only. The Commissioners confirm the assessments:*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes held at the town-hall, in the town and county of the town of Nottingham, on the 9th Sept. 1862, for the purpose of hearing appeals against the first assessment for the said town for the year 1862-63:

William Enfield, Esq., appealed on behalf of himself and the other trustees of the lunatic hospital at the Coppice, Nottingham, against an assessment which had been made upon the said trustees in respect of the inhabited house duty for the said hospital, and for four male servants, which he contended were exempted under the Acts relating to the duties of assessed taxes.

As regards the inhabited house duty, the commissioners found that the hospital is a building provided for the reception and relief of lunatics who are not paupers, for whose maintenance and medical attendance sums varying from 6s. to 25s. per week each are paid. That in receiving applications for admission, no person is disqualified by reason of being in sufficient circumstances, and that as a fact persons in good circumstances are admitted upon payment of the maximum charge of 25s. per week. That the full charge is made in all cases in which the trustees are not satisfied of the inability of the parties to pay the same. In each case in which the trustees are so satisfied an abatement is made in the weekly charge proportionate to the want of means on the part of the applicant.

At the date of the last report, the hospital contained forty-five patients, who paid the respective sums set forth in the following statement, and in aid of some of whom further sums set forth were contributed out of the charitable fund of the hospital as necessary to meet the actual costs of their maintenance and medical attendance:

Number of Patients.	Amount paid per Week.	Amount paid per Annum.	Contributions out of Funds of Hospital.
	£ s. d.	£ s. d.	£ s. d.
13	1 5 0	845 0 0	...
4	1 1 0	218 8 0	46 12 0
2	1 0 0	104 0 0	26 0 0
11	0 18 0	514 16 0	200 4 0
1	0 15 0	38 0 0	26 0 0
2	0 14 0	72 16 0	57 4 0
1	0 13 0	33 16 0	31 4 0
4	0 12 0	124 16 0	135 0 0
1	0 10 0	26 0 0	39 0 0
2	0 9 0	46 16 0	83 4 0
2	0 8 0	41 12 0	88 8 0
1	0 7 0	18 4 0	46 16 0
1	0 6 0	15 12 0	49 8 0
45		2,099 16 0	829 0 0

The fourth exemption under schedule (B.) of the Act 48 Geo. 3, c. 55, exempts from house tax any hospital, charity school, or house provided for the reception or relief of poor persons.

The trustees contend that the building is exempt from house tax as being a hospital: that it is certainly a hospital for the cure of persons suffering from disease; it has always been called a hospital, and has all the usual features of a hospital, namely, it was founded and built with charitable donations, it is an

institution for the relief of persons suffering from a most distressing disease, and it is managed by charitable persons not deriving any pecuniary benefit from it, but, on the contrary, assisting it by their subscriptions, and having under their direction the house surgeon, matron and servants.

The trustees further contend that the building is exempt from house tax as being a house for the relief of poor persons.

The patients are not paupers, but the greater part of them are poor persons, and the rate of pay, which for board, lodging and attendance in no case exceeds 25s. per week, and in the other cases varies from 12s. to 6s. per week, shows the inmates to be poor persons; and even these small payments are in numerous cases contributed by the benevolence of relatives and friends, who wish to save these poor persons from becoming paupers supported by the poor-rates.

The sum of 25s. only pays the costs of food, maintenance and care, and gives nothing in the shape of rent. It is submitted that the above facts show that the building is a hospital, and is also for the relief of poor persons, and therefore exempt from house tax.

As respects the male servants, the commissioners found that the four for whom exemption was claimed are male attendants upon the patients in the hospital, and it was admitted that three of them were employed to look after the male insane patients, in performing the duties of nurses, and in dressing, shaving, waiting upon them at their meals, brushing their clothes, cleaning their boots and shoes, and any other necessary or needful thing which cannot or ought not to be intrusted to be done by themselves. The fourth attendant is up all night as a nurse and watchman, but he does not perform any of the other duties above mentioned, he does not dress, shave, or wait on them, brush their clothes, or clean their boots.

The surveyor submitted that there was no exemption for male servants so employed, and referred to Judges' Cases, numbers 708, 916 and 1157, in all of which they were held to be chargeable.

The trustees contend that as these cases apply to private asylums and not to public hospitals, they do not apply to the present question.

They further contend that there is no word in the Act descriptive of the attendants upon the patients at a public lunatic hospital, the nearest designation being "*valets de chambre*." That private asylums are open for the reception of rich persons, used to be attended on by *valets de chambre*, and in those establishments there may in some cases be persons employed strictly as "*valets de chambre*," but that the patients in this and other lunatic hospitals are not persons who would have been waited on by a male servant if in sound mind, and the term "*valet de chambre*" cannot be stretched to include persons who are really "male nurses," and who are employed merely because, from the mental condition and violence of the patients, the employment of female nurses would not be practicable.

The Commissioners, in view of these facts, and of the further fact that exemption from inhabited house duty is already granted to the county lunatic asylum for paupers at Sneinton, near Nottingham, which fact, however, the appa. contend does not affect the question, were of opinion—

- 1st. That the hospital is not a hospital for the reception and relief of poor persons within the meaning of the Act; and
- 2nd. That the way in which the male attendants were employed rendered the trustees liable to be assessed for them as domestic servants, and they therefore confirmed the assessment under both schedules, with which decision the app. being dissatisfied, he requested that a case for the opinion of the judges might be stated, which he, the commissioners present, have stated accordingly.

THOMAS CULLEN, } Commissioners of  
J. WATSON, } Assessed Taxes.  
WILLIAM FELKIN, }

FIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

## Re S. AND G. HADFIELD.

*Inhabited house duty—House occupied as solicitor's offices, but also inhabited.*

*Solicitors appeal against an assessment for a building occupied by them as their offices, but inhabited also by their errand-man and his wife. The Commissioners confirm the assessment:*

*Commissioners right.*

At a meeting of commissioners of assessed taxes, held at the Tax-office, 21, Mount-street, Peter-street, Manchester, on the 24th Sept. 1862, for the purpose of hearing appeals against the first assessments for the year 1862-63:

Messrs. Samuel and George Hadfield, solicitors, appealed against an assessment to the inhabited house duty upon the building of which their offices in Manchester form a part.

They also denied their liability altogether in April last against the assessment for 1861-62, but only succeeded in reducing it from 180l. to 150l. The facts to be considered in respect of both assessments are the same.

ASSESSSED TAXES.] *Re* BIRKENHEAD, & CO JUNCTION RAILWAY CO.—*Re* CURTIS. [ASSESSSED TAXES.]

The building, which (except the three top rooms and the conveniences and staircase to them) is occupied by the appa. as solicitors' offices only, is the property of their father, George Hadfield, Esq., M.P., between whom and the Chancellor of the Exchequer there ensued a correspondence, resulting in a recommendation by the latter, on the 10th May 1862 (after a report from the surveyor), that a case should be stated for the opinion of Her Majesty's judges.

The three top rooms of the building, which is three stories high, are let off to, or occupied by, John Turner, the appa.'s errand man, and his wife, and their occupation of them is considered in the amount of his wages, which is equivalent to letting at a rent.

The building is situated at the corner of Fountain-street and Marble-street; the office door and entrance are in Fountain-street. There are also a doorway and entrance in Marble-street to a staircase up to Turner's rooms at the top of the building. The Marble-street doorway and entrance and this staircase are used only by Turner and his wife. From this staircase there are two doorways, one communicating with the general offices occupied by the appa., the other with Turner's rooms.

The office door in Fountain-street is locked up from the inside at night, and the office door on the staircase is then locked up from the staircase, and the keys kept by Turner.

It is the duty of Turner and his wife to enter the offices from their rooms through the inner door on the stairs, for two purposes only, viz., one to pass through the offices to lock and unlock the front door in Fountain-street, and the other for Mrs. Turner to dust and clean the offices; but there is, nevertheless, during the night (and so there would be if they resided at a distance from the offices), the facility, and nothing (except a sense of duty and the appa.'s orders, and a risk of loss of situation) to prevent either Turner or his wife from entering into and using the offices for any purpose.

As a matter of fact, however, they do only enter for the two purposes just particularised, which are performed by them without assistance, and could, of course, be just as well accomplished by their passing along the few yards of street between Marble-street and Fountain-street doors.

The rooms occupied by Turner have distinct and separate conveniences, and are not used for cooking or other service for the offices, and their privacy is in every way respected.

The appa. contended against their liability to assessment, on the ground that the building was erected upwards of thirty years ago for Mr. Hadfield, M.P., then a solicitor, by an eminent architect, with especial reference (in contemplation of its being used as now) to non-liability to window tax, for which inhabited house duty has been substituted, and that the only attempt ever made to assess it to window tax (the circumstances having been similar to the present ones) was successfully resisted on appeal, and that no attempt has been made to assess it to the inhabited house duty until the year 1861-62, though the circumstances have throughout been similar.

They also contend that, under the circumstances, the rooms occupied by Turner constitute a distinct tenement, which alone is to be considered for the purposes of duty, from which it is exempt, being worth less than 20*l.* per annum, and that the connexion of the offices with the staircase from Marble-street entrance is not such as to bring them into charge.

They also (while guarding themselves from being committed by the printed instructions furnished to assessors, which are merely official views, and do not decide the law) referred to the third exemption in such instructions, and contended that it applied *a fortiori* to such part of the building as is occupied by them, which has never been used for the purpose of residence.

The surveyor on the other hand contended that as there was an internal communication to and from all parts of the building, the entire building was therefore chargeable under the 48 Geo. 3, c. 55, schedule (B); and he further contended that by the exemption granted by 6 Geo. 4, c. 7, s. 7, to houses occupied for purposes of carrying on trade, or exercising professions in the daytime only, and extending, under certain conditions, to the watching and guarding of such premises by a servant at night, it is expressly provided that no servant shall be allowed to dwell in any such house as a place of residence.

The surveyor therefore urged that the three rooms occupied by Turner and his wife constituted the usual abode and residence of those persons, they having in fact no other place of residence, and that such a general occupation by them cannot be considered "for the purposes only of watching and guarding the premises" belonging to the appa.

The surveyor referred to cases 2299 and 2597 in support of the assessment.

The appa., however, contended that in neither of these cases do there appear to have been separate doors, entrances and conveniences to the parts resided in, or other such circumstances as to constitute them distinct tenements, and that case 2299 does not apply, because the duties are performed by Turner and his wife without assistance, and that case 2597 was decided on grounds peculiar to municipal corporation.

The appa. also requested to have the commissioners' confirmation of the reduced assessment for the year 1861-62 included in this case, having regard to the Chancellor of the Exchequer's recommendation, which was not made until after the close of the financial year, and therefore could not be followed within it. They have not paid the duty for either year.

The commissioners having carefully considered all the facts, particularly with reference to the occupation of the top rooms

of the building, and the internal communication from them to and from the offices, and having referred to and read the cases to which their attention had been called by the surveyor, confirmed the assessment, with which the appa. were dissatisfied, and requested a case might be stated for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

THOS. BARGE, } Commissioners.  
WILL. JOYKSON. }

PIGOTT, B. and SHEP, J.—We are of opinion that the determination of the commissioners is right.

*Re* THE BIRKENHEAD, LANCASHIRE AND CHESHIRE JUNCTION RAILWAY COMPANY.

*Inhabited house duty—Railway station, &c.*

*A railway company appeals against an assessment for station offices and house therewith connected, occupied by station-master. The bedrooms of the house are partly over the offices. The Commissioners confirm the assessment:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at Oakmere, on the 29th Aug. 1863:

The Birkenhead, Lancashire and Cheshire Junction Railway Company appealed against an assessment made upon them of 2*5*l.** for the inhabited house duty, in respect of the station offices and the house and premises occupied by their station-master at Frodsham.

The house in question is connected, on the ground floor, with the booking office, waiting-room and ladies' room, which form the company's offices; and upstairs there are four bedrooms occupied by the station-master, partly over the rooms used by him as a residence, and partly over the company's offices.

The appa. claimed to be wholly exempt; the surveyor contended the contrary, referring the commissioners to the case No. 2327.

The Commissioners confirmed the charge; but the appa. being dissatisfied demanded a case for the opinion of Her Majesty's judges, which we state and sign accordingly.

S. WOODHOUSE,  
T. F. MARSHALL.

PIGOTT, B. and SHEP, J.—We are of opinion that the determination of the commissioners is right.

*Re* CURTIS.

*Inhabited house duty—Question of value.*

*App. appeals against an assessment at 35*l.* in respect of a house alleged to be held on lease at 24*l.* The premises are found to be held, with five cottages of an admitted value of less than 15*l.*, at a reserved rent of 50*l.* The Commissioners confirm the assessment:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at the Police office at Middleton Cheney, on Monday the 26th Aug. 1861, for the purpose of hearing appeals against the first assessments for the year 1861-62:

Thomas King Curtis, of Brackley, Saint James, draper, appealed against a charge made on him for inhabited house duty at 35*l.* per annum in respect of a house and premises at Brackley.

App. stated that he occupied a draper's shop, house and out-buildings as tenant under a lease dated within the last seven years, under which he had always paid, and was now paying, a reserved rent of 24*l.*, the landlord covenanting to keep the said premises in repair and to pay landlord's taxes, and he contended that the assessment ought to be made on the said reserved rent of 24*l.*

He refused to produce the lease, and said it was not in his possession. He produced the last poor-rate of the parish of Brackley, Saint James, based on a new valuation made within the last twelve months, and pointed out the following cases, which, he stated, showed that his premises were assessed to the house duty at a higher rate than other premises in the same parish:

	Gross Estimated Retal.	Rateable Value.	House Duty.
Curtis, Draper.....	£ s. d. 25 0 0	£ s. d. 15 18 4	s. d. 17 6
Dearlove, Chemist.....	25 0 0	15 13 4	10 0
Strott, Chemist.....	24 0 0	16 0 0	10 6
Judge, Grocer.....	22 0 0	15 0 0	11 0
Hawkins, Ironmonger.....	35 0 0	22 0 0	15 0
Clarke, Ironmonger ...	24 10 0	16 10 0	10 0

## ASSESSED TAXES.]

## Re TURLE—Re FOTHERGILL—Re JUSTINS.

## [ASSESSED TAXES.]

App. also produced a receipt for 25*l.*, which purported to be for a half-year's rent and "goodwill" of his house and premises.

The surveyor, Mr. Leach, contended in support of the charge that as the house and premises, with five cottages, were held under a lease, dated within the last five years, at the yearly rent of 50*l.*, the app. was liable to be assessed on the amount of rent less the annual value of the cottages, and he having on a former appeal against the assessment for the year 1857-58 admitted that 18*l.* was more than the annual value of the cottages, was therefore liable to be assessed on the remainder of the rent, viz., 32*l.*

The Commissioners confirmed the charge, but app., being dissatisfied, demanded a case for the opinion of Her Majesty's judges.

We, the commissioners by whom the appeal was heard and determined, have accordingly stated and signed this case for the opinion of Her Majesty's judges.

R. S. CARTWRIGHT, } Commissioners of  
A. J. EMPSON. } Assessed Taxes.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

## Re TURLE.

*Inhabited house duty—House rented at 19*l.* 19*s.**

*App. appeals against an assessment on 20*l.* in respect of a dwelling-house rented at 19*l.* 19*s.* The Commissioners, in view of the rent, relieve the app. : Commissioners wrong.*

At a meeting of the commissioners of land and assessed taxes held at the Inland Revenue-office, Taunton, on the 27th Aug. 1861:

Mr. Richard Turlie appealed against an assessment made on him for inhabited house duty in the sum of 20*l.* in respect of a dwelling-house which he rents and occupies in the borough of Taunton.

The app. being sworn, stated that his *bona fide* rent was nineteen guineas, for which amount he produced receipts, and he stated that the sum had been agreed on for the purpose of avoiding liability to the tax.

The gross estimated rental in the poor-rate is 22*l.*

The assessment to the property-tax under schedule (A.), 19*l.* 19*s.* for the year 1857.

The surveyor contended, on the authority of cases 2233 and 2438, that the party was liable.

The Commissioners, being satisfied that the actual rent agreed to be paid was nineteen guineas, and no more, *relieved* the app., with which decision the surveyor being dissatisfied, demanded a case for the opinion of Her Majesty's judges, which we hereby state accordingly.

Dated this 16th day of February 1862.

WILLIAM BARRETT, }  
EDW. EASTON, } Commissioners.  
JOHN BARROWFORTH, }  
CHAS. BALLAM. }

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

## Re FOTHERGILL.

*Inhabited house duty and duty for dog—Question of value and use of dog.*

*App. appeals against an assessment for dwelling-house is 65*l.*, contending that the value is 50*l.* only, also for a dog as being kept for the care of cattle. Commissioners find the value of the house 60*l.*, and that the dog is not kept *bona fide* for the care of cattle, and confirm assessments, house duty on 60*l.* :*

*Commissioners right.*

At a meeting of the commissioners of land and assessed taxes for the Hundred of Broxtowe South, "Nottingham," held on the 26th Aug. 1862:

James Fothergill, Esq., appealed against an assessment on him to the inhabited house duty of 65*l.* in respect of a house, outbuilding and garden, his property, situated in the parish of Beeston, and the duty of 12*s.* for a third dog.

The app. stated that his house and premises were not worth 65*l.* per year, and showed by the poor-rate the gross estimated rental to be 50*l.* per annum, and the rateable value 34*l.* per annum, and he submitted that the gross estimated rental was the real value of the property in question.

It was also shown by the app. that several other houses in the said parish had been assessed upon that value. With respect to the dog, that it was kept for the care of cattle at his farm, about two miles distant from his dwelling-house, but admitted that the dog was always kept at his private house,

Beeston, but when he visited the farm he took it with him; was also used as a house dog.

That the dog was not a pure sheep and cattle dog. The parish assessor, who knew the house and premises well, stated that the same were well worth the amount charged, and that he could procure a tenant at 70*l.* per annum if the premises were to be let.

That the gross rental in the poor-rate was under the value, compared with the rentals of some of the property in the parish.

The house is assessed to the property tax at 65*l.* per annum.

The surveyor, Mr. Wyatt, contended that the property should be assessed on the full annual value, namely, upon the rent which could be obtained for the same if let from year to year; and with respect to the dog, that it was unnecessary for the purposes stated, and also that the dog was used for other purposes, namely, as a house dog.

The Commissioners having considered the several before-mentioned statements (one of them having a personal knowledge of the house and premises in question) were of opinion that the full annual value of the house, &c., was 60*l.* per annum, and reduced the assessment accordingly, and also decided that the dog was not *bona fide* kept for the care of cattle and confirmed the charge.

The app. being dissatisfied demanded a case for the opinion of Her Majesty's judges, which we hereby state accordingly.

As witness our hands this 24th day of Sept. 1862.

E. J. LOWE, }  
H. C. BREWSTER. } Commissioners.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right on both points.

## Re JUSTINS.

*Inhabited house duty—Railway-station—Question of value.*

*Railway company appeals against an assessment on 30*l.* for a station, producing professional evidence valuing the house at not more than 19*l.* The Commissioners, considering the premises worth 20*l.*, confirm the assessment at that sum :*

*Commissioners right.*

At a meeting of commissioners of land and assessed taxes, held at the Sessions-house, Sleaford, on the 13th Feb. 1863:

Mr. Hippealey Justins appealed on behalf of the Great Northern Railway Company, lessees of the Boston, Sleaford and Midland Counties Railway, against a surcharge made by Mr. Busby, surveyor of taxes, on 30*l.* for inhabited house duty upon their station at Quarrington, occupied by the clerk in charge, John Lewin.

Mr. Justins produced a certificate from Mr. Nathan Roberts, valuing the whole of the premises at 17*l.*; but, as the commissioners were not satisfied therewith, they, at Mr. Justins' request, adjourned the case to their next meeting on the 8th April, in order to afford him the opportunity of having the personal attendance of his witnesses.

On the 8th April 1863, Mr. Justins again attended with his valuers.

Mr. Nathan Roberts, of Heckington, sworn, states that he valued the line for poor's rate, and estimated the gross value of the station at 17*l.*, but the whole line and buildings are assessed to the poor in one sum.

Mr. William Ansell Kirkby, the company's engineer at Boston, sworn, states that he estimates the gross value of the station at 19*l.*, viz., six rooms, &c., occupied by a clerk, at 10*l.* 5*s.*, and the company's offices and waiting-room at 10*l.* 15*s.* He values all the premises at 2*d.* per superficial foot.

The Commissioners, however, considered that neither of these valuations were so much, upon comparison with other houses in the vicinity, as the premises were worth to let, and they were satisfied that the annual value was not less than 20*l.*, at which amount they confirmed the assessment; but the app. being dissatisfied with such decision demanded a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

JOHN MACKINNON, } Commissioners of  
J. TOMLINSON. } Assessed Taxes.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

*Re WELFORD.**Inhabited house duty—Question of value—19l. 19s. rent.**Solicitor appeals against an assessment on 20l., on the ground that the rent is 19l. 19s. The Commissioners, considering the house worth 20l., confirm the assessment :**Commissioners right.*

At a meeting of commissioners of land and assessed taxes for the division of Tindale Ward, in the county of Northumberland, held at the Court-house in Hexham Abbey, on Tuesday 26th Aug. 1863, for the purpose of hearing and determining appeals against the first assessments for the year ending 5th April 1864:

Mr. Thomas William Welford, of Hexham, solicitor, appealed against a charge made upon him for inhabited house duty at 20l. App. stated that the rent paid by him was only 19l. 19s. per annum.

The surveyor contended that the house was worth 20l., and that, but for the inhabited house duty, it would have been fixed at that sum, and referred the commissioner to cases No. 2280, 2372 and 2475.

The Commissioners, without doubting that the taking was *bona fide* on the part of the app., considered the house to be worth 20l. per annum, and confirmed the assessment.

The app. was dissatisfied with their decision, and requested a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

JOHN F. BIGGE,  
NICHOLAS MAUGHAN.  
FREDERICK GIFFS.

FIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

*Re GRIGSBY.**Inhabited house duty—Question of value—House only partially tenanted.*

*Dissenting minister appeals against an assessment for a house formerly occupied by him at 22l., but of which he alleges he now occupies a portion only, at a rental of 14l. The communication between the occupied and unoccupied portions is interrupted only by doors, the keys of which are in possession of the app. The Commissioners relieve the app. :*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes for the division of Lower Arundel, Sussex, on the 30th Aug. 1863:

The Reverend David Grigsby, a dissenting minister, appealed against an assessment made upon his dwelling-house to the inhabited house duty, upon an annual value of 20l.

The app. stated that he occupied only part of the house at a rent of only 14l. per annum; that the rest of the house was shut up; that the doors between the occupied and unoccupied parts were locked, and the keys kept by himself, but the communication between the two parts of the house was not otherwise cut off; that he occupied the whole of the garden, and that there was an understanding between him and the landlord that the unoccupied portion of the house should not be let to another person without his (Mr. Grigsby's) assent. The app. also stated that he had previously held the whole house at a rent of 22l., which he admitted to be the value thereof.

Mr. Kirkpatrick, the surveyor, contended that as the house was not divided otherwise than by looking up the internal doors, the app. must be treated as the occupier of the whole house, and was liable to the assessment.

The Commissioners relieved the app.; but the surveyor being dissatisfied with their determination demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

J. L. ELLIS,  
W. TOWSEY MITFORD.

FIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

*Re BENNETT.**Inhabited house duty—House occupied by a clergyman rent free.*

*Clergyman appeals against an assessment in 200l. for house occupied by him rent free, on the ground that he is prohibited from letting it. The Commissioners allow an abatement on that account :*

*Commissioners wrong.*

At an adjourned meeting of the commissioners of assessed taxes, held at the Town-hall, in Christchurch, in and for the

division of New Forest West, in the county of Southampton, on the 24th Aug. 1863:

The Reverend Alexander Morden Bennett appealed against an assessment of 100l., made upon him for inhabited house duty, and increased to 200l. for the year 1863-64.

The app. is the perpetual curate of Bournemouth, and as such has the privilege of residing in the house, the subject of appeal, but he is prohibited from letting off the whole or any portion thereof, by reason of which he claimed an abatement on its annual value, to which he objected, as being too high at the assessment of 200l.

The Commissioners, after hearing the app.'s statement, considered the value of the house to be 180l., and that the app. was entitled, on account of the prohibition to let off any portion of the house, to an abatement therefrom of one-sixth, or 30l., and accordingly reduced the assessment to 150l.

The surveyor contended that a clergyman's house was not entitled to any special exemption, and that it should be assessed, as if it belonged to any other person, at the full annual value which was fixed by the commissioners, viz. 200l. He therefore demanded a case for the opinion of Her Majesty's judges, which we, a majority of the commissioners present at such decision, hereby state and sign accordingly.

W. W. FARR,  
THOMAS BENTWISTLE,  
W. CLAPCOTT DEAR.

FIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong in deducting one-sixth from the annual value.

*Re COPE.**Inhabited house duty—Rate of duty—Farmhouse, farmer being also a mine agent.*

*Farmer and mine agent appeals against a charge at the higher rate in respect of his dwelling-house, which is the farmhouse likewise. He occupies and is assessed for another house for his offices as a mine agent, but never resides there. His income as a mine agent is found to be greater than his income as a farmer. The Commissioners relieve the app. :*

*Commissioners wrong.*

At a meeting of commissioners of land and assessed taxes, acting in and for the district of Brimstree West, in the county of Salop, held at the Public-office in Shifnal, on the 27th Aug. 1863:

James Cope, of Albrighton, appealed against the charge of 30l. inhabited house duty, at ninepence in the pound.

The app. is a farmer and mine agent. His farm consists of a dwelling-house, farm-buildings and seventy-six acres of land, the rent of which is 254l. He resides in the house, and contends that it is occupied as a farmhouse only, and is his exclusive residence, his business of a mine agent being carried on in offices at Wolverhampton, a distance of eight miles therefrom, for which he is assessed to inhabited house duty, but where he never resides.

The surveyor, Mr. S. G. Carter, contended that the party was not chargeable at sixpence in the pound, inasmuch as a house occupied by a person carrying on another business, from which he derived an income equal to or greater than that derivable from the farm, which is the case with the app., he being charged at Wolverhampton under schedule (D.) of the income-tax, upon a greater amount than the amount defined by the law to be the income arising from the occupation of the land in question, cannot be said to be a house *bona fide* used for the purpose of husbandry only, as required by schedule (D.) of the Act 14 & 15 Vict. c. 36, and in support quoted cases numbered 2299 and 2538.

The Commissioners, being of opinion that, as Mr. Cope carried on his business of a mine agent in offices at Wolverhampton, the house which is his actual residence, and is taken with the land, and included in the rent of 254l., should be considered as occupied by him solely for the purpose of husbandry, and as such chargeable at sixpence instead of ninepence in the pound, relieved the app.

Whereupon the surveyor, being dissatisfied with the decision, requested that a case be stated for the opinion of Her Majesty's Judges, which we, the commissioners who heard the case, have stated and signed accordingly.

G. HOLYOAK,  
GEORGE T. O. BRIDGMAN,  
ARTHUR C. LAGGE.

Commissioners of land  
and assessed taxes,  
acting in and for the  
district of Brimstree  
West in the county of  
Salop.

FIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.



[ASSESSED TAXES.]

Re ADAMS—Re MONCK—Re TWEEDY.

[ASSESSED TAXES.]

## Re ADAMS.

*Male servant—College servant.*

*Member of the governing body of St. John's College, Oxford, appeals against a charge for a male servant. He keeps his carriage in the College stables, where it is cleaned by a servant of the college. Commissioners confirm the assessment:*

*Commissioners right.*

At a meeting of the commissioners of land and assessed taxes, acting in and for the division of the University of Oxford, held at the Delegate's room, at Oxford, on the 28th Nov. 1861:

Arthur Robert Adams, Esq., D.C.L., of Saint John's College, Oxford, appealed against the charge in the first assessment for the current year for one male servant, schedule (C.) 11. 1s.

The app. admitted that he kept a carriage with two wheels, and a horse at the college stables, but objected to the charge for the servant on the following grounds:

1. That he had never hired any male servant to clean the carriage for which he paid duty.
2. That he had never employed any male servant to perform that duty.
3. Because, although his carriage or dog cart is cleaned, it is cleaned by a servant of the college, by orders from the college, and not from his orders.
4. That the college pays duty for the same male person as its servant, and that the said college employs the said servant in no other way.
5. That he pays the said groom a weekly payment for the keep of his horse, and that it would be just as correct to charge him with every person who washed the carriage, if he kept the said horse and carriage as a livery stable.
6. That he has no power of dismissing or reproving the said person if he should refuse to wash or clean his carriage. His only remedy in such a case being to complain to the college authorities, who might or might not discharge or reprehend such servant.
7. That he is a member of the governing body of St. John's College, and as such that he has a right to keep his carriage in the college stables.
8. That if the said male person does not perform the duty of washing carriages the college will have paid duty for a servant who has no duties to perform.

Mr. Henry Wootton, the surveyor, contended on the part of the Crown, that the app. employed the male person in question to clean his carriage and horse, and although such person was not his servant, but the servant of the college authorities, who paid him for attending to horses belonging to fellows of the college out of the common funds of the said college, yet being chargeable to the duty imposed on a carriage, he was liable to the assessment for a servant under 16 & 17 Vict. c. 90, rule 2.

We, the undersigned commissioners, considering the app. liable to the duty, confirmed the assessment, with which decision Dr. Adams expressed himself dissatisfied, and requested a case for the opinion of Her Majesty's judges, which we, the commissioners then present, have stated and signed accordingly.

Dated this 28th day of Jan. 1862.

FREDERICK CHARLES PLUMTREE.  
JAMES NORRIS.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

## Re MONCK.

*Male servants—Trainers of race-horses.*

*Gentleman appeals against charges for eight male servants, in respect of a professional training groom and his apprentices employed in training app.'s race-horses. The Commissioners confirm the assessment:*

*Commissioners right.*

At a meeting of the commissioners of land and assessed taxes for the division of Morpeth, in the county of Northumberland, held at the Borough Justice-room, Morpeth, on the 2nd April 1862, for the purpose of hearing appeals against the additional first assessment:

Sir Charles Monck, of Belsay Castle, in the said division and county, appealed against charges of 11. 1s. for a male servant above eighteen years of age and 3d. 13s. 6d. for seven male servants under that age.

The app. stated that he kept and trained race-horses at his private residence, and employed the eldest servant referred to as a professional training groom to train such race-horses. That he, the servant, was a man regularly brought up to the business of training horses, and was employed by app. solely to train his. That some of the younger males alluded to were apprentices, bound to such trainer for the purpose of learning the art of training race-horses, and that the others were only

assistants to him in his business. That the whole of the persons so charged for were exclusively employed in the training and care of app.'s race-horses, and were not menial servants, did not wear livery clothes found by app., nor did they provide them lodging, board, or clothes, nor did they sleep or eat in his house, nor were the horses attended by them ever employed by app. for any other purpose or use than racing, nor did the servants in question ever attend upon the app. personally in his use of horses of pleasure for which he pays the ordinary tax of 11. 1s. each. And the app. further offered his opinion that as the tax of 3d. 17s. on each race-horse had been imposed some years ago as a separate tax on horses used for racing, and was so much higher a tax than that for ordinary horses of pleasure, which is 11. 1s. each, the intention of the Legislature was that the tax of 3d. 17s. each should cover both horses and their attendants.

The Commissioners did not require the surveyor to reply to app.'s statement, but confirmed the charge.

The app. not being satisfied with this decision, demanded a case for the opinion of Her Majesty's judges, which we, the commissioners present at the hearing of the said appeal, do hereby state and sign accordingly, and submit that the app. is chargeable with the duties mentioned, on the ground that the several duties charged became payable by reason of the individuals being employed as grooms or helpers in app.'s stables, and being exclusively so engaged, and that although the person employed as the private trainer of app.'s race-horses was master of the apprentices, or grooms, or helpers, yet the whole were solely employed by the app. in the characters mentioned, and so were chargeable with duty.

Given under our hands this 2nd day of April 1862.

JOS. YOUNG.  
ROBERT COULL.  
THOMAS SWAN.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

## Re TWEEDY.

*Male servant—Labourer employed in stables and garden.*

*Gentleman appeals against an assessment for a labourer employed as helper in his stables and garden, on the ground that such employment is occasional only. The Commissioners relieve the app.:*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes acting in and for the division of West Powder, in the county of Cornwall, held at the Town-hall, Truro, on the 6th Sept. 1862, for hearing and determining appeals against the first assessment of the year 1862-63:

Robert Tweedy, Esq., of Truro, banker, was charged in the first assessment, upon his own return, as follows:

	£	s	d
Butler .....	1	1	0
Cochman .....	1	1	0
Gardener .....	1	1	0
Helper in stables .....	1	1	0
Two four-wheeled carriages .....	7	0	0
Three horses (E.) .....	3	3	0
Four dogs .....	2	8	0
Armorial bearings .....	2	12	3

He appealed against the duty for the helper in the stables, considering that as the man was hired as a farm labourer for a farm of eight acres, was paid weekly, and has his services in the stables were occasional only, he was not liable to be assessed.

He admitted that the servant in question was sometimes, when he arrived at his residence late at night, occasionally employed in the stables, but could not state how often; and that when he had no work on the farm, and was required by the gardener, he was also employed in the garden.

Mr. Yewens, the surveyor, contended that sufficient had been admitted to render Mr. Tweedy chargeable for the fourth servant, and referred to rule 6 of the 16 & 17 Vict. c. 90, in which it is stated that "The said duties shall extend to every person who shall be employed in the capacity of a helper in the stables, although such person shall be retained for the purposes of husbandry;" and although the man was ostensibly hired as a farm labourer, yet it appeared evident that he was to assist the coachman whenever his services were required; and he drew attention to the establishment kept, alleging that as the coachman was often employed in driving his master and the family to different places, it was quite impracticable for him to attend to, and keep in proper order, three horses (E.) and two four-wheel carriages, without the frequent assistance of the man in question, and cited cases 2496 and 2515 in support of the assessment.

The majority of the commissioners present being of opinion that app. was not liable for the labourer, discharged the assessment upon him.

Whereupon the surveyor being dissatisfied with the decision

[ASSESSED TAXES.]

Re WALKER—Re NUNN—Re REY—Re GODDARD.

[ASSESSED TAXES.]

demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

FRED. WEBBER,  
WILLIAM F. KIRKP. } Commissioners.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

#### Re WALKER.

##### *Male servant—Licensed victualler.*

*Licensed victualler appeals against an assessment for a man employed generally as a servant. The Commissioners confirm the charge:*

##### *Commissioners right.*

At a meeting of the commissioners of assessed taxes acting for the division of Middleton, in the county of Lancaster, held on the 19th Feb. 1863, for the purpose of hearing appeals: John Walker, of Oldham-below-Town, innkeeper, appealed against a charge made on him for a person called a servant, waiter, or house porter. Schedule (C.) No. 1, 11. 1s.

The app. being sworn, stated:—"I have one man servant, but I claim exemption as a licensed victualler. He takes care of horses and generally acts as a servant; he gets the beer into the cellar; he cleans the windows outside, whilst the females clean them inside; he cleans mine and my wife's shoes; he also cleans the guests' shoes and boots. We had only twenty-six lodgers as travellers last year 1860-61. He cleans the knives and forks; and I claim exemption on the ground that I am an innkeeper and keep only one servant. He, the servant, sleeps in the house, and I give him five shillings a-week and his board. I have no horse or gig."

The Commissioners confirmed the charge, but the app. being dissatisfied with their decision requests a case for the opinion of the judges, which we hereby state accordingly.

E. ABBOTT WRIGHT,  
A. WORTHINGTON,  
SAM'L RADCLIFFE,  
JON. HAGUE. } Commissioners.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

#### Re NUNN.

##### *Male servant—Wine and spirit retailer's apprentice.*

*Wine and spirit merchant appeals against a charge in respect of an apprentice under eighteen years of age, who waits on the guests who come to the spirit vaults. The Commissioners relieve app.:*

##### *Commissioners wrong.*

At a meeting of the commissioners of assessed taxes, held at the Bear's Head Hotel, Newtown, on the 2nd Sept. 1863, to hear appeals against the first assessments for the year 1863-64:

Mr. James Nunn, wine and spirit merchant and retailer, of Newtown, appealed against a charge made on him for a male servant 21s. The app. is chargeable, and charged for a two-wheel carriage, 15s., but he keeps no horse, and when his carriage is used he hires a horse from a postmaster, and the ostler of such postmaster always acts on such occasion as the groom. He has an apprentice, under eighteen years of age, who waits on the guests who come to the spirit vaults, but does not perform any household duties or act as groom upon any occasion. Under these circumstances he contends that he is not liable to be taxed for a servant.

The surveyor of taxes contended that, as it is admitted that the lad acts as waiter, his being an apprentice does not affect his master's liability, there being no exemption granted by the Act of Parliament, and that the assessment ought not to be wholly discharged, but only reduced to 10s. 6d. In consequence of the decision come to by the judges in case 2898, the surveyor did not press the charge with respect to a groom.

The Commissioners, however, decided on discharging the assessment, entirely on the ground that it is necessary for the lad to wait on his master's customers in order to learn the business, and therefore the latter cannot be liable to pay duty for him as a servant.

The surveyor, being dissatisfied with this decision, requested that a case might be stated for the opinion of Her Majesty's judges, which we, the commissioners present, hereby state and sign accordingly.

CHAR. THOS. WOORNAM,  
R. JONES. } Commissioners.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong. App. should be assessed at 10s. 6d.

#### Re REY.

*Male servants—Attendants in a private lunatic asylum. Keeper of a private lunatic asylum appeals against a charge for persons employed in waiting upon patients. Commissioners relieve app.:*

##### *Commissioners wrong.*

At a meeting of the commissioners of assessed taxes for the district of Kensington, held at 12, Broadway, Hammersmith, on the 9th Sept. 1863:

Mrs. Harriet Rey, of Hammersmith, appealed against a charge made upon her for two male servants, schedule (C.), No. 1.

The app. admitted that the servants were employed by her in an asylum for lunatics as keepers or nurses to her patients, that their duties consisted of nursing, dressing, waiting upon them at their meals, brushing their clothes, reading to them and attending them for any other necessary purpose.

The app. contended that, as the servants charged for were employed solely to look after and attend upon the patients, and not kept or used as domestic servants, she was exempt from the duty, schedule (C.), No. 4.

The surveyor in support of the charge produced cases Nos. 708 and 916, and contended that the persons for which the charge was made were, by the nature of their employment, "domestic servants," being employed in some one or more of the various capacities enumerated in schedule (C.), No. 1, 3d Geo. 3, c. 23, and consequently liable to duty as such.

The Commissioners having heard the app. and, also the surveyor in support of the charge, were of opinion that the app. was not liable to the charge of such servants, and relieved her, with which decision the surveyor was dissatisfied, and requested a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

JOSEPH CROOKES,  
JOHN BREN,  
ROBT. M. PIER,  
W. LONDON. } Commissioners.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

#### Re GODDARD.

##### *Male servants—House porters and watchmen in a bank.*

*Sub-agent to a branch Bank of England appeals against a charge for persons employed in the day as house porters and messengers, and on alternate nights as watchmen. The Commissioners confirm the assessment:*

##### *Commissioners wrong.*

At an adjourned meeting of the commissioners of land and assessed taxes, held at the commissioners' offices in Newcastle-upon-Tyne, on the 18th Nov. 1863, for the purpose of hearing appeals against the first assessments for the year 1863:

Daniel Halli Goddard, Esq., sub-agent of the Newcastle branch of the Bank of England, appealed against a charge made upon the bank for two male servants, schedule (C.), No. 1, 2s. 2d.

The app. stated that the two men, who wear the livery of the Bank of England, sleep on the premises every alternate night, that they wait upon the clerks, who have dinner in a room on the premises, but it is no part of their duty to do so, and the dinners of some of the clerks are cooked upon the premises, and that they delivered letters, &c., to the bank customers, and act as house porters at the bank.

The Commissioners, considering that there was no exemption for such male servants, confirmed the charge.

The app. being dissatisfied (stating that the men are householders and pay rates and taxes, that they do not live on the bank premises, that they take their meals at their own houses and remain at the bank every alternate night as watchmen; that their duties at the bank during office hours are to bring up from the safes the boxes and books required during the day, and to put them back at the close of business; to run with messages, parcels and letters to the customers of the bank; that they occasionally bring in refreshments for the clerks, to be eaten by them in a room set apart for the purpose; that this is no part of their duty, but is done to oblige the clerks and at their request, and that neither of the men is employed by either the agent or sub-agent (who live on the premises) for any domestic purpose whatever), demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

HENRY ANGUS,  
HENRY INGLEDEW,  
JOHN BURNUP. } Commissioners.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

ASSESSED TAXES.] *Re COLMAN—Re DAVENPORT—Re WOOLF—Re BRATNE.* [ASSESSED TAXES.]

*Re COLMAN.**Male servant—Groom policeman.*

*Superintendent of police appeals against a charge in respect of a "groom policeman" who attends to his horse and carriage. Commissioners relieve the app.:*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes, acting in and for the division of Sevenoaks, held at the Crown Inn, Sevenoaks, on the 4th Sept. 1863:

George Colman, superintendent of the county police for the division of Sevenoaks, appealed against a charge of 11. 1s. made on him in the first assessment for a servant.

App. is assessed upon his own return for one two-wheeled carriage, 15s., and one horse 21s., which horse and carriage are the property of the county, and groomed and cleaned, and the horse harnessed and taken in and out of the carriage, as occasion may require, by a policeman who is called "groom constable," whose business is to look after the horse and carriage, and who is subject to general police duties. The policeman receives no pay for these services beyond his ordinary pay as an officer of the police force.

App. therefore contended that he was not liable to the charge for a servant, and referred to the printed case No. 2606.

The Crown surveyor, Mr. Harry Munro, contending the contrary, and citing the judge's cases Nos. 2494, 2542, 2543 and 2544, in support of the correctness of the charge, the commissioners relieved the app.

The surveyor, being dissatisfied, demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

W. LAMBARDE,  
J. P. ATKINS.

PIGOTT, B. and SHEP, J.—We are of opinion that the determination of the commissioners is wrong.

*Re DAVENPORT.**Establishment—Executor's liability.*

*Executor appeals against an assessment for establishment of deceased, who died on the 18th April in the year of assessment. Commissioners confirm the assessment:*

*Commissioners wrong.*

At an adjourned meeting of the commissioners of assessed taxes for the division of Weobley, Hereford, held at the Lion Inn, Weobley, on the 9th Dec. 1863:

George N. Davenport, Esq., of Foxley, in the parish of Yazor, appealed against an assessment made upon him, upon his own return, as an executor of his late father, John Davenport, Esq., for the under-mentioned articles:

	£	s.	d.
Nine servants at 21s. ....	9	9	0
One servant at ..... ..	0	10	6
Three carriages at 70s. ....	10	10	0
One ditto at 40s. .... ..	2	0	0
Ten horses at 21s. .... ..	10	10	0
Two ditto at 10s. 6d. ....	1	1	0
One pony ..... ..	0	10	6
Six dogs at 12s. .... ..	3	12	0

and claimed to be relieved from the charge on the ground that he personally did not keep the articles in question between the 5th April 1861 and 6th April 1862, that his father died on the 18th April 1862, and that as no assessment was made upon him in his lifetime, he as executor was not liable to the charge made upon him.

The app. still keeps and uses the establishment, with the exception of one or two articles which have been recently discontinued.

The surveyor, Mr. R. James, in support of the assessment, contended that he was decidedly liable by 48 Geo. 3, c. 161, s. 54, which enacts, "That where any person or persons chargeable with the duties hereby made payable shall die, in every such case the executors and administrators of the persons so dying shall be and are hereby made liable to and charged with the payments which the persons so dying were chargeable with."

The Commissioners confirmed the assessment, but the app. being dissatisfied with their determination requested a case for the opinion of the judges, which we, the undersigned commissioners who heard and decided the appeal, have hereby stated accordingly.

W. EDWARDS, } Commissioners.  
R. S. COX. }

PIGOTT, B. and SHEP, J.—We are of opinion that the determination of the commissioners is wrong.

Thursday, June 26, 1862.

(Before BYLES, J. and WILDE, B.)

*Re WOOLF.*

*House used for purposes of business only—57 Geo. 3, c. 25—Two rooms only occupied by a policeman and his wife to take care of the premises.*

*App. claimed exemption from the charge on him at 180l. for house duty in respect of a house used for purposes of business only, he residing in another house charged to the duty. The surveyor contended that, as a policeman and his wife inhabit and abide in two of the rooms, the party was not entitled to the exemption granted by the 57 Geo. 3, c. 25, s. 1. The Commissioners confirmed the charge:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes for the parish of St. George, Hanover-square, held at their office, 11, South Molton-street, on the 7th Nov. 1860:

Mr. Benjamin Woolf appealed against an assessment of 180l. made on him for inhabited house duty, at 6d. in the pound, for the year 1860, of Bond-street, Piccadilly.

App. stated that the whole of the house is used for business purposes, and no one resides therein except a policeman and his wife, who take care of the premises at night, and that he, the app., does not have any benefit from the man residing there, nor does he or any one in his employ have anything cooked there: the app. further contended that he is not liable to house duty, otherwise every empty house in the occupation of a policeman would be liable.

The app. states that he pays house duty on his private house, which is in another district.

The surveyor submitted that the app. was liable to the assessment, inasmuch as the policeman and his wife inhabiting and abiding in two rooms (the attics) took the case out of the exemption allowed by the 57 Geo. 3, c. 25, s. 1, and the commissioners, being of the same opinion, confirmed the charge, whereupon Mr. Wolf demanded a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

GEO. DODD, } Commissioners of  
THOMAS DAVIDSON, } Assessed Taxes.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

*Re BRATNE.*

*Post-office—Apartments occupied as a residence—48 Geo. 3, c. 55, sched. (B.)*

*Postmaster claimed relief from house duty assessed on him at 60l. for his dwelling-house. He contended that, as the house is the property of the Crown, and certain rooms therein are used by himself and his assistants for official purposes, it was exempt under case 1, schedule (B.) of the 48 Geo. 3, c. 55; but if not, that the assessment ought to be reduced to the annual value of the apartments occupied by himself and his family. The Commissioners confirmed the full assessment, but in case that decision should be found wrong, and that the app.'s apartments only are chargeable, they considered their annual value 20l.:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at the Spread Eagle Hotel, Rugby, on the 26th Aug. 1860, for the purpose of hearing appeals against the first assessment for the year 1860-61:

John Brayne, of Rugby aforesaid, postmaster, appealed against an assessment made upon him of 60l. for inhabited house duty for the year 1860-61 in respect of his dwelling-house at Rugby aforesaid, in a portion of which he carries on his duties of postmaster, and relied upon the following exemption in the Act 48 Geo. 3, c. 55, schedule (B).

"Case 1. Any house belonging to His Majesty or any of the Royal family, and every public office for which the duties heretofore payable have been paid by His Majesty or out of the public revenue."

From the app.'s statement upon oath the Commissioners find the following facts:

That the app. is duly appointed postmaster to the post-office at Rugby by Her Majesty's Postmaster-General; that he, together with his wife, one child and two domestic servants, occupies the house the subject of the assessment; that certain rooms in the house are used by the app. and his assistants in the discharge of his official duties as postmaster, but which rooms are internally connected with the remainder of the

## ASSESSED TAXES.]

## Re WHIMPER—Re RAWLE—Re HAYES.

## [ASSESSED TAXES.]

house occupied by himself and family, the whole being under one and the same roof; that about twelve months ago the whole house was purchased by the Crown, up to which period it belonged to a private individual, and no duties have ever been paid by the Crown or out of the public revenue in respect of the house in question or any part thereof, but on the contrary, the window duty and afterwards the house duty was always paid by the occupier. The app. further claimed to have the assessment reduced to the annual value of the apartments occupied by himself and family. But upon the foregoing facts, the Commissioners were of opinion that the case did not come within the exemption quoted, and confirmed the full assessment (see case 1507).

With which decision the app. being dissatisfied, and requesting a case for the opinion of Her Majesty's judges, we, the majority of the commissioners who heard the same, do hereby state this case accordingly. Should Her Majesty's judges be of opinion that the decision of the commissioners is wrong, and that the app. is liable only in respect of the apartments occupied by him and his family, we find the annual value thereof at 30l.

PETER VAN NOTTEN POLK, } Commissioners.  
JAMES ATTY. }

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

## Re WHIMPER.

*House belonging to Her Majesty—48 Geo. 3, c. 55—Occupied by the Lieutenant-Governor of the Tower.*

*Lieutenant-Governor of the Tower of London claimed exemption from house duty in respect of the house occupied by him in the Tower as a servant of Her Majesty. One room therein is furnished as an office by the Commissioners of Works, and another is set apart for the use of the deputy-lieutenant. The surveyor contended that the house was liable to assessment as an ordinary dwelling-house. The Commissioners discharged the assessment, considering the Tower to be a royal palace within the exemption, case 1, sched. (B.) 48 Geo. 3, c. 55:*

## Commissioners right.

At a meeting of the commissioners of assessed taxes for the division of the Tower, held at their offices, No. 33, Spital-square, Middlesex, on the 6th March 1861:

Frederick Whimper, colonel and major of the Tower of London, in the said division, appealed, through the agency of J. Aubrey, Esq., High Bailiff of the Tower, against a charge made upon him for inhabited house duty in respect of the house occupied by him as Lieutenant-Governor of the Tower for the year from the 5th April 1859 to 5th April 1860, which charge is as follows, viz:

Names of Street or Place and Christian and Surname of Occupier.	Description as to trade and purposes for which the premises are occupied.	Rent or annual value.	Duty.
F. A. Whimper ...	Lieut.-Colonel .....	£80	£3

On behalf of the app. it was stated that the house in question is the Queen's, and occupied by the app. as a servant of Her Majesty, and by her command; that the app. has no permanent tenure, and that it is under Her Majesty's control, and is part and parcel of the Tower of London, which is and always has been a royal palace, and is therefore exempt from house tax (see case 1, sched. B. 48 Geo. 3, c. 55). The app. further stated such tax never had been paid, and that he was liable to removal from the said house at any moment Her Majesty pleased any other of her servants in it.

The app. further stated that two or three years since a demand for land tax had been made in respect of the said house, but that the Lords of the Treasury had issued an order that it was exempt from that tax, and that it had never since been put in assessment or applied for.

The surveyor contended that the house, although belonging to the Crown, was an inhabited house within the 14 & 15 Vict. c. 26, and liable to duty as an ordinary dwelling-house, and in support of the assessment cited cases 2808 and 2809.

It appeared that the house in question had not been charged inhabited house duty prior to 1859; but the income-tax, under schedule (A.) duty on 80l., had been duly assessed and paid by the app., but that Colonel Whimper says that it was so paid by him in error.

It was also shown that one room was furnished as an office by the Commissioners of Works and Buildings, and that another is exclusively set apart for and used by the Deputy-Lieutenant of the Tower, Lord de Ros; the remaining portion is furnished partially only by Colonel Whimper, but no one room in the establishment is exclusively furnished by him, but certain furniture is added for his own comfort.

The Commissioners discharged the assessment, considering

the Tower to be a royal palace within the meaning of the exemption; whereupon Mr. Gracewood, the surveyor, requested a case for the opinion of the judges, which we, the undersigned commissioners who heard and decided the appeal, have hereby stated accordingly.

GEORGE OTTOM.  
JOHN CARTER.  
JAMES GATEL.  
THOMAS BRICKFIELD.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

## Re RAWLE.

*Police station—48 Geo. 3, c. 55, sched. (B.)*

*Police station assessed to the house duty at 40l. Six rooms are occupied by a police sergeant and his family and three constables under him. The part occupied by the app. is of the annual value of 15l. He contended that, as the premises were not occupied by the officers beneficially, and as the whole are liable to the reception of prisoners and may be used as lock-ups, the police station was exempt under schedule (B.) case 4, of 48 Geo. 3, c. 55. The Commissioners discharged the assessment:*

## Commissioners right.

At a meeting of the commissioners of assessed taxes, held at the Sessions-room, at Lawfords-gate, Gloucester, on Tuesday, Sept. 25, 1860, for hearing appeals against the first assessments for the year 1860-61:

Sergeant George Rawle, of the Gloucestershire police force, appealed against an assessment made on the police station, in the borough of Thornbury, to the inhabited house duty on 47l. value.

App. stated that the premises in question are a police station and petty sessions court belonging to the county of Gloucester, and that six rooms are occupied by himself, his family and the three police constables under him; that the part occupied by app. is of the value of 15l. at the outside. The app. contends that there is no beneficial inhabitation in him, as contemplated by the Inhabited House Duty Act; that he and the constables are under the orders of the superintendent and chief constable of the county, and are subject to removal from station to station without notice; that the premises are not occupied by them beneficially, further than for county and public purposes, and they pay no rent; that in the event of riots or other necessity the whole of the premises are liable to the reception of prisoners; and that police stations, being lock-ups and places for the temporary reception and confinement of prisoners, are exempt from house duty under the 48 Geo. 3, c. 55, sched. (B.), case 4.

There is an internal communication throughout under the same roof, and the value, as regards the six first-mentioned rooms, being under 20l., is not disputed by the surveyor on the one hand, neither is the value at which the whole premises are rated disputed on the other hand.

The surveyor referred to cases 1835, 2806 and 2131, under which he contended that the whole of the premises are assessable.

We, the Commissioners present, discharged the assessment; but the surveyor, being dissatisfied, demanded a case for the opinion of Her Majesty's judges, which we hereby sign and allow.

Given under our hands this 31st day of Dec. 1860, at the sessions room, at Lawfords-gate in the said county.

WILLIAM MIREHOUSE, } Commissioners.  
EDWARD SAMPSON. }

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

## Re HAYES.

*Rooms used for offices, &c., in the Town-hall at Wolverhampton—48 Geo. 3, c. 55, sched. (B.)*

*Town clerk of Wolverhampton appealed against an assessment upon the corporation at 300l. house duty for their premises, used for the purposes of offices by the town clerk, borough surveyor, rate collector, &c. Some of the rooms are used as committee rooms, and there is a hall or council chamber. There is an internal communication to and from all parts of the building. It was contended that the premises were exempt, as the only part occupied as a residence by the hall keeper and his wife was under the annual value of 20l. The*

## ASSESSED TAXES.]

## Re MANBY—Re HODGSON.

## [ASSESSED TAXES.]

*Commissioners confirmed the assessment with reference to the Act 48 Geo. 3, c. 55, sched. (B.), rule 5.*

**Commissioners right.**

At a meeting of the commissioners of assessed taxes, held at the Corn Exchange, Wolverhampton, on the 18th Feb. 1861, for the purpose of hearing appeals against the additional first assessments and supplementary charges for the year 1860-61:

Mr. Edwin John Hayes, solicitor and town clerk of the borough of Wolverhampton, appealed against an assessment upon the corporation of their premises to the inhabited house duty, at the sum of 300*l.* per annum.

The app. contended that the inhabited rooms or apartments hereinafter mentioned are under the value of 20*l.* per annum, and that if the whole of the rooms, &c., are to be assessed the assessment shall be on such sum as shall be fixed by the Income Tax Commissioners at their next meeting, it being contended on behalf of the corporation that the assessment at 300*l.* is too high, and that 160*l.* per annum would be the proper amount.

The parties charged are "the Corporation of Wolverhampton." They are in fact the mayor, aldermen and burgesses acting under a charter of incorporation under the Municipal Corporation Act 5 & 6 Will. 4, c. 75; they also act by the council of the said borough as the local board of health, under the Public Health Act 1848, and as the local board under the Local Government Act 1858. The premises on the ground floor consist of the town clerk's office comprising three rooms, the accountant's clerk's office, borough surveyor's office, rate collector's office and the inspector of nuisances' office; the rooms on the first floor consist of the council chamber or hall, an anteroom for hall, and three committee rooms, and the rooms on the second floor are occupied as the residence of the hall keeper and his wife, they having the care of the whole, which is one entire building. The hall keeper receives a weekly wage of 2*s.* which is paid by the corporation. There is an internal communication to and from all parts of the building.

The whole premises are vested in the municipal corporation under the Municipal Act, and the local board pay a rent of 80*l.* per year for the joint use of the property.

The app. contended that the building excepting the apartments occupied by the hall keeper and his wife, and which he considers under the value of 20*l.*, did not constitute such an "inhabited dwelling-house" as is contemplated by the 1st section of the 14 & 15 Vict. c. 36; and he further contended that the "inhabited" house duty is a tax imposed and granted in lieu and instead of the window tax, and he urged that it must be assessed and levied under the rules in schedule A. to the 48 Geo. 3, cap. 54, and not according to the rules in schedule B.; and that as he contended no window tax would, according to rule 9, of that schedule A. be payable on any other part of the building than the said apartments, and these apartments would not under the 14 & 15 Vict. be chargeable, being under the annual value of 20*l.*, they were exempt.

The surveyor on the other hand contended that the whole of the building is chargeable under rule 5 of schedule B. to the said Act of 48 Geo. 3, and cited cases Nos. 153, 367, 2088, 2131, 2283, 2370, 2528, in support of the assessment; to which the appa. replied, that taking it to be so they are entitled to the exemption under rule 5 of exemptions to such schedule B., and that in either view they are not chargeable.

The Commissioners, however, considering that the duties made payable upon inhabited dwelling-houses by the 14 & 15 Vict. notwithstanding they were in lieu of the window tax, should be charged and assessed according to the rules and regulations contained in the schedule B. to the Act 48 Geo. 3, c. 55, rule 5, and not according to the rules and regulations contained in the rule 9, schedule A. of the same Act, confirmed the assessment, with which the app. being dissatisfied, requested a case might be stated for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

THO. WM. FLETCHER, } Commissioners of  
JOSEPH BENNETT, } Land and As-  
F. H. G. BARRA. } sessed Taxes.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

**Re MANBY.**

*Rooms used for various purposes in the Corn Exchange, Wolverhampton—Two only used as a residence.*

App., on behalf of the directors of the Wolverhampton Corn Exchange, appealed against an assessment on their premises to the house duty at 275*l.* per annum. The building consists of a hall used as a corn exchange which is occasionally let for holding concerts, &c.; a news-room; a room let to ironmasters, which is also used by the District Commissioners of Taxes, cellars, law library, and two other rooms in which the secretary and his wife and family reside. There is an internal

[MAG. CAS.—VOL. III.]

communication throughout. It was contended that the premises were exempt, as the only part occupied as a residence was under the annual value of 20*l.* The Commissioners confirmed the assessment with reference to the Act 48 Geo. 3, c. 55, sched. (B.), rule 5:

**Commissioners right.**

At a meeting of the commissioners of assessed taxes, held at the Corn Exchange, Wolverhampton, on the 18th Feb. 1861, for the purpose of hearing appeals against the additional first assessments and supplementary charges for the year 1860-61:

Mr. William Manby, solicitor, Wolverhampton, as one of the directors of the Wolverhampton Corn Exchange, appealed against an assessment of their premises to the inhabited house duty at the sum of 275*l.* per annum.

The app. admitted for the purpose of the appeal that the assessment was fair if the whole of the rooms and cellars, &c. hereinafter mentioned are chargeable.

The company is incorporated under the Joint Stock Companies Act, and their building consists of a hall used as a corn exchange, and this room is frequently let for the purpose of holding concerts, delivering lectures to corn merchants and others who frequent the market, and who pay various annual sums for the accommodation, and as an auction room, and for other public purposes; a general news room, which the directors supply with papers, and for admittance to which an annual subscription is paid; another room which they let to the ironmasters to hold their weekly and quarterly meetings in, and which is also used by the Commissioners of Taxes for holding their appeal meetings in, and for which they pay 1*s.* 6*d.* per day, and for other purposes; cellars let off as distinct holdings for warehousing purposes; a room let to solicitors for a law library; and two other rooms in the basement in which the secretary to the company, his wife and family, reside, they having the care of the whole, which is one entire building. The secretary receives a salary of 60*l.* a-year, which is paid by the directors. There is an internal communication to and from all parts of the building.

The app. contended that the building, excepting the apartments occupied by the secretary and his wife and family, and which he considered under the value of 20*l.*, does not constitute such an "inhabited dwelling-house" as is contemplated by the 1st section of the 14 & 15 Vict. c. 36, and he further contended, that the "inhabited" house duty is a tax imposed and granted in lieu and instead of duties assessed and levied according to the number of windows or lights therein, as set forth in schedule A. according to the rules in such schedule A. to the 48 Geo. 3, c. 55, and not according to the rules in schedule B., and that, as he contended no window tax would, according to rule 9 of that schedule (A.), be payable on any other part of the building than the said apartments, and these apartments would not, under the 14 & 15 Vict., be chargeable, being under the annual value of 20*l.*, they were exempt.

The surveyor on the other hand contended that the whole of the building is chargeable under rule 5 of schedule B. to the said Act of 48 Geo. 3, and cited cases No. 153, 367, 2088, 2131, 2283, 2370, 2528, in support of the assessment; that such schedule B. applies to the inhabited house duty authorised to be raised, and not to the window duties; though, even taking it to be so, they might be considered to be entitled to the exemption under rule 5 of the exemptions to such schedule B., and that in either view they are not chargeable.

The Commissioners, however, considering that the duties made payable upon inhabited dwelling-houses by the 14 & 15 Vict. notwithstanding they were in lieu of the window tax, should be charged and assessed according to the rules and regulations contained in the schedule B. to the Act 48 Geo. 3, c. 55, rule 5, and not according to the rules and regulations contained in the rule 9, schedule A. of the same Act, confirmed the assessment; with which the app. being dissatisfied, requested a case might be stated for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

THO. WM. FLETCHER, } Commissioners of Land  
JOSEPH BENNETT, } and Assessed Taxes.  
F. H. G. BARRA. }

BYLES J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

**Re HODGSON.**

*Offices of a solicitor, forming part of his dwelling-house—5 Geo. 4, c. 44, s. 4.*

Solicitor, whose rent was 24*l.*, charged to the house duty at 26*l.* One of the rooms on the ground-floor, with the chambers over it, is used as his office, and the office is not connected internally with the dwelling-house. He contended that the office was exempt, and deducting 6*l.* as the value of the office from the rent that the house was only worth 18*l.* a-year, and that therefore he was not liable. The surveyor opposed the claim of

K

## [ASSESSED TAXES.]

## Re ROUNTHWAITE—Re WYATT—Re CLARK.

## [ASSESSED TAXES.]

*exemption with reference to the 5 Geo. 4, c. 44, but the Commissioners discharged the assessment:*

*Commissioners wrong.*

At a meeting of the commissioners acting in execution of the Acts relating to assessed taxes, held at the Court-house, Kelghley, on Monday, Aug. 26, 1861:

Mr. Hodgson is a solicitor residing at Kelghley, having a house at the annual rent of 24*l.*, assessed at 26*l.*, one of the rooms on the ground-floor of this house with the chamber over the same being used as an office in his profession of a solicitor.

The office has an external entrance, and is not connected internally with the portion of the house used as a dwelling-house.

Mr. Hodgson appealed against the charge upon the ground that there being no internal communication between the inhabited portion of the house and the room used as an office, the latter should be considered as exempt, and that deducting the value of the office estimated at 6*l.* from the rent, the inhabited portion of the house would be worth 18*l.* only, and therefore that he was not liable to the charge.

Mr. Irwin, the surveyor, contended that there was no exemption in the Acts of Parliament which clearly applied to the case, and that therefore the app. should be held liable to the charge. The surveyor further pointed out that the exemption (*vide* 5 Geo. 4, c. 44, s. 4) would not apply to this case, an essential condition of that exemption being, that the person to whom such exemption is granted should reside in a dwelling-house or part of a dwelling-house charged to the inhabited house duty.

The Commissioners, however, concurred in the view taken by the app. and discharged the assessment; whereupon the surveyor demanded a statement of the facts of the case, for the opinion of Her Majesty's judges, which is hereby stated accordingly.

JNO. BRIDG, } Commissioners for  
JNO. G. SATDEN, } Stancliffe East.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

## Re ROUNTHWAITE.

*Farmhouse—43 Geo. 3, c. 161, s. 10.*

*Farmer charged to the inhabited house duty at 20*l.* in respect of a house in a country town which he occupied with a farm. The farm-buildings are on the opposite side of the road to the house. He contended that he ought not to be assessed, as he considered the house without the farm not worth more than 12*l.* a-year. The Commissioners, being of opinion that the house, with the offices, yards and garden, was of the annual value of 20*l.*, confirmed the assessment:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes acting in and for the division of Bunkrooe, East Riding of York, held at the Queen's Head Inn, in North Grimston, on the 31st Aug. 1860, for the purpose of hearing appeals for the year 1860-61:

James Rounthwaite, of Howham, in the said division, farmer, appealed against an assessment made upon him of 20*l.* for inhabited house duty, at 6*l.* in the pound, in respect of his dwelling-house, household and other domestic offices, yards and garden therewith occupied.

App. stated that he occupied the house in respect of which the assessment is made with stable and ighouse, garden and all other necessary outbuildings for the occupation of a farm. That the house is a farmhouse, and together with the outbuildings mentioned is occupied for the purposes of husbandry only. That the rent of the house and farm together is 220*l.* per annum exclusive of tithes. That the house is not rated distinct from the farm in the poor-rate. That the house is in the town street of Howham, and the farm-buildings are on the opposite side of the road. That he considers the house without the farm is not worth more than 10*l.* or 12*l.* per year. That he objects to state what rent he would give for the land and farm-buildings if there were not the house and domestic offices attached. That he objects to state whether he considers the land worth as much as 200*l.* without the house attached. That he objects to state on his oath that he would not give 20*l.* a-year for the house, providing he had the farm, and there was no house convenient which he could take at a less rent. The house in question is about eleven miles from York, and about nine miles from Malton.

The Commissioners being of opinion that the house, together with the household offices, yards and garden, occupied as a farmhouse, was of the annual value to the app. of 20*l.* per annum, confirmed the assessment; whereupon the app. being dissatisfied, demanded a case for the opinion of Her Majesty's

judges, which we the undersigned, being the commissioners who heard the appeal, do hereby state and sign accordingly.

JOSE. MARSHALL, } Commissioners.  
T. W. RIVER.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

## Re WYATT.

*Shop—Cabinet-maker—14 & 15 Vict. c. 36.*

*Cabinet-maker claimed to have the assessment on him reduced from 9*d.* to 6*d.* in the pound. App. exposed goods for sale in the forecourt of his premises, but he had no shop-window on the ground or basement story. The Commissioners reduced the assessment to the lower duty:*

*Commissioners wrong.*

At a meeting of the commissioners acting in the execution of the several Acts relating to the duties of assessed taxes in and for the division of the Isle of Wight, held at the Guildhall, Newport, on Saturday the 18th March 1861, for the year 1860 ending 5th April 1861:

Frederick Wyatt, of West Cowes, in the parish of Northwood, cabinet-maker, appealed against the charge of inhabited house duty at 9*d.* in the pound.

The app. stated that goods were exposed to sale in the forecourt of the premises. There is no shop-window on the ground or basement story, the rooms being fitted up and used occasionally by himself and his family. All the goods in the house being for sale, there is a warehouse at the back of the house in which goods are deposited, but they are exhibited only in the avenue or court in front of the building. The app. also stated that he occasionally lets lodgings, but the front rooms on the ground-floor are never let or used otherwise than as before stated.

The Commissioners, referring to a minute passed on the 4th Sept. 1844, whereby it appeared that the assessment upon the same premises was reduced from 9*d.* to 6*d.* in the pound, and the premises in question remaining precisely the same as at that period, reduced the assessment from the higher to the lower rate of duty; but the surveyor, contending that the premises were not of that description as would come under the denomination of a shop, demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

Given under our hands this 6th day of July 1861.

H. P. GORDON, } Commissioners of  
A. S. HAMOND, } Assessed Taxes.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

## Re CLARK.

*Shop.*

*App. claimed to have the assessment on him reduced from 9*d.* to 6*d.* He keeps a registry office for servants, sells coals, and his wife sells artificial flowers, but as no goods, wares, or merchandise were exposed for sale in the window or in the shop, the surveyor contended that the premises were not used as a shop within the meaning of the Act. The Commissioners confirmed the assessment:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at the Guildhall, Bristol, on Tuesday, Sept. 10, 1861, to hear appeals against the first assessment for the year 1860:

Charles Clark, of 20, St. Augustine's-place, appealed against an assessment under schedule B. of 40*l.* at 9*d.* in the pound.

The app. stated that he keeps a registry office for servants, and also sells coal, and that his wife has frequently sold artificial flowers, and he therefore contended that he was only liable to be charged 6*d.* in the pound.

The surveyor contended that the premises were not used as a shop within the meaning of the Act, no goods, wares, or merchandise being exposed for sale either in the window or the shop, the former being filled with bills of servants wanted or wanting situations, and the latter being fitted up as a waiting-room for the various applicants.

The Commissioners present confirmed the assessment; but app. being dissatisfied, demanded a case for the opinion of Her Majesty's judges, which we hereby sign and allow.

Given under our hands this 22nd day of November 1861, at the Council-house, Bristol.

CHRISTR. J. THOMAS, } Commissioners.  
R. G. BAKER.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

At a meeting of the commissioners of land and assessed taxes acting in and for the borough of Hastings, Sussex, held at the office of their clerk, on the 19th Sept. 1860, for the pur-



[ASSESSED TAXES.]

Re FRY—Re KERRIDGE—Re BALLHATCHETT.

[ASSESSED TAXES.]

pose of hearing and determining appeals against the first assessments of assessed taxes for the year 1860 ending April 5, 1861:

Mr. Thomas Skinner, of the Harold Mews, St. Leonards, livery-stable keeper and riding-master, appealed against an assessment of

	£	s.	d.
1 servant .....	1	1	0
1 two-wheel carriage drawn by one horse .....	0	15	0
3 horses (sched. E.) .....	3	3	0

The Crown surveyor stated to the commissioners that the assessment for a servant was in respect of one of app.'s stablemen employed in grooming app.'s carriage and horses; the two-wheel carriage assessed was a gig used in driving about the town for orders; and that the horses were ridden by the app.'s two sons and his assistant, in his business as a riding-master, in teaching their pupils to ride, and in accompanying riding parties.

Mr. Skinner grounded his non-liability on the facts that the carriage and horses were included in a licence to let twenty carriages and thirty horses, granted to him by the Board of Inland Revenue; that the carriage was used entirely in his business, having his name, address and occupation painted on a board affixed behind, which was removed when the carriage was let to hire; and that the horses ridden by his sons and his assistant were taken indiscriminately from his stables, no particular horses being kept for their exclusive use, and that when they accompanied their customers an extra charge was made.

The surveyor contended that Mr. Skinner was liable to the assessments for the horses, on the ground that the licence granted by the Board of Inland Revenue was for horses, and solely to let for hire, and that when they were ridden by his sons and assistant they could not be considered to be let for hire, and referred to cases 2407, 2408 and 2498, and to the following letter from the Board of Inland Revenue to the clerk to the commissioners of the district on the subject:

"Inland Revenue, Somerset-house,  
London, W.C.

19th June 1860.

Sir,—With reference to your letter of the 9th inst, I am directed to inform you, that horses ridden by riding-masters and their assistants in teaching their pupils, and included in their excise licences, are liable to the assessed tax duty under schedule E.

I am, Sir,

Robert Grouse, Esq. Your obedient Servant,  
(Signed) T. SARGENT."

Also, that Mr. Skinner was liable to assessment for the gig, it not being such a description of vehicle as was intended by the exemption under 16 & 17 Vict. c. 90, sched. D, and referred to cases 2406 and 2449; and that the fact of the board on which the name, &c., were painted could at any time be taken off would render it liable to assessment, and referred to case 1919. In support of the assessment for the servant, he stated that if Mr. Skinner was liable for the horses and carriages he would be liable for the servant as well.

The Commissioners discharged the whole of the assessment; whereupon the Crown surveyor demanded a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

Given under our hands this 28th day of Feb. 1861.

FREDERIC TICEHURST, } Commissioners of Assessed  
THOMAS HICKS. } Taxes for the division of  
Hastings borough, in the  
county of Sussex.

BYTES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right as to the three horses, but wrong as to the servant and carriage.

Re FRY.

Similar to the preceding case.

At a meeting of the commissioners of land and assessed taxes acting in and for the borough of Hastings, Sussex, held at the office of their clerk in the said borough, on the 19th Sept. 1860, for the purpose of hearing and determining appeals against the first assessments of assessed taxes for the year 1860 ending April 5, 1861:

Mr. Frederick Fry, livery-stable keeper and riding-master, Hastings, appealed against an assessment of

	£	s.	d.
1 servant .....	1	1	0
1 four-wheel carriage .....	2	0	0
2 horses .....	2	2	0

The Crown surveyor stated to the commissioners that the servant was one of the app.'s stablemen employed in grooming his carriage and horses; that the carriage was a four-wheel chaise used by him for private purposes in going to his farm, and in occasionally driving his family out; and that one of the horses was the one ridden and driven by himself, and the other ridden by his assistant in his business as a riding-master.

Mr. Fry grounded his non-liability on the fact that the carriage and horses were included in a licence to let nine carriages and twelve horses granted to him by the Board of Inland Revenue.

The Commissioners confirmed the assessment of the servant, carriage and one horse, but discharged the assessment on the second horse ridden by the assistant; whereupon the surveyor,

having used similar arguments in support thereof as in the accompanying case of *Re Skinner*, demanded a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

Given under our hands this 28th day of Feb. 1861.

FREDERIC TICEHURST, } Commissioners of Assessed  
THOMAS HICKS. } Taxes for the division of  
Hastings borough, in the  
county of Sussex.

BYTES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

Re KERRIDGE.

Similar.

At a meeting of the commissioners of land and assessed taxes acting in and for the borough of Hastings, Sussex, held at the office of their clerk in the said borough on the 19th Sept. 1860, for the purpose of hearing and determining appeals against the first assessments of assessed taxes for the year 1860, ending April 5, 1861:

Mr. George Frederick Stanley Kerridge, of the Swan Mews, Hastings, livery-stable keeper, riding-master and horse dealer, appealed against an assessment of

	£	s.	d.
1 servant .....	1	1	0
1 two-wheeled carriage .....	0	15	0
3 horses .....	3	3	0

The Crown surveyor stated to the commissioners that the servant was one of the app.'s stablemen, employed in grooming his horses and carriage, the two-wheeled carriage was a gig used by him in his business, and that the horses were ridden by himself and his two assistants in his business as a riding-master.

Mr. Kerridge grounded his non-liability on the facts that the carriage and horses were included in a licence to let fifteen carriages and twenty horses granted to him by the Board of Inland Revenue; that the carriage was used entirely in his business, having his name, address and occupation painted on a board affixed behind, which was removed when the carriage was let for hire; and that the horses ridden by himself and his assistants were taken indiscriminately from his stables, no particular horses being kept for their exclusive use, and that when they accompanied their customers an extra charge was made. He also contended that as he was assessed to the horse dealers duty he or any one in his employ could ride his horses, all of which were for sale, without rendering them liable to assessed taxes. He likewise produced an account book, purporting to show that the horses ridden by his assistants were let to them at so much per week, dated from the commencement of Aug. 1860, which was not entertained by the Commissioners.

The Crown surveyor in support of the assessment made use of similar arguments as those employed in the accompanying case of *Re Skinner*; he also contended that the fact of Mr. Kerridge's being assessed for horse dealers duty did not allow him or the assistants employed by him in his business as a riding-master to ride horses free of duty, and that the fact of the horses being let by the week to the men was merely an evasion of duty which could not be sanctioned by the Legislature.

The Commissioners, however, relieved the app. from the whole of the assessment; whereupon the surveyor demanded a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

Given under our hands this 28th day of Feb. 1861.

FREDERIC TICEHURST, } Commissioners of Assessed  
THOMAS HICKS. } Taxes for the division of  
Hastings borough in the  
county of Sussex.

BYTES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right as to the horses, but wrong as to the servant and carriage.

Re BALLHATCHETT.

*Two-wheeled carriage charged to the assessed taxes, which was used for carrying passengers before the taking out of the excise licence—16 & 17 Vict. c. 90.*

*App. claimed to be relieved from a charge on him for the year 1861-2, for a carrier's cart at 1l. 6s. 8d., used occasionally for carrying passengers, on the ground of his having taken out an excise licence to let the carriage for hire in April 1861. The surveyor contended that the licence would not entitle the party to exemption until the year commencing 5th April 1862. The Commissioners relieved:*

*Commissioners wrong.*

At a meeting of the commissioners of land and assessed taxes acting in and for the division of Haytor, Devon, held at

## [ASSESSED TAXES.]

## Re BAYLEY—Re GRIFFITHS—Re CORBETT.

## [ASSESSED TAXES.]

the Globe Hotel, Newton Abbott, on the 29th Aug. 1861, for the purpose of hearing appeals against the first assessments made for the year 1861, ending 5th April 1862:

Thomas Ballhatchett, of Ipplepen, a basket-maker, appealed against an assessment of 1l. 6s. 8d., under schedule D, in respect of a carriage with two wheels used occasionally to carry passengers, and 10s. 6d., under schedule F, for a horse used to draw the said carriage.

He claimed to be relieved from the charge to the assessed taxes for the year 1861, ending 5th April 1862, upon the ground of his having taken out a licence in April 1861 to let the said articles to hire, and had since that period paid duty for the same to the excise.

The Commissioners, being of opinion such licence would exempt him from the duties to the assessed taxes charged for the current year, relieved him from the assessment, but Mr. Malby, the Crown surveyor, contended that the assessments to the assessed tax duties for the current year being made upon articles kept or used between 5th April 1860 and 5th April 1861, the fact of the licence being taken out in April 1861 would not entitle the party to exemption from the duties chargeable under the Assessed Tax Acts until the year commencing 5th April 1862; he therefore demanded a case for the opinion of Her Majesty's judges, which we hereby sign and allow accordingly.

Witness our hands this 37th day of Dec. 1861.

WM. FLAMANK, } Commissioners of  
WM. CREED, } Assessed Taxes.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

## Re BAYLEY.

*Claims of exemption—16 & 17 Vict. c. 90—Farmer's carriage built like a dog-cart.*

*Farmer claimed exemption for a two-wheeled carriage used solely in his business, never for pleasure; the carriage was constructed like a dogcart, to carry four persons back to back. The Commissioners confirmed:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes acting for the district of Holworthy, Devon, held at the White Hart Hotel, Holworthy, on the 21st Aug. 1861, for the purpose of hearing appeals against the first assessments for the year ending 5th April 1862:

Mr. Daniel Bayley, of the parish of Clawton, Devon, farmer, appealed against a charge of 15s. for a two-wheel carriage under schedule D.

The app., on being sworn, stated that he kept the carriage, a dogcart, entirely for agricultural purposes, and it was only used in his trade as a farmer; it had never been used for pleasure; it was constructed to carry four persons, who sat back to back in it; it has a dashboard and three springs, steps on each side in front, but none at the back. When more than two persons ride in it the back is let down as a footboard, and the harness is used with horse drawing it.

The surveyor contended it was a dogcart, and did not come within the exemption.

The Commissioners, concurring with the surveyor, confirmed the charge.

The app. thereupon demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.  
WALTER WM. MELHUIS, }  
WILLIAM EDGECOMBE, } present.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

## Re GRIFFITHS.

*Claims of exemption—16 & 17 Vict. c. 90—Light cart on springs—Used to markets and fairs.*

*Similar claim for a light cart on springs, marked with the name, &c., used by app. or his wife and family to fairs and markets, usually taking with them their farm produce. The commissioners confirmed:*

*Commissioners wrong.*

At a meeting of land and assessed tax commissioners, held at the Church House Inn, Forden, on Saturday the 24th August 1861, for the purpose of hearing appeals against the first assessments for the hundred of Gourse Lower:—

Mr. John Griffiths, farmer and pig dealer, of Forden, appealed against a charge made on him for a two-wheeled carriage, 15s.

On examination it appeared that the vehicle in question (which was produced to the commissioners) is a light cart on springs of the construction generally used by farmers and small trades in the country, being adapted as well for the con-

veyance of the person as for the carriage of light loads when necessary.

It is marked on the side with Mr. Griffiths' name and place of abode, and is furnished with a moveable seat and a step. The use to which it is put is to convey the app. or his wife and family to and from fairs and markets, and on these occasions they usually take with them some of the farm produce (such as poultry, butter and eggs), and bring back groceries or goods for family use. It did not appear that the cart is used for purposes of pleasure.

The surveyor of taxes contended that the vehicle in question is not "a waggon, van, cart, or other such carriage" within the meaning of the exemption; that such exemption is limited to vehicles of heavy construction, such as are expressly intended for and wholly confined to the carriage of loads or burdens in the ordinary course of trade or affairs of husbandry; and that, as the cart is evidently constructed for the conveyance of the person and is principally used for that purpose, the assessment ought to be confirmed. In support of this view he submitted to the commissioners the case No. 2550, decided by the judges.

The majority of the commissioners present being of opinion that the carriage in question does not come within the meaning of the exemption, and that both in its construction and the use to which it is put it is like the one referred to in case 2550, confirmed the assessment. The app., being dissatisfied, demanded a case for the opinion of Her Majesty's judges, which we the commissioners present have stated and signed accordingly.

Mr. Harrison dissented from the decision come to by the majority of the commissioners, and urged that if vehicles of a heavy construction are the only ones not liable the latter part of the exemption 5, schedule D, of 16 & 17 Vict. c. 90, viz., "except for conveying the owner thereof or his family to or from any place of divine worship," would not have been put in the Act of Parliament, as it could never be supposed that vehicles of a heavy construction would be used to convey the owner or his family to a place of worship. Therefore, as Mr. Griffiths' cart was not used for any purpose of pleasure, it was exempt.

Given under our hands this 19th day of November 1861.

J. ROBINSON JONES, }  
R. S. HUMPHREYS, } Commissioners.

BYLES, J. and WILDE, B.—We are of opinion, that the determination of the commissioners is wrong.

## Re CORBETT.

*Servant—16 & 17 Vict. c. 90—Pony cart—Pony.*

*App. charged for a servant in respect of the man who looks after his carriage and pony which were used for pleasure as well as for business. The Commissioners relieved.*

*He also claimed exemption for a pony cart charged at 10s., stated to be used for business, but in which he admitted having on several occasions taken his children. The Commissioners relieved.*

*Charged also for a pony at 10s. 6d., used in a similar manner. The Commissioners reduced the charge to 5s. 3d.:*

*Commissioners wrong.*

At a meeting of commissioners of land and assessed taxes, holden at the office of their clerk, Edward Knocker, Esq., Castle Hill, Dover, on the 4th Sept. 1860, for the purpose of hearing appeals against first assessments:

Charles Corbett, on behalf of the firm of Corbett and Iggulden, farmer, boot and shoe and portmanteau dealers, &c., appealed against a charge for a servant 21s., a pony cart 10s. and pony 10s. 6d., on the ground that the pony and cart were used entirely in his business as a farmer, to wit, to convey the party to and from their farm at Capel. The cart is a small spring cart, and is suitable for pleasure purposes, although rather dingy and shabby in appearance.

The party admitted having on several occasions taken his children from Dover to and from the farm at Capel in the cart, and it was proved that he had also taken up a friend more than once.

The surveyor, Mr. J. H. Moore, contended that as the party resides at Dover, the market town, and uses the cart ordinarily as a means of conveyance to and from his farm at Capel, the exemption in favour of market carts does not apply, but that the cart must be considered as a private conveyance, and that the fact of the party having taken his children out occasionally, and also ridden in the cart in company with other persons, was sufficient of itself to establish his liability.

We, however, having doubts of the party's liability discharged the assessment on the servant and cart, and reduced the charge on the pony to 5s. 3d.; but the surveyor, being dissatisfied with our decision, requested a case to be drawn out

ASSESSED TAXES.] *Re DUTTON AND THOROGOOD—Re BUCKENHAM—Re CALVERT.* [ASSESSED TAXES.]

for the opinion of Her Majesty's judges, which we state and sign accordingly.

Given at Dover, in the county of Kent, this 19th day of March 1861.

G. C. POUND, }  
E. CRABT. } Commissioners.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

*Re DUTTON AND THOROGOOD.*

*Servant—Four-wheeled van—Horse.*

*Shoemakers charged for a servant in respect of the man who was employed to look after their horse and four-wheeled van, which carriage, although alleged to be used solely for the conveyance of goods in business, was, the surveyor contended, from its construction liable. The Commissioners confirmed:*

*Commissioners right.*

*Claimed exemption for a four-wheeled van, constructed and used for delivering goods in their trade, built on springs, with a covered body, with an open seat in front padded and cushioned, marked with the name and address and the words common stage cart, and never used for pleasure. The Commissioners discharged the assessment:*

*Commissioners right.*

*Horse charged at 1s. 1d., used in a four-wheeled van, solely for conveyance of goods in business. The Commissioners, considering that the carriage, from its construction, did not come within the exemption, confirmed the charge for the horse at 1l. 1s.:*

*Commissioners wrong.*

At a meeting of commissioners of land and assessed taxes, held at the Sessions-house, Newington Causeway, on the 8th Nov. 1860, to hear appeals against the assessments for the year 1860, ending 5th April 1861:

Messrs. Dutton and Thorogood, of Stones End, shoemakers, appealed against an assessment for a servant, 21s., charged under schedule C. of the Act 16 & 17 Vict. c. 90, for a four-wheeled carriage, 40s., charged under schedule D. of the same Act, and for a horse, 21s., charged under schedule E. of the same Act.

The app. stated that the carriage in question was constructed for the purpose of delivering goods in the course of their trade as shoemakers; that it was built on springs, with a covered body in which the goods were deposited; that it had an open seat in front, padded and cushioned, for the driver and another to accompany him, with a hood attached to be raised or lowered as the weather required; that the name of the firm and the place of abode was painted on the carriage; that it was never used for pleasure or personal convenience, nor otherwise than for trade purposes; that the turnpike toll demanded on this carriage is more than that for an ordinary carriage in consequence of its being classed as a van, and further that it was marked with words "common stage cart," in pursuance of the directions of the Board of Inland Revenue in 1863, numbered "11," under which the vehicle has been held to be exempt; and under these circumstances the app. claimed exemption, under the 5th case of exemption under schedule D. of the said Act, and that the assessment in respect of the driver should be discharged, and that on the horse reduced to 10s. 6d.

The Commissioners present discharged the assessment on the servant and carriage, and reduced that on the horse to 10s. 6d.; but the surveyor, being of opinion that the vehicle in question was neither waggon, van, nor cart, nor other such carriage as would come within the exemption No. 5, above referred to, but such as might at any moment be used as a private carriage, requested that the case might be submitted for the opinion of Her Majesty's judges, which we the commissioners have signed accordingly.

ROBERT ALEXANDER GRAY, }  
J. E. HOBSON, }  
RICHARD A. ROBERTS. } Commissioners.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

*Re BUCKENHAM.*

*Licensed hawker—16 & 17 Vict. c. 90.*

*Licensed hawker claimed exemption for a large square four-wheeled carriage van on springs, used solely in conveying his goods, constructed with a door to admit the goods, and a seat outside for the driver, marked with his name and address. The Commissioners relieved:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at the Swan Inn, at East Harding, on the 21st March 1861, for the purpose of hearing appeals against supplementary charges for the year 1860-61:

Mr. Thomas Buckenham, of North Lopham, a licensed hawker, appealed against a charge of 2l. for a four-wheeled van with springs under schedule D. 16 & 17 Vict. c. 90. App. stated that the van in question was solely and exclusively used by him in conveying his goods as a cloth and linen hawker, and that the construction was such (being a large heavy square covered van, with a small door to admit the goods into it and a little seat outside for the driver, and built expressly to convey his heavy cloth and linen goods about the country) that it was quite impossible to use it for pleasure or any other purpose whatever except in his business, and that his name and address are properly painted thereon; he therefore claimed to be relieved of the charge under the following exemption to schedule D., viz.—

"Any waggon, van, cart, or other such carriage kept truly and without fraud to be used solely in the course of trade or in the affairs of husbandry, and whereon the Christian name and surname and place of abode of the owner shall be legibly painted; provided that such carriage shall not on any occasion be used for any purpose of pleasure or otherwise than as aforesaid, except for conveying the owner thereof or his family to or from any place of divine worship."

The Commissioners were of opinion that the charge must be dismissed; but before deciding the case they directed their clerk to apply to the Board of Inland Revenue on the subject, who in reply was referred by the Board to cases Nos. 2582 and 2584 as bearing on the subject; but such is not the fact; as in the first case the surveyor grounds his claim entirely on the construction of the carriage therein referred to, which is light and smart and capable of conveying persons as well as goods; whilst the van now in question is a heavy covered carriage, and utterly unfit to convey any person except where the driver sits; and in the second case referred to the surveyor also there makes his claim on the ground of the conveyance of heavy goods, but to carry needles and pins, and is undoubtedly of the same construction as in the last case; this case also therefore does not apply to the present appeal as the van in question is entirely used for the conveyance of very heavy goods. Under these circumstances, and looking at the exemption to schedule D. before named, the Commissioners relieved the appellant; whereupon the surveyor, Mr. H. F. Yeates, expressed himself dissatisfied, and after referring to cases 1326, 2285, and 2356, he requested a case for the opinion of Her Majesty's Judges, which we the Commissioners, who heard the case, hereby state and sign accordingly.

C. H. BROWN, }  
A. COCKELL, }  
T. B. WILKINSON, } Commissioners of  
Assessed Taxes.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

*Re CALVERT.*

*Four-wheeled carriage.*

*App. claimed exemption for a four-wheeled carriage, constructed and used for delivering millinery, built on springs, with a covered body, with an open seat in front, marked with the name and address, and never used for pleasure. The Commissioners confirmed the assessment:*

*Commissioners wrong.*

Thomas Calvert, 12, Edward-street, Hoxton, appealed against the duty on a four-wheeled carriage drawn by one horse for the purpose of conveying and delivering goods (millinery) in his trade. The carriage is on springs, with a covered body in which the goods are deposited, with a seat in front for the driver, and is accompanied by his servant boy; the name and address is in fine spider lines on the side thereof; never used for pleasure.

App. contends such carriages used for trade are exempt. The Commissioners confirmed the charge, on the principle

## [ASSESSED TAXES.]

## Re WILLS—Re TURNER—Re KENT.

## [ASSESSED TAXES.]

of case 2584; whereupon the app. demanded a case, which we sign accordingly.

Dated this 2nd day of October 1861.

GEORGE OFFOR.  
J. J. FOWNER.  
THOS. WINKFIELD.  
JEREMIAH LANE.  
JAMES GIBKELL.

BYLES, J. and WYLDE, B.—We are of opinion that the determination of the commissioners is wrong.

## Re WILLS.

*Butcher, who farmed land, charged to the duty of 1l. 1s. for his riding-horse—16 & 17 Vict. c. 90.*

*App., who was a butcher, claimed to have the assessment on him for a riding horse at 1l. 1s. reduced to 10s. 6d., on account of his occupying land which he farmed. The surveyor contended that as the party did not get his livelihood principally by farming, he was chargeable to the higher duty. The Commissioners reduced the assessment to 10s. 6d.:*

*Commissioners wrong.*

At a meeting of the commissioners of land and assessed taxes acting for the division of Haytor, Devon, held at the Globe Hotel, Newton Abbot, on the 29th Aug. 1861, for the purpose of hearing appeals against the first assessments made for the year 1861, ending 5th April 1862:

Francis Thomas Wills, of the parish of St. Nicholas, butcher appealed against an assessment of 1l. 1s. made upon him for the year above mentioned under schedule E., in respect of a horse used for riding, &c., and claimed to have the said assessment reduced to the duty of 10s. 6d., stating that he occupied land and should be rated as a farmer.

The surveyor for the Crown opposed the claim on the ground that the party did not obtain his livelihood principally by farming, he having for several years past made a return of 100l. a-year as the profits of his trade of a butcher, upon which amount he has been assessed to the income tax and paid the duty, but the whole of the land occupied by him did not amount to more than 100l. per annum rent, one-half of which amount, namely 50l. only, would be considered by law to be his profit from the farm.

The Commissioners, having some doubt on the matter, gave the app. the benefit of the same, and relieved him to the duty of 10s. 6d.; upon which Mr. Maltby, the Crown surveyor, demanded a case for the opinion of Her Majesty's judges, which we hereby sign and allow.

Witness our hands this 27th day of Dec. 1861.

WM. FLAMNK, } Commissioners of  
WM. CREED, } Assessed Taxes.

BYLES, J. and WYLDE, B.—We are of opinion that the determination of the commissioners is wrong.

## Re TURNER.

*Farmer and lime-burner charged for three of his husbandry horses—16 & 17 Vict. c. 90.*

*Farmer, who was also a lime-burner, claimed exemption from an assessment on him for three husbandry horses (schedule F.) 10s. 6d., which he lets for hire to men in his employ, for drawing limestones to the lime-kilns. The surveyor contended that as the letting was not occasional and the horses were used in a distinct trade, the exemption claimed should not be allowed. The Commissioners relieved:*

*Commissioners wrong, app. being chargeable for two horses.*

At a meeting of the commissioners of assessed taxes acting in and for the division of Shebbear North, Devon, held at their Clerk's office, in Bideford, within the said division and county, on the 9th July 1861:

William Turner, of Bideford, appealed against an additional assessment made upon him for three horses, schedule F., at 10s. 6d. each, for the year 1860-61:

App., on being sworn, stated that he was a farmer and lime-burner, and had fifteen or sixteen horses, four of which were occasionally used at the limekilns, and that if they did nothing else two would be sufficient; that he never used more than four, but had three horses at the present time working at the limekilns; it being only in the busy season of the year that he worked four, and when not so employed they were worked on his farm, the busy season not continuing six months.

App. considered himself exempt from assessment for the horses in question, inasmuch as he let them to hire to men in his employ for the purpose of drawing the limestones from

the beach to the limekilns, all his limeburning work having been done by contract or piece work with those men, with whom he had no written contract; that if during the time the men were using the horses for drawing the limestones he had required them for farming purposes and had taken them away from the men without their permission the contract would have been broken; that the men neither kept nor fed the horses. App. therefore relied on the latter part of the 8th exemption clause of the Act of Parliament, 16 & 17 Vict. c. 90, Schedules E. and F., which states that "such horses or mules, although occasionally used by such person or let by him for the purpose of drawing for hire or profit," are exempt from assessment.

The surveyor (Mr. Colquhoun), in support of the assessment, referred the commissioners to cases decided by the judges, Nos. 597, 774, 1063, 1086, 1087, and 1094, wherein horses used in trade by a farmer are clearly defined, and contended that the app. was the owner of the horses and that they were used in his trade; in proof of which the surveyor produced to the commissioners a debtor and creditor account given in by the app. when he appealed against an assessment under schedule D. of the Income Tax Act, wherein he deducted for the keep of four horses, which must be taken as conclusive evidence of his having been the owner thereof, and of their having been used in his trade as a limeburner.

That the app., having stated he let the horses to hire to his workmen was only for the purpose of evading the additional assessment, and that it was not such an occasional letting to hire as is contemplated by the Act of Parliament referred to, and moreover, that the exemption claimed was inapplicable to horses used in a distinct trade, but merely to farm horses occasionally used for drawing burdens, such as fuel, &c., or occasionally let to a gentleman or neighbour for a similar purpose, and also that horses used in a distinct trade are liable to be assessed at a duty of 10s. 6d. each, otherwise it would scarcely be necessary to retain schedule (F.) in the list of schedules, as those are the principal horses to be charged under it.

The Commissioners, however, relieved the app. on the ground of his having let the horses to hire to his workmen; with which decision the surveyor expressed himself dissatisfied, and requested a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

Witness our hands this 27th day of Aug. 1861.

JOHN PYKE,  
J. SALTERN WILLKITT, } Commissioners.  
E. W. VIDAL,

H. F. W. Hatherly,  
Clerk to Commissioners.

BYLES, J. and WYLDE, B.—We are of opinion that the determination of the commissioners is wrong, the app. being chargeable for two horses.

## Re KENT.

*Innkeeper selling horses for other persons but not on his own account—52 Geo. 3, c. 93.*

*Innkeeper, who was also a horse breaker, charged to the horse dealer's duty. He denied having bought or sold for himself although he admitted selling horses at fairs and elsewhere, but for persons only who employ him to break, from whom he receives remuneration for his time and expense, but no commission or profit. The Commissioners confirmed:*

*Commissioners wrong.*

At a meeting of the commissioners of land and assessed taxes, holden at the Sessions House in Wisbech, on Wednesday 12th Sept. 1860, for the purpose of hearing appeals against the first assessment for the year ending Lady-day 1861 for the parish of Wisbech St. Peter:

Thomas Kent, of Wisbech St. Peter, innkeeper and horse-breaker, appealed against a charge of 13l. 14s., made upon him for horse dealers duty.

The app. stated, on oath, that he has neither bought nor sold a horse for himself, or on his own account, since Lady-day 1859. Between Lady-day 1859 and Lady-day 1860 he has ridden and sold, at fairs and elsewhere, five horses. Sold two horses last Wincoult Fair, one for Mr. Holah and one for Mr. Hart. Generally charges 6s. per day for his time, or the actual expenses incurred. Does not get any commission or profit by the sale of horses, merely does it for those who employ him to break their horses. Considers himself a horse shaver. Received from Mr. Holah about 8s. for his own and the horse's expenses; about 2s. of this about 6s. for his time. Has never sold horses or shown them except for those who employ him to break for them. Has broken horses for Mr. Holah. Received from Mr. Hart nothing for himself; Mr. Hart was at the fair himself. Paid the horse's expenses and he repaid me. Mr. Hart in reality sold the horse himself and took the money, I only rode it.

The Surveyor referred to case No. 2714 in support of the assessment, and the majority of the commissioners present, feeling bound by the decision in the case referred to,

[ASSESSED TAXES.] *Re HARRISON—Re MATTHEWS—Re PHILLIPS—Re GRIFFITHS.* [ASSESSED TAXES.]

confirmed the charge. The appellant, being dissatisfied with their decision, demanded a case for the opinion of Her Majesty's Judges, which we, the majority of the commissioners by whom the appeal was heard, hereby state and sign accordingly.

JOHN BROWN, Chairman.  
THOS. P. HOLMES.  
HUGH WOOLL.  
JOHN TAYLOR.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

*Re HARRISON.**Similar.*

At a meeting of commissioners of assessed taxes acting for the Division of Wigan, held at the Town Hall, Wigan, on the 12th Sept. 1861, for the purpose of hearing appeals against the first assessments 1861-2:—

Mr. James Harrison, innkeeper, residing at Wigan, appealed against a charge of 13*l.* 1*s.*, under schedule H. of 62 Geo. 3, c. 94, for horse dealers duty; and stated upon oath, that he bought a stallion which he took about the country for a time and then sold him, about August 1860. He then bought another horse to work with one he was breaking in, which horse he sold in Nov. 1860; a third horse he stated was left with him which was sick, and he was to sell it when cured; he made attempts to do so but could not, and then returned it to the owner in Dec. 1860. App. bought a pony and used it himself for a while and then sold it; his wife transacted the sale as he was ill in bed at the time; the party who bought it left it at app's stables two months, and then wished to dispose of it again, and app. being now recovered drove the pony to Chorley, and sold it to a Mr. Cross, and handed the money to the owner without receiving anything for his trouble; he further stated that he accompanied Messrs. H. and W. Liptrot into Oxfordshire, to advise them on the purchase of a stallion, which they bought on his recommendation, and that he only received for his services payment for his time and his travelling expenses; finally, in reply to a question put by the surveyor, he admitted that he had attended Warrington, Wigan, and Chester horse and cattle fairs. The commissioners being of opinion that the purchase and sale of horses for other people, and the attendance at fairs, rendered him liable to the charge, which they thereupon confirmed. The app., being dissatisfied with their decision, requested a case for the opinion of Her Majesty's Judges, which we hereby state and sign accordingly.

WM. LAMB, }  
THOS. COOK, } Commissioners.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

*Re MATTHEWS.**Veterinary surgeon buying and exchanging horses.*

*Veterinary surgeon who had bought and exchanged horses with a view to profit, charged as a horse dealer. The Commissioners confirmed:*

*Commissioners right.*

At a meeting of the commissioners of land and assessed taxes, held at the Tree Inn, Stratton, on Tuesday 29th Jan. 1861, for the purpose of hearing appeals against additional assessments:—

Robert Matthews, of Kilkhampton in the said division, appealed against a charge of 13*l.* 1*s.*, made on him as a dealer in horses, for the year 1859, ending 5th April 1860.

The app. on his oath, stated that he was a veterinary surgeon, and farmed about two acres of land. That he did not buy four horses between April 1859 and April 1860; could not say he did not buy three during that time, but thought the only horse he bought within the year of charge was of Mr. Stapleton; that he gave 1*l.* for it; that he kept it two months and finding it too big, he exchanged it, and got a few shillings in exchange; that he would not say he did not exchange six horses between April 1859 and April 1860, he did not think it was more than six, certainly not more than eight; thought there was no harm in doing it; that he had a large family, and was glad to get a little; that he parted with several because they fell with and threw him; that he was not aware that he bought a horse for any other person during the year; that he did not buy either of the horses with a view to sell again; that he required only one horse for the purpose of his business; that at one time he had two horses, but one of them was lame.

The appellant contended that as his evidence only admitted one case of sale, the other transactions having been by way of exchange, he was not liable to the duty.

The surveyor referred to case 1641, and contended that the facts, as admitted by the app., showed a sufficient dealing to

render him liable to duty, and that an exchange really constituted a buying and selling.

The commissioners, considering the app. liable to duty, confirmed the charge. The app. being dissatisfied with the determination, requested a case for the opinion of Her Majesty's Judges, which we submit accordingly.

OLEMONT B. KINGSTON, }  
CECIL N. BRAY, } Commissioners.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

*Re PHILLIPS.*

*Crest on plate not that of the owner—16 s. 17 Vict. c. 90.*

*Auctioneer charged for armorial bearings, who admitted having kept and used certain articles of plate, purchased by him at sales on which was a crest. He contended that he was not liable as it was not his crest. The Commissioners relieved.*

*Commissioners wrong.*

At a meeting of commissioners of assessed taxes, held at Haverfordwest on the 3rd Sept. 1860, Mr. Henry Phillips, of St. Thomas, Haverfordwest, appealed against the charge of 13*s.* 2*d.* for armorial bearings, year 1860-61.

The app. stated that he was an auctioneer, and from April 1859-60 he had kept and used certain articles of plate which bore the crest of another person, the articles having been purchased by him at different sales. The app. contended that he was not liable, on the ground that the crest was not his own. The commissioners coincided in that opinion, and discharged the assessment; whereupon the surveyor, Robert Wyatt, requested a case for the opinion of the judges, which is hereby stated and signed accordingly.

Dated this 10th day of Dec. 1860.

W. BINLER, }  
JAMES THOMAS, } Commissioners.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

*Re GRIFFITHS.**Cattle dealer buying and selling colts.*

*Cattle dealer charged as a horse dealer. He admitted that it was his practice to buy unbroken colts, which he grazed and improved on his farm, and to sell them generally after keeping them for twelve months, but sometimes sooner. The Commissioners relieved.*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes, held at Eglwysrhwr, on the 21st Jan. 1861:—

John Griffiths, of Forest, in the parish of Kilgerran, appealed against a supplementary charge of 13*l.* 1*s.*, for horse dealers' duty for the year 1860, ending 5th April 1861, made upon him by Mr. Robert Wyatt, the surveyor of taxes for the said district.

The appellant made the following statement upon oath:—

"I live at Kilgerran, in the county of Pembroke, and buy and sell cattle, and did so between April 1859-60. I employ no person to buy cattle for me or on my account, but I employ from two to ten men to assist me in taking the cattle so purchased from fair to fair, and to find keep for them. When the men have a large number of beasts to drive I allow or permit them to ride one of my horses, and sometimes two; the horses are sometimes the property of the men themselves. Between April 1858-9 and 1859-60 I purchased each year about a dozen horses, including unbroken colts; the colts were purchased for the purpose of being grazed on my own farm, and to improve them they were kept about twelve months and then taken to England for sale. Six of the colts were taken to Barnet Fair in Sept. 1859, and were offered for sale, but I could not dispose of them. In the following December these colts were removed from Barnet to Relgate Fair, but the night previous to the fair four of them were stolen; the other two were offered for sale, and one of them was sold, and the remaining one was taken to Brighton for sale, and is now unsold.

"It is my practice yearly to buy young colts about two or three years old, graze them for twelve months, and then sell them unbroken. The horses are sometimes used by the drivers before they are resold, but are generally sold by me at the end of the year, when the fairs are over; but sometimes, when a long way from home, I sell them before the end of the year and buy others within the year when again required. I am duly assessed for my profits as a cattle dealer, and do

V.C. K.]

Re **TITUS THEWLIS—FELKIN v. HERBERT.**

[V.C. K.]

not consider that buying and selling the horses and colts as before mentioned renders me liable to the horse dealers' duty."

The commissioners who heard the case were of opinion that the app. was exempt, and decided accordingly; with which determination the surveyor was dissatisfied, and requested us to state the case for the opinion of Her Majesty's Judges. The surveyor contended that the buying and selling as before mentioned was sufficient to constitute a horse dealer, and referred to cases 1878 and 2418.

Dated this 28th day of Jan. 1861.

W. MATTHIAS, } Commissioners.  
L. L. THOMAS, }

**BYLES, J. and WILDE, B.**—We are of opinion that the determination of the commissioners is wrong.

#### Re **TITUS THEWLIS.**

*Annual value of house*—14 & 15 Vict. c. 36—43 Geo. 3, c. 161, s. 10.

*App. charged to the inhabited house duty at 40L. He contended that he was only liable to be assessed upon 28L, which was the amount of his rent as a tenant from year to year. The surveyor maintained that as the annual value of the house in the poor's rate book was 32L, the assessment should be made upon that sum. The Commissioners reduced the assessment from 40L to 32L.*

*Commissioners wrong. The assessment should be reduced to 28L.*

At a meeting of the Commissioners of Assessed Taxes held at the Zealand Hotel, in Huddersfield aforesaid, on Thursday, the 6th of Sept. 1860, for the purpose of hearing appeals against the 1st assessment for the year 1860, ending April 1861:—

**Titus Thewlis**, of Upperhead-row, in Huddersfield aforesaid, appealed against an assessment of 40L made upon him to the inhabited house duty for the year 1860-61, in respect of a house occupied by him in Upperhead-row aforesaid.

From the app.'s statement the Commissioners elicit the following facts:—

The house stands in the poor's rate book for the township of Huddersfield aforesaid as follows:—

	Gross Estimated Rental.	Rateable Value.
<b>Titus Thewlis</b> .....	32L	24L
And the amount of rackrent paid is 26s. per annum, without any deduction.		

The app. contended that he was only liable to be assessed upon 28L, as he was only tenant from year to year.

The surveyor for the Crown contended that as the rateable value in the poor's rate book was only made upon three-fourths of the value, the assessment should be made upon 32L, the annual value in the poor's rate book.

The Commissioners, upon hearing both statements, reduced the assessment from 40L to 32L; but the app., being dissatisfied, demanded a case for the opinion of Her Majesty's Judges, which we have accordingly set forth.

GEO. ARMITAGE,  
WILLIAM WILLIAMS

**WILDE, B. and BYLES, J.**—We are of opinion that the determination of the commissioners is wrong.—  
*The assessment should be reduced to 28L.*

#### **V. C. KINDERSLEY'S COURT.**

Reported by **JOSHUA METCALFE** and **G. T. EDWARDS, Esqrs.**, Barristers-at-Law.

Feb. 10 and 25, 1864.

#### **FELKIN v. HERBERT.**

*Public Health Act, 11 & 12 Vict. c. 63—Easement—Right of drainage.*

*A local board of health instituted a suit against the owner of a certain ditch for filling up the ditch, thereby obstructing an ancient easement which the pte. possessed in the flow of water through the ditch, and interfering with their right to the free use thereof for sanitary purposes:*

*The ptes. claimed the easement with regard to the drainage of the whole district, whereas it appeared that from the nature of the locality the ditch in question could carry off only the surface water which collected on an undulating space of ground 114 yards in length.*

*Bill dismissed with costs, principally on the ground that the proper remedy for a Board of Health to resort to in such a case was under the provisions of the Public Health Act 11 & 12 Vict. c. 63.*

*Where a party claims an easement, and proves only a part of his claim, the easement proved constitutes a different easement from the one claimed, and the claimant cannot obtain relief.*

This cause now came on upon motion for decree. On the 1st April 1861, a motion for an injunction had been made by the plt. as the officer of the Local Board of Health for the district of Sheerness, to restrain the deft. the Right Hon. Sidney Herbert, the then Secretary for War, and Richard Berridge, and Henry Bateman Jenkins, their agents and workmen, from stopping up a certain ditch abutting on High-street Miletown, Sheerness, they being part owners of the soil, by filling it with earth and soil, and thereby interfering with the right of the ptes. to the free use of the ditch for sanitary purposes. The V. C. refused the motion on that occasion, on the ground that both parties must have the public interest at heart, and he considered that there was no such invasion of those interests, nor was there sufficient injury to call for the interference of the court. During the period which had since elapsed Mr. Sidney Herbert, afterwards Lord Herbert, and Sir George Cornwall Lewis, his successor, who was made deft. to the bill, had both died, and the present deft. was Earl De Grey and Ripon, as Secretary for War. The ditch, which in consequence of these proceedings has obtained the *soubriquet* of "Chancery-ditch," is in the immediate neighbourhood of the High-street, Miletown, and is upwards of half a mile in length.

Various steps have from time to time been taken in the suit (see 8 L. T. Rep. N. S. 788; sub nom. *Felkin v. Lewis*; also 9 L. T. Rep. N. S. 685). The bill was amended in May last, and the cause now came on upon motion for decree. The defts. by their answer maintained that there never was any intention on their part to do what was imputed to them; that the plt. well knew the same, and that the expense of the suit, which was very great, had been wilfully caused.

The ptes. on the other hand, insisted that they had possessed a right for upwards of thirty-years, previously to 1858, the period when the acts complained of commenced, to an easement, consisting of a drain from a pair of cesspools situate immediately opposite the ditch. In the course of the argument reference was made to the powers of the Local Board of Health under their Acts of Parliament. A correspondence had taken place between the plt. as officer of the board, and Colonel Montagu, an official at the War Office, and under the direction of the latter, the ditch was being filled up when the suit began. Colonel Montagu in one of the letters disclaimed any intention of doing what was imputed to him, and upon notice given the works were stopped. The case resolved itself into three questions—first, whether the plt. had a right to institute the suit; secondly, whether there was any case for an injunction at the time the bill was filed; and thirdly, whether there was now a case for a mandatory injunction.

The hearing of the cause occupied the court twelve days.

*Baily, Q. C. and Hallett, for the ptes.*

*Glaspe, Q. C. and E. F. Smith, for Messrs Berridge and Jenkins.*

*The Attorney-General (Sir R. Palmer) and Wickens for the Crown.*

*Baily, Q. C. in reply.*

The VICE-CHANCELLOR referred to the position of the parties, to the relief that was asked, and to the powers conferred by the Public Health Act (11 & 12 Vict. c. 63), by which, he observed, the local board had means given them to exercise their powers without the necessity of coming to a court of equity. He then described minutely the position of the district and the mode of drainage, and the locality of the ditch in question. He observed, that the whole neighbourhood was remarkably flat, and the High-street in particular had many almost imperceptible undulations, and it was in one of these undulations, which extended about 114 yards, that the ditch in question and three pairs of cesspools were situated, so that, as to surface water, nothing but the rainfall in that particular space could be carried into the ditch. Those cesspools had been subsequently converted, and a drainpipe made into the ditch; and it clearly appeared from the evidence that that portion of the surface water which collected upon the 114 yards of the High-street passed into the ditch. What right had the local board, to come to this court? Upon looking at the bill it appeared that they claimed an easement as to all Miletown, Sheerness, with the streets, &c., particularly the High-street; whereas it was clear that, with respect to this ditch, the only easement they really possessed was as to the 114 yards in question. This was quite irrespective of the Public Health Act; whatever powers they had under that Act formed no part of their present contention. It was a rule of law that, where a party claimed an easement, either as to ancient lights, water, &c., if he claimed one easement, and only proved a part, that part constituted a different easement, upon which he could have relief. So, as to right of pasturage, where a right to feed cattle generally was claimed, and a right to feed sheep only was proved, that was not sufficient. If in this case a pipe was laid down to include a larger area than the 114 yards, it was a simple usurpation, and brought the case within the principle of *Renshaw v. Beaumont*, 11 Q. B. 124, where it was settled that the owner of a servient tenement had a right, if the owner of the dominant tenement sought to extend by usurpation the easement which he already possessed, to obstruct his ancient easement, if necessary to do so in order to obstruct the usurpation. The most common cases on this question were those which related to easements of light. The present was not the case of a right to water below a certain point, for, although the local board had a right to drink or boil away their water, they had not a right *quoad* the easement to carry away any filth through the ditch to another place. There was nothing to prevent the local board from calling upon the defendants under the powers of their Act to remove any filth, &c.; but they did not choose to do that, but rested their case solely on the question of easement. The evidence showed that in the heaviest rain no obstruction had ever taken place by means of the grip; but it was said that there would be an obstruction owing to the steepness of the banks of the ditch, and the nature of the soil; that, however, was not proved on the balance of evidence. Then came the question as to what was asked about restoring matters to their original state by mandatory injunction. It appeared to him that the plaintiff's own witnesses proved that the former condition of things was far worse than the present. That appeared to be so with regard to the public health. It was remarkable that the plaintiff did not insist on the restoration, but on the laying down of pipes, and this had been over and over again offered to be done, and the pipes which the local board had in store were referred to for that purpose. It was a matter of the strongest consideration with him that the new system of drainage

had been carried to a point within twenty yards of the ditch, and could be adopted immediately as the cheapest and simplest plan. The public interest appeared to be sacrificed for a so-called right, and because the ire of the local board had been raised. It was to be regretted that the suit had been instituted, and, more particularly so, as the works were discontinued the instant the notice had been given. Colonel Montagu's letter was also disregarded, and on all these grounds the bill must be dismissed with costs, including the costs of the motion.

Solicitor for the plt., *Nichols and Clark*; for the defts., *Messrs. Berridge and Jenkins, Willoughby, Cox, and Lord*; for the Crown, *Solicitors for the Treasury*.

### EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

#### ERROR FROM THE COURT OF QUEEN'S BENCH.

Wednesday, May 11, 1864.

(Before ERLE, C.J., WILLES, J., BRAMWELL and CHANNELL, B.B., KEATING, J. and PIGOTT, B.)

REG. on the prosecution of the VESTRY OF ST. MARYLEBONE v. THE BOARD OF WORKS FOR THE STRAND DISTRICT.

*Parish—Boundary—Metropolitan Local Management Act—Contribution order.*

*The parish A. was created by a statute of Charles II. out of parish B., and the boundary of A. was described as the houses abutting on a street, the houses on the other side of the street being in the third parish M. The parish of M. had always treated the middle of the street as the exact boundary line of their parish:*

*Held (affirming the judgment of the Q. B.), that the boundary of parish A. extended ad medium filum via.*

*A street in more than one parish was placed by an order of the Metropolitan Board of Works under the exclusive management of one vestry (18 & 19 Vict. c. 120, s. 140). That vestry by sect. 160 made orders on the other parish for contributions towards the repairs of the street:*

*Held (affirming the judgment of the Q. B.), that though certain items might be improperly charged, yet if any part of the sum claimed was due, a mandamus might issue.*

Error alleged by the defts. upon a judgment of the Court of Q. B. in favour of the prosecutors on a special case stated for the opinion of that Court.

The report of the case in the Q. B. will be found in 9 L. T. Rep. N. S. 374.

A mandamus was issued commanding the board of works for the Strand district to pay to the vestry of St. Marylebone certain moneys required for defraying the expenses of the Metropolitan Local Management Act (18 & 19 Vict. c. 120) in pursuance of two orders made in that behalf by the vestry of St. Marylebone in respect of "that part of the parish of St. Anne, Soho" (now in the Strand district board of works) "placed under the management of the vestry of St. Marylebone by an order of the Metropolitan Board of Works made the 6th March 1857."

Issues raised on the return to the *mandamus* came on to be tried before Cockburn, C. J. in *Mid-December* after Michaelmas Term 1860, and a verdict was returned for the prosecutors, subject to leave reserved to the defts. to move to enter a verdict for them. Subsequently, by consent, this special case was stated for the opinion of the Court of Q. B.



EX. CH.] VESTRY OF ST. MARYLEBONE v. BOARD OF WORKS FOR THE STRAND DISTRICT. [EX. CH.]

*Bovill, Q. C. (Macnamara with him).*—The leading facts in the case are these:—The two orders in question were made by the Marylebone Vestry, on the 14th Aug. 1858, and the 18th June 1860, pursuant to sect. 160 of the Metropolis Local Management Act, which came into operation on the 1st Jan. 1856. On the 6th March 1857, the whole of Oxford-street was placed under the exclusive management of the vestry of St. Marylebone, under the powers of sect. 140 of that Act. The first order includes expenses incurred before the 6th March. Each order charges the Strand district with a sum bearing the same ratio to the whole sum expended in maintaining the southern half of the whole of Oxford-street, that the length alleged to be within St. Anne's, Soho, bears to the whole length of Oxford-street. The parish of St. Anne's, Soho, was formed out of St. Martin's parish, by the 30 Car. 2, which enacted that, "all that precinct included within the bounds hereinafter expressed," should form the new parish, "with all the east side of Soho-street, to the sign of the Red Cow, being the corner house at the north end of the said Soho-street, abutting upon the King's highway or great road, with all the houses and grounds abutting on and upon the said road leading from the said sign of the Red Cow to the aforesaid house known by the sign of the Crooked Billett." The "King's highway or great road" is now called Oxford-street, and Soho-street is now Wardour-street, and the Red Cow is now a woollen warehouse, 382, Oxford-street, at the north-east corner of Wardour-street, the Crooked Billett is now 440, Oxford-street, at the corner of Crown-street. By the 2 Will. & M. c. 8, for paving and cleansing the streets of London and Westminster, all streets were to be repaired and paved "at the cost of householders, inhabitants in any such streets, by each householder repairing and paving the street before his own house unto the middle of such street." By the 10 Geo. 3, c. 23, s. 10, it was enacted (*inter alia*) that that part of Oxford-street within the parish of St. Anne's, was to be taken as part of the parish of St. Marylebone, to be put under the control of certain commissioners, with reference to paving, lighting and cleansing. From the year 1771 to the year 1855 rates were made by the parish of St. Marylebone, under the statutes, upon the occupiers of the houses on the south side of the part of Oxford-street in question, towards the paving of the street. For the last thirty years the parishioners of St. Marylebone had perambulated the boundaries of their parish to the middle of the road in Oxford-street; whilst, on the other hand, the parishioners of St. Anne, Soho, had perambulated the boundaries of their parish only to the pavement of the south side. First, on the true construction of the statutes and facts set out in the case, the boundary of the parish of St. Anne, Soho, is the line of houses on the south side of Oxford-street, and it does not extend *ad medium filum vie*, and therefore the parish of St. Anne, Soho, is not liable for these expenses. The rule that, where a close of land abuts on a highway, the presumption is that half of the highway passes with the conveyance of the close (*Berridge v. Ward*, 10 C. B. N. S. 400), does not apply. This is the case of a parish created by an Act of Parliament, with a defined boundary, and there ought to be no presumption that the boundary extends further than as defined. Secondly, the orders in question are bad for including expenses incurred before the 6th March, when the part of Oxford-street in question was put under the management of the Marylebone vestry; and also because the sums charged are not for the work actually done on the part of Oxford-street in question, but for an aliquot part of the expense of repairing the whole of the south side of Oxford-

street, proportioned to the length of the part supposed to be in St. Anne, Soho. There is no power to charge for retrospective expenses; and the actual expense only of the part repaired belonging to St. Anne's is what St. Anne's is liable to. The only mode of obtaining redress was to question the validity of these orders by refusing to pay them. The auditors appointed under the 18 & 19 Vict. c. 120, could not entertain the question of their validity:

*St. Botolph Aldgate v. Whitechapel District Board of Works*, 29 L. J. 228, M. C.; 2 L. T. Rep. N. S. 504;  
*The King v. The Mayor of Gloucester*, 5 T. R. 346.

*D. D. Keane, Q. C. (Petersdorff, Serjt., with him).*, for prosecutors, was stopped by the court.

*ERLE, C.J.*—I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. This is a *mandamus*, obtained by the parish of St. Marylebone, commanding the Strand Union District Board of Works to contribute two sums of money, to defray certain expenses incurred by the parish of Marylebone, in executing the Act for the Better Management of the Metropolis (18 & 19 Vict. c. 120). The return of the Strand Union Board raises the important question, whether the parish of St. Anne, Soho, comprises the part of Oxford-street abutting upon houses which are clearly within the parish of St. Anne, Soho. According to the strict meaning of the words of the Act, 30 Car. 2, "houses and grounds abutting on the said roads," taken alone, the boundary would include the houses and exclude the street. But the case sets out a great quantity of evidence tending to the conclusion that it was the intention of the Legislature to include part of Oxford-street, as well as the houses abutting on the road, and we therefore come to the conclusion, that the part of Oxford-street in question was included in the parish of St. Anne, Soho. In a conveyance of a close, the expression "abutting on a highway," commonly carries with it the right to the soil *ad medium filum vie*, and there is nothing we think to prevent that rule of construction being applied in the present case. The jury and the court below have come to the conclusion, and we think it a proper one, that the part of Oxford-street in question is in the parish of St. Anne, Soho. That is the substantial question raised by the first issue on the return. The second issue in substance is, that the sums ordered to be paid were for the repairs of parts of Oxford-street, not in the parish of St. Anne, Soho. That is the same issue as the first in another form. The third issue is, that the defendants do not pay the sum demanded because the first order includes expenses incurred between January and the 6th March 1857, when the order of the Metropolitan Board was made which placed Oxford-street under the management of the Marylebone vestry. I think that there are several answers to that objection. It is by no means clear that the very peculiar powers given by the Act would not extend to works done between January and March; and it is clear that these are works which the parish ought to pay for to some one. Whether that be so or not, and whether it is objectionable that the mode of levying the rate is by charging the parish an aliquot part of the expenses of repairing the whole of Oxford-street, proportioned to the length of the part of that street in the parish of St. Anne's, or whether there is any objection as to the amount ordered to be paid, the *mandamus* being to pay such sum as the vestry shall require for the purposes of the execution of the Act, if anything be due, the *mandamus* ought to issue. It would be extremely pernicious to lay down a rule, that if one wrong item were inserted by mistake, no sum at all could be levied. The Strand Union were bound to pay what was due, and they have no right according to law to refuse to pay anything because part of the sum ordered has been erroneously

C. P.]

HODGSON v. LITTLE.

[C. P.]

arrived at. In the court below Blackburn, J., in his judgment touches on this point. He says, "If the fact of an order, good on its face, having been made for a sum which had been erroneously arrived at, was to make the order itself void, so that every individual ratepayer could object to his quota, it would be singularly inconvenient." The principle of this *mandamus* is in accordance with the law as to the apportionment of rate in 2 Inst. 503. As to the powers of the auditors, I do not think that under this statute the auditors have any power to relieve the parish of St. Anne, Soho. From what has been stated during this argument, I expect that the attention of the Legislature has been drawn to the point of not leaving the power to the vestry without appeal. If there be no power of appeal, the order of the Marylebone vestry would, I think, be conclusive. The *mandamus* is for the sum required for the expenses. If the proper amount were tendered, there would be a perfect answer to any application for an attachment.

BRAMWELL, B.—I am of the same opinion. The *mandamus* does not mention any sum which it requires to be paid. We have not properly before us the question of figures, only the expenses that have been incurred, and are therefore not in a condition to say how much ought to be paid.

The other judges concurred.

*Judgment affirmed.*

Attorney for the prosecutors, E. G. Randall; for the defendants, J. H. Lewis.

#### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUNLEY SMITH, Esqrs.,  
Barriers-at-Law.

Feb. 4 and May 23, 1864.

HODGSON (app.) v. LITTLE (resp.).

*Salmon Fisheries Act 1861 (24 & 25 Vict. c. 109).*

*What is a fishery within the meaning of sect. 20—Obstruction to free passage of fish.*

*The occupier of a fishing mill-dam removed the hecks, but left a sliding door down, which, with the hecks, had been used for catching salmon:*

*Held, that the fishery did not cease to be a fishery because part of the machinery for catching fish had been removed, notwithstanding that, had the part left been removed, the milling power would, to a certain extent, have been injured; and that the occupier of the mill-dam had been rightly convicted under sect. 20 for not removing every obstruction which might interfere with the free passage of fish during the close season.*

This was a re-argument of the case already reported in 8 L. T. Rep. N. S. 358, and 14 C. B., N. S., 111, with these differences in the statement of facts, namely, first, that the finding that "locks and cruives were synonymous terms" was struck out; secondly, that it was found that lifting or removing the sliding doors would, to some degree, injuriously affect, but not ruinously, the milling power; and, thirdly, that it was expressly found that the sliding door was necessary for the mill as well as for the fishery.

Manisty, Q.C. appeared for the app.

Davidson (R. Fowler with him) for the resp.

*Cur. adv. vult.*

WILLES, J. now delivered the judgment of the court.—This was in effect a re-argument of the case reported in 14 C. B., N. S., 111, with these differences in the state of facts; namely, first, that the finding

that "locks" and "cruives" were synonymous terms is struck out; secondly, that it is found that the lifting or removing the sliding doors or sluices would, to some degree, injuriously diminish, though it did not destroy, the milling power; and thirdly, it is expressly found that the sliding doors or hatches were necessary for the fishery as much as for the mill. Upon the argument, the whole question being decided in the former case was re-opened. The question is, whether a conviction of this app. under the 22nd section of the 24 & 25 Vict. c. 109 (An Act to amend the laws relating to Fisheries for Salmon in England), was valid? The app. had a fishing mill-dam, with a fish-lock through it; at the head of that lock was a hatch, or sliding door, which moved in grooves; when this door was down no salmon could pass within three feet of the door; and down-stream was a frame in which the up-stream hecks of the fish-lock were placed, when the lock was used for taking salmon; and when this was done the sliding door or hatch was raised. This was, of course, to allow of a rush of water through the lock, against which the fish, following their natural instinct to ascend the river, would make what way they could, and so swimming up the lock and being stopped by the up-stream hecks, and prevented from returning by the down-stream hecks or inscales, would be caught in a trap. When this was effected the final capture might, perhaps, be aided by letting down the sliding door or hatch so as to leave the fish high and dry, though this is not at all necessary, and was not the first occasion of lifting the sliding door or hatch to cause a stream, and consequently an attraction to the fish, in the first instance in order to make such sliding door or sluice a part of the fishing apparatus; if it were necessary, then it is clear that part of the fishery may have been obstructed, whereby the fish is prevented from passing in and through the lock or box. The app. kept down the sliding door, and moved the hecks after the period mentioned in the 20th section, which kept down the sliding door, and hence the conviction. It was argued on behalf of the app. that though language is used in this Act which the court cannot understand, so as to give effect to such terms as "crib," "cruive," or "inscale," as being within the meaning of the section, and enough is not found by way of explanation to justify the conviction, to which it must be answered we are bound to inform ourselves of the meaning of the words used by the Legislature. The Act is unfortunately not in precise words. Through the decay of the salmon fisheries on this part of the coast, these terms are not of frequent use, but they were used by persons acquainted with the subject, and then again we find it explained in Jamieson's Dictionary: wherever the word "box," "cruive," or "crib" is used it is strictly applicable to the fish-lock in question, and indeed to the greater part of these contrivances. The salmon are enticed into an inclosed space where they are cribbed and confined in a "crib," "box," or "inscale." Then again the word "obstruction" is a well-known word of most general import, and that the sliding-door or sluice is an obstruction to the free passage of the fish in and through the locks within the app.'s fishery and mill-dam is clearly made out, in fact, so that if it was a fishery within the Act the case falls within the words of the 20th section. That it was a fishery was decided in the former case between the same parties. It was originally intended for fishing, and had been formerly used for fishing, and it was still capable of being used for fishing by shutting the box and lifting the sliding door or hatch. That it had not been sometime used for fishing only shows that it was a fishery out of use, not that it was not one. Now it seems that being made and completed for

C. P.]

GERRING v. BARFIELD.

[C. P.]

use, this was a fishing mill-dam, and none the less a fishery because it also was used as a mill-dam. The interpretation clause is express: "Fishing mill-dam shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes." It was further urged that the conviction was wrong, because, though damage to the milling power was likely to result from the lifting the sliding door or hatch, it was a damage for which it was said the Legislature could not have intended to impose a penalty. The answer, however, is twofold. First, the Act is one for redressing the great mischief and wrong from the restriction of the supply of food of very great national importance, and recites "that salmon fisheries, in England," &c. Then follows a series of enactments against catching fish in particular manners, and amongst others with fixed engines. This would apply to fishing mill-dams against fishing-weirs, and fishing mill-dams unless "lawfully in use at the time of the passing of this Act by virtue of a grant or charter or immemorial usage," and against taking at unseasonable times, or out of what is fixed by the Act as close times. Then follows the 20th section by which "the proprietor or occupier of every fishery for salmon shall within thirty-six hours after the commencement of the close season cause to be removed and carried away from the waters within his fishery the inscales, hecks, tops and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs and boxes within his fishery." Then follow the sections which provide for the weekly close time. Then the 23rd and 24th sections follow for providing for the attaching of fish passes to existing dams, and the 23rd is important, because it is subject to the express qualification not to be found in sect. 20, "so that no injury be done to milling power." Then follows the 25th, as to the attaching of fish passes, with no such qualification. The 26th provides for the supply of water to passes. Then follow sections for imposing restrictions as to the construction of fishing weirs and dams, and others for more effectually enforcing the Act. From this review it is clear that fishing mill-dams were considered by the Legislature to be injurious to the salmon fishery, and were therefore placed under special restrictions; that where it was intended that the provisions of the Act were not to apply if they interfered with the milling power, that was expressly stipulated; that there is no such restriction in sect. 20; that that section rendered penal the continuance of any obstruction to the passage of fish through the box of a fishery; that the fishing mill-dam is a fishery expressly dealt with as such by the statute; and that as the sliding door or hatch was kept down at a prohibited time, and constituted an obstruction to the passage of fish through the box, the conviction was right and ought to be affirmed, and, as on the former occasion, with costs.

*Conviction affirmed.*

Thursday, June 2, 1864.

GERRING v. BARFIELD.

*Highway—User—5 & 6 Will. 4, c. 50.*

*Where an innkeeper had used a piece of ground, which was part of a public highway, for twenty years for standing the vehicles of his guests on market-days:*

*Held, that such user was no answer to an information against him for obstructing the highway under the 72nd section of the Highway Act.*

CASE.

At a petty sessions holden at Faringdon in and for the division of Faringdon on the 19th Jan. last, before us, the undersigned, Thomas Leinster Goodlake and Henry Tucker, two of Her Majesty's justices of the peace in and for the said county of Berks, an information preferred by Frederick Henry Barfield, the district surveyor of the Faringdon highway board (hereinafter called the resp.) against Charles Gerring, innkeeper (hereinafter called the app.) under sect. 72 of the Act 5 & 6 Will. 4, c. 50, charging for that he the said Charles Gerring, on the 5th Jan. last, at the parish of Faringdon, in the said county of Berks, unlawfully and wilfully did obstruct or cause to be obstructed the free passage of a certain highway there situate, leading from Marlborough-street to Gloucester-street, by then and there placing or causing to be placed, and leaving or causing to be left thereon certain carriages or other vehicles for a long and unreasonable time, to wit, two hours and upwards, and without just cause, contrary, &c., was heard and determined by us, the said parties respectively being then present, and upon such hearing the app. was duly convicted before us of the said offence, and we adjudged him to pay the sum of 6d. fine and 16s. 6d. the costs incurred by the said resp.

And whereas the app., being dissatisfied with our determination, upon the hearing of the said information, as being erroneous in point of law, hath, pursuant to sect. 2 of the statute 20 & 21 Vict. c. 43, applied to us in writing, within three days after the said determination, to state and sign a case setting forth the facts and the grounds of such our determination as aforesaid, for the opinion thereon of Her Majesty's Court of C. P. at Westminster.

At the hearing of the aforesaid information it was proved, on the part of the informant, the resp. in this appeal, that the deft., the app. in this appeal, had on the day named, which was the ordinary market-day of the town of Faringdon, placed divers gigs or carts on a certain piece of ground opposite the house of the app., which is a public inn, and which piece of ground lies between the two streets before named, and until the recent erection of a corn exchange was (with a portion of Marlborough-street and its footpath) the site of the corn market.

It was also proved that this piece of ground had been invariably repaired at the expense of the parish out of the highway-rate, and had been stoned and metalled the same as the other streets and roads in the town and parish, and had also been recognised as a highway by the highway board of the district.

It was also proved that by reason of the vehicles being so placed on the ground the free and ordinary passage between Marlborough and Gloucester-street had been made less convenient. The waste land of the manor of Faringdon, within which the town is situate, and the right to toll on cattle, corn and goods sold and delivered therein, belong to Daniel Bennett, the lord of such manor; and the app. proved that he had been in the habit of placing his customers' gigs in the street in front of his house, but not on this particular piece of ground, on market-days, for a long period of time far exceeding twenty years, without making any payment to the lord or his lessee; but, in this instance, he had, by arrangement, paid the lessee 1s. for the privilege of placing them there. He also proved that sums had been occasionally taken by the said lessee from licensed hawkers and other traders selling their wares, by auction and otherwise, on the said piece of ground, vans and carts belonging to whom were left during such sales, and during any portion of the market-day thereon. It was also proved that public exhibitors had occasionally been permitted to occupy such piece of ground on making a payment to the lessee for the privilege.

C. P.]

HILL AND BAILEY v. HASKEW.

[ARCHES.]

It was not shown however that any payment had ever been made in respect of empty vehicles standing on the ground in question until the present occasion, but it was proved that a money payment had been occasionally made to the lessee for such a purpose in respect of a piece of ground lying in front of another inn in the town, and between the carriage road and footpath, and which last-mentioned payment was shown to have commenced upwards of twenty years last past. It was contended on the part of the deft., the app. in this appeal, first, than the two streets over which the public passed could be approached from either side, irrespective of any obstruction caused by the vehicles being placed on the piece of ground in question, inasmuch as such vehicles occupied no larger space than had been accustomed to be occupied for the purpose aforesaid, and that no obstruction of the free passage within the meaning of the Act had therefore been proved, and that, even assuming a slight abridgment of the free passage did exist, yet that being on the ordinary market-day, the uninterrupted use of the ground for purposes for a period long exceeding twenty years would be an answer to the proceedings. And, secondly, that the evidence adduced showed a right in the lord of the manor to authorise the appropriation on market-days of the piece of ground in question for the purposes aforesaid, and that although the vehicles complained of were not actually used in the sale, or in the conveyance for the purpose of sale of marketable articles, yet that they were entitled to the like advantages, inasmuch as they belonged to farmers and traders attending the market for strictly market purposes, and that in some instances the sample sacks in ordinary use in corn exchanges were conveyed in such vehicles.

We, however, being of opinion that the evidence given before us proved the ground in question to be part of the highway, and that an obstruction to the free passage of the same had been created within the meaning of the 72nd section of the Act, 5 & 6 Will. 4, c. 50, and being also of opinion that the voluntary payment to the lessee of the lord of the manor for the privilege claimed in this and the other case mentioned was not in the nature of a market toll, which in the case of empty vehicles could, according to the custom, be legally demanded, gave our determination against the app. in the manner before stated. The questions of law arising on the above statement therefore are: Whether the circumstances set out proved an obstruction to the free passage of the highway within the meaning of the Act; and whether it was any answer thereto that the app. had exercised the privilege of placing empty vehicles on the street near, for a period of twenty years and upwards, on market-days; and whether the fact of his making a payment to the lessee of the tolls (coupled with the fact of a similar payment having been made in the other case referred to for a period of twenty years and upwards) can be considered in the nature of a market toll, and would give him any right to use the piece of ground in question for the purpose mentioned.

Whereupon the opinion of the Court of C. P. is asked upon the said question of law whether or not we, the said justices, were correct in our determination as aforesaid, and as to what further should be done or ordered by the said court in the premises.

THOMAS L. GOODLAKE.  
HENRY TUCKER.

*Cole*, for the app., contended that he had a perfect right to do what he did by custom, and that it must be held that when this piece of ground was dedicated to the public, it was a limited dedication subject to the rights of the lord of the manor. He cited

*Reg. v. Smith*, 4 Esp. 110;

*Ellwood v. Bullock*, 6 Q. B. 383.

*J. O. Griffiths*, for the resp., was not called on.

ERLE, C. J.—We think that, notwithstanding this piece was a triangular piece of ground between two streets, nevertheless there was evidence brought before the magistrates which justified them in finding that this was part of the highway. It was a piece of ground through which people passed if not obstructed, and, if so, it was a highway, and the public had a right to pass over it. A highway may be dedicated to the public, subject to certain rights; but there is no evidence here to justify the user claimed. The innkeeper used this piece of ground when his yard was too full; and although the vehicles might be the property of farmers attending the market, that fact would not give any right.

WILLIAMS, J.—I am of the same opinion. The magistrates found as a fact, that this was a highway. Then the question arises, had the app. any right to use it as he did? There is no proof that on particular days an obstruction might be put there.

WILLES, J.—The only evidence for the app. is, that he had been in the habit of using this piece of ground for more than twenty years: that is, that the public tolerated the obstruction as long as they suffered no inconvenience from it; but now they in all probability find it inconvenient, and therefore wish to prevent its being used by the app. any longer.

BYLES, J.—I concur.

*Judgment for resp. with costs.*

## COURT OF ARCHES.

(CANTEBURY.)

Reported by Dr. SWABY, of Doctors'-commons.

Feb. 5 and 6, May 5 and 23, 1864.

(Before the Right Hon. S. LUSHINGTON, D.C.L.,  
Dean.)

HILL AND BAILEY v. HASKEW.

*Church-rate — Illegal item — Liability of "prebendal" and "common" lands — Inequality of assessment — Apportionment of costs on rate pronounced invalid.*

*In the circumstances of an extensive parish and upwards of 2000 ratepayers the Court held an item of 10*l.* for the expenses of collecting a church-rate not to be illegal; and, assuming it to be illegal, held the item not of sufficient amount to vitiate the rate.*

*Prebendal lands, liable to the repair of the chancel of the church, are not rateable to church-rate.*

*Generally, all property assessable to poor-rate (with the exception of church property) is liable to church-rate.*

*To sustain a church-rate the churchwardens must be in a position to show the court that the properties rated were in substance fairly and equally assessed on some principle; the principle adopted seems immaterial, provided the result is substantial equality.*

*When the Court pronounces against a church-rate, and condemns the pls. in costs generally, it may condemn the deft. in such part of the costs as were occasioned by unfounded objections raised by his pleadings.*

This was a suit, by letters of request from the Chancellor of the Diocese of Lichfield, promoted by the churchwardens of the parish of Tamworth, to recover 1*l.* 14*s.* 1*d.*, alleged to be due from the deft. as his proportion of a church-rate made for the parish of Tamworth on the 11th Oct. 1861, at the rate of 1*½d.* in the pound. The libel was in the usual form, and the churchwardens' estimate for the rate was as follows:

[ARCHES.]

HILL AND BAILEY v. HASKEW.

[ARCHES.]

An estimate of the sums necessary for repairing the parish church, and for the other purposes chargeable on the church-rate from Easter 1861 to Easter 1862:

	£	s.	d.
Repairing the south-east pinnacle, also the mullions to the clerestory on the north side, and other repairs .....	40	0	0
Repairing lead roof and flashings .....	10	0	0
Painting iron fencing, gates, &c. ....	25	0	0
Repairing windows .....	10	0	0
Carpenter, bricklayer, washing surplices .....	15	0	0
Coals .....	10	0	0
Wine and bread .....	13	0	0
Insurance .....	4	2	6
Cleaning and dusting church, &c. ....	18	0	0
Two beehives .....	10	0	0
Brooms, mops, &c. ....	5	0	0
Printing and stationery .....	4	0	0
Churchwardens' expenses, being sworn into office and fees .....	2	0	0
Ringin prayer bell .....	6	10	0
Winding up and cleaning clock, &c. ....	6	0	0
Making and collecting rate .....	10	0	0
Two new stoves, piping and repairs .....	20	0	0

£208 12 6

The above estimate was presented by the churchwardens at the meeting held in the vestry of the parish church of Tamworth, pursuant to public notice, on the 11th Oct. 1861, and adopted.

JOHN MOULD, Chairman.

The case was ultimately disposed of on the ground of serious inequality in the assessment (on which point the pleadings were of considerable length, and a vast bulk of depositions reduced to writing was before the court), and the rate pronounced invalid.

The other points raised by the allegation on behalf of the deft. were as follows: First, that the churchwardens had a balance of 10*l.* 1*s.* in hand at the time the rate in question was made; secondly, that there were arrears of previous rates amounting to about 50*l.*, which might have been collected if proper diligence had been used; thirdly, that the rate in question was calculated to produce about 232*l.*, that the ordinary yearly legal expenses chargeable on church-rate amounted to 160*l.*, and the rate therefore void by reason of excess; fourthly, that the estimate of sums necessary for repairing the parish church and for the other purposes chargeable on the church-rate contained items either altogether illegal to be charged on a church-rate, or the amounts thereof were grossly in excess of the actual requirements; in particular, that 25*l.* for painting iron fencing, gates, &c., was greatly in excess of the sum necessarily required for such purpose; that 2*l.* as expenses of the churchwardens on being sworn into office greatly exceeded the fees and expenses legally payable; that 10*l.* for making and collecting the rate was altogether illegal.

The responsive allegation admitting a balance in hand of 10*l.* 1*s.* alleged the good arrears to be no more 19*l.* 1*s.* 11*d.*, and explained an admitted variation between the value of properties in the poor-rate and church-rate assessment, first, by reference to certain cottage property rated to poor-rate under the Small Tenements Act (13 & 14 Vict. c. 991), which was not applicable to church-rates; by certain corporation tolls not included in the poor-rate; by the various modes of dealing with a canal which ran through different townships of the parish; and by reason of certain prebendal lands assessed to poor-rate, but alleged not to be liable to church-rate, inasmuch as they were liable to the repair of the chancel. Certain alleged omissions were accounted for as being rights of common, not liable to either poor, county, or church-rate. The responsive allegation also counterpleaded the particulars alleged in the deft.'s allegation to establish the general inequality and unfairness of the assessment.

The case was argued on the 5th and 6th Feb. by Dr. Robertson and Dr. Swabey on behalf of the churchwardens; by Dr. Deane, Q.C. and Dr. Tristram on behalf of the deft.

Cur. adv. vult.

On the 5th May Dr. Lushington delivered an elaborate judgment, parts only of which are here printed; the parts omitted referring mostly to details of evidence as to value of properties necessary to the decision of the particular case, but of no general importance or interest.

Dr. LUSHINGTON.—This is a cause of subtraction of church-rate, alleged to have been duly made for the parish of Tamworth. The parish of Tamworth consists of seven divisions, viz.: the borough of Tamworth, Castle Liberty, the townships of Wigington, Fazely, Bolehall and Glascote, Amington and Wilnecote. The rate in question was of 1*½d.* in the pound; the date of its being made was Oct. 11, 1861, and it was to cover the expenses of the church from Easter 1861 to Easter 1862. The deft. offers many objections to the validity of the rate: that it was excessive in amount; that it included illegal items; that it was laid on a totally false principle; and that many properties were overrated, others underrated, others omitted altogether. I will begin by disposing of several of the objections respecting which I find no difficulty and entertain no doubt. In all cases of church-rate it is necessary to bear in mind the circumstances of the parish for which it is made. True it is that the same principle must govern all cases of church-rate, but the application of those principles may depend on the peculiar circumstances of the place. I will presently illustrate this observation by reference to facts. First, it is objected that the present rate of 1*½d.* in the pound was unnecessary and excessive, on the ground that there were arrears of former rates due, and that no such rate was required for the proper expenditure of church-rate purposes. It appears that the parish church of Tamworth is an ancient and large building; the sums which it is alleged might be recovered for arrears are very trivial, and the necessary expenditure, amounting to 232*l.* 1*s.* or thereabouts, does not appear to me, either by reference to the evidence, or considering the circumstances of the parish, its extent or its valuable property, to be excessive. I shall certainly not pronounce against the validity of the rate on that ground. Secondly, in the estimate for the expenses to meet which the rate was made, there is an item of 10*l.* for collecting the rate, and it is contended that this item is illegal, and that the churchwardens are bound to perform the duty themselves. As a general proposition this argument may be well founded, but I am not disposed to admit its validity in a case like the present, where there are seven separate divisions of the parish, above 2000 rate-payers, and 2000 properties liable to assessment, and in aggregate value amounting, at the least, to 35,000*l.* But I will assume that this is an illegal item, and assume, for the purpose of the argument only, that it was not in the power of the vestry to sanction it; yet if all this were so, I would not quash the rate on that account. I know of no authority which would require me to adopt so severe a measure, and none has been cited; and upon a rational view of these questions, it would, I think, be preposterous to expect a properly accurate knowledge of the law in all these minute particulars. Thirdly, as to the omission to rate prebendal lands, I need make no observations. It is not now, and could not be, contended that they are rateable to a church-rate. I pass by also the objection with regard to Staffordshire and Warwickshire moors. Fourthly, I now proceed to the important question raised in this case, the validity of the rate on account of the method of its assessment. In considering this question, I propose to divide the subject into two heads:—1. The law applicable to the making of church-rates. 2. The facts of this case. The law: Church-rates are of great antiquity,

[ARCHES.]

HILL AND BAILEY v. HASKEW.

[ARCHES.]

existing for centuries before any poor-law was established. They have no original legal connection with each other, none by statute law. It would be a vain exhibition of industry to trace the progress of church-rates from early days to the present time. Many ancient customs interfered with the ordinary mode of assessing to church-rate. In the *Poole* case stock-in-trade was held by the delegates to be assessable. (a) But passing by these exceptions, and looking to the modern practice, which must be my rule, I apprehend the law to be that all property in lands or houses, collieries, mines and canals are assessable to church-rate; in fact, that all property assessable to poor-rate is assessable to church-rate, with the exception of property belonging to the Church. That all property assessable must be assessed upon the same principle; but, provided all be assessed on the same principle, it matters not whether the valuation be high or low so that all are equally assessed. That omission to rate valuable property may render a church-rate illegal is an indisputable proposition, but it does not therefore follow that small and accidental omissions, not really affecting the rate, would have that consequence. It is acknowledged law that neither this nor any other ecclesiastical court has power to amend a church-rate, but it does not therefore follow that trivial errors, incidental to all such transactions, would render the rate illegal. If the omissions are many or important the rate is invalid. It is also quite clear that no rate can be just and equal, and therefore legal, if some be rated at a much higher rate than they ought to be and some on too low a scale. But here you must observe that such misrating must be clearly proved and on matters of importance; minor errors, inevitable in a large parish with numerous ratepayers, can produce no such effect. The law requires that the ratepayers of the whole parish should be equally assessed to the church-rates; of course, I do not mean an absolute equality, that is impossible, but the adoption of a principle of assessment, and a carrying out that principle so as to attain a reasonably just and equal contribution. In assessing to church-rates the law knows nothing of townships, the rate must be laid as if the whole were one township. An assessment might be equal as between different townships, looking only to the aggregate value of the property of each township; but if it was at the same time unequal as between individual properties in any one township, the rate founded upon it would be invalid. Again, poor-rates have no legal connection with church-rates. The poor-rate assessment is governed by its own law, and is subject to a particular course of appeal not applicable to church-rates. I am not aware of any law or case which prescribes that the poor-law assessment is binding in a case of church-rate. Sir J. Nicholl said it might be referred to, but no more: (*Lambert v. Weall*, 4 Hagg. 100.) An assessment for the church-rate is not necessarily invalid because it does not agree with that for the poor-rate; nor, if founded upon the poor-rate assessment, is it therefore necessarily valid; it will be valid only if the poor-rate assessment is fair and uniform. An assessment to the poor-rate, unless appealed against or if confirmed upon appeal, is binding on all till a new assessment is made, but such assessment has no legal or binding effect upon church-rate. It would be perfectly competent to any person assessed, according to the poor-rate assessment to church-rate, to impeach the assessment at any time; such assessment might, when recently made, be *prima facie* evidence of equality, but no more. It is not, I think, to be denied that the law as to church rates is in a most unsatisfactory state; but though I have no doubt that this is so, and that it imposes

great burdens on those who have to execute it, yet, nevertheless, it is their duty to strive to make their acts conformable to what they believe to be the law. I can hardly conceive a task of greater difficulty than, as the law stands, to make a valid church-rate in extensive and populous parishes. Independently of many other facts, the task to assess equally to church-rate a town like Tamworth, covering a space of 10,000 acres and containing 2464 assessable properties, is a herculean task. And whatever may be the result of this case, I feel bound to express my opinion that Mr. Hill, the churchwarden, has most meritoriously exerted himself to fulfil his onerous duty. The most important question to be decided in the case depends upon the ascertainment of facts, and by far the most important of the facts is a clear understanding of the principle upon which the rate has been framed; the general rule intended to be followed with certain exceptions. I have no hesitation in saying that I have experienced very great difficulty in this investigation. I never yet met a church-rate case involved in so much intricacy. It would appear that the basis upon which this church-rate assessment was laid was for all the townships except Wilnecote, the then latest (i. e., the immediately preceding) assessment for the poor-rate; and for the township of Wilnecote, a poor-rate assessment, but not the latest. Mr. Hills says, "The poor-rates set forth the annual value and the rateable value of the properties in the parish, and we have gone principally by the poor-rates as to both values." Again, Mr. Shaw says, "The several properties within the said parish were assessed to the church-rate in question, with very few exceptions, according to the amounts at which the same were assessed to the then last several poor-rates in the borough of Tamworth and Castle Liberty, and the respective townships of Fazeley, Wigginton, Bolehall and Glas-cote, and Amington." The particular mode in which the rate-book was drawn up is thus described by Mr. Hill: "Mr. Bull and I corrected the church-rate book of 1860, with the latest poor-rate book of each township, and then we pencilled in 1860 church-rate books any alterations in (i. e., any divergences from) the said poor-rate books, and then had the church-rate book of 1860, with the alterations copied into a new book." For Wilnecote, as above mentioned, the poor-rate book, adopted as the basis for the church-rate, was not the latest. The reason for that was as follows:—On Sept. 13, 1861, two months only before the church-rate was voted, there had been a new assessment for the poor-rates of Wilnecote township, and the result was a large increase of the aggregate rateable value, namely, 4928*l.* 17*s.* 6*d.* as compared with 3139*l.* 5*s.* 6*d.* But at the date of the church-rate this assessment was under appeal. The appeal was subsequently dismissed, but on technical grounds only. However, the assessment so made has been acted upon ever since for the poor-rates. Under these circumstances, Mr. Shaw recommended Mr. Hill, the churchwarden, not to adopt the new rate assessment, but to adhere to the old poor-rate assessment, on the ground that the old poor-rate assessment for Wilnecote was upon the same scale with the existing poor-rate assessments for the other townships, and was fair; whereas the new poor-rate assessment for Wilnecote was on a much higher scale than the existing poor-rate assessments for the other townships, and therefore could not be acted upon without hardship to the inhabitants of Wilnecote. Assuming that these facts are true, the reasoning of Mr. Shaw seems quite correct. This, then, is the acknowledged method upon which the church-rate was calculated. For the present, I will assume it to be fair, and proceed to inquire how far it was carried out. If it had been carried out

(a) See *Miller v. Bloomfield and Stade*, 1 Add. 493.

[ARCHES.]

HILL AND BAILEY v. HASKEW.

[ARCHES.]

exactly, of course the poor-rate and the church-rate would exactly tally. It appears, however, that there was very considerable difference, even for the aggregate of the rateable value for every township except Fazeley.

	Poor-rate.			Church-rate.		
	£	s.	d.	£	s.	d.
Boro' of Tamworth	5950	8	4	6308	17	11
Castle Liberty	908	6	4	836	9	7
Fazeley	6922	10	5	6922	10	5
Wigginton	9811	2	1	8614	16	7
Wilnecote	3139	5	6	3174	8	2
Bolehall & Gloscote	5822	0	6	6214	3	2
Amington	4021	9	3	3828	2	7

These differences clearly require explanation, and the supporters of the church-rate do accordingly offer some explanation. I think it will be unnecessary to follow the items for each township, it will be sufficient to point out the principal causes which are alleged for the variation. They are as follows: 1. Prebendal lands. 2. Corporation tolls. 3. Sundry alterations. 4. Small Tenements Act. 5. The canal. 1. Prebendal lands were included in the poor-rate assessment, but not in that of the church-rate. 2. Corporation tolls were included in the church-rate assessment, but not in that of the poor-rate. It is needless to say that in these two respects the churchwardens acted rightly. 3. A third cause of variation was that in the church-rate assessment were inserted some properties which had been improperly omitted from the poor-rate assessment, or some improper valuations were corrected. On principle, no doubt it was the duty of the churchwardens to correct any mistake that existed in the books which they took as the basis of the church-rate; but how was this done? Mr. Hill says, "If I happened to pitch upon any assessment which I thought or knew was very incorrect, I altered it, as was the case in a few instances." And again, "I was guided principally by the poor-rate assessment, making in some instances such alterations as I considered from my knowledge of the properties were necessary to put the parish upon an equality." This certainly appears to be a very rough haphazard mode of proceeding, and what increases the difficulty is, that Mr. Hill does not state upon what scale these new valuations were made, except that he considered they put the parish on an equality, but to this I shall advert more particularly hereafter. 4. The Small Tenements Acts. Two of the divisions of the parish, viz., the borough of Tamworth and Wilnecote, but these only, were affected by the Small Tenements Act, which prescribed that cottages of less value than 6*l.* per annum should for the poor-rate be assessed to the landlord instead of the tenant, and their rateable value should be taken to be only three-fourths of the annual value. As the statute did not apply to church-rates, some modification was required in adopting the poor-rate book, the first step in each case being to enumerate with the names of their respective occupiers the cottage properties which in the poor-rate book had been lumped together for assessment to the landlord of them all. The next step was to disregard the reduction of the rateable value introduced by the statute; this seems to have been done quite fairly for the borough of Tamworth, for in the church-rate the rateable value of the cottages in the borough is ascertained upon the same scale as that which had always been, and still was, in use for the properties not being cottages within the operation of the statute, and which had been in force for the cottages themselves before the passing of the statute, viz., 10 per cent. reduction from the gross annual value fixed by the original poor-rate assessment; but for Wilnecote the churchwardens adopted a different course. Mr. Hill states, "The cottage property in Wilnecote I had inserted in

our rate at the gross estimated value of the poor-rate assessment" (i. e. without deduction), and the reason he alleges for this is, "because I considered the gross estimated value was taken so low as in fact still to leave a good margin, but I calculated it as being on an equality with all the rest of the parish." And again, "because even that gross estimated rental was so low that it was only in reality the rateable value." Now, for all the other properties in Wilnecote which were not subject to the Small Tenements Act, a large deduction from the gross estimated value was made to fix the rateable value, a deduction varying from 18 to 23 per cent., if not a full 25 per cent. It would appear then beyond a doubt that on the small cottages in Wilnecote an increased value was placed, whilst upon cottages of the same character in the borough of Tamworth the ancient valuation was retained. I am at a loss to see how this can be justified; something more is required than Mr. Hill's assertion that his conviction is that the plan he adopted was fair and equitable, and brought the whole of the parish on an equality as regarded their assessment to the church-rate. 5. The canal. The Coventry Canal passes through three townships, viz., Castle Liberty, Amington, and Bolehall and Gloscote; and for the poor-rate, each of these townships is rightly assessed for the part of the canal within its own limits thus: Castle Liberty, 103*l.* 14*s.* 3*d.*; Amington, 164*l.* 17*s.* 7*d.*; Bolehall and Gloscote, 144*l.* together, 412*l.* 11*s.* 10*d.* In the church-rate it is otherwise; the whole of the church-rate for the canal passing through the three townships is thrown upon one only, viz., upon Bolehall and Gloscote. It is thus charged, 103*l.* 14*s.* 8*d.*, 164*l.* 17*s.* 7*d.*, which properly belongs to Castle Liberty and Amington, and 214*l.* 3*s.* 9*d.* Bolehall and Gloscote proper; being an excess of 70*l.* 3*s.* 9*d.* over the 144*l.* on which the poor-rate was assessed. I cannot find any satisfactory explanation of this transaction, though perhaps I may conjecture one. It may be that all the proprietors being the same, it matters not whether they were assessed in one township or several; otherwise there would be injustice. But I will assume that the discrepancies of the church-rate assessment from the poor-rate assessment of 1861, constitute no injustice, and therefore that the church-rate assessment was fair. It now remains to be considered whether the poor-rate assessment was fair; for, as I have said before, a church-rate founded upon a poor-rate assessment is valid, not because it was so founded, but only on condition of that assessment being fair and uniform. This question may be conveniently divided into two. First, was the assessment originally fair? Secondly, was it fair in the year 1861? First then, was the assessment originally fair? When, by whom, and on what principle was it made? This part of the case is unfortunately not brought out in the evidence. The sum of what is deposed is as follows:—Wilnecote was assessed in 1826 by a Mr. Dumolo. Tamworth was assessed about twenty-five or thirty years ago, and it is said by competent professional valuers. The date of the assessment of Castle Liberty was different, but it is not specified. The date of the assessment of Fazeley, Amington, Bolehall and Gloscote and Wigginton is not stated at all, but it was certainly many years ago. A question here arises: the assessment being made at different times, the value of the properties must have increased at least something in value during the intervals, and when an assessment was made for a township it could not be fair as between that township and the other divisions of the parish, and therefore between the individual occupiers, unless the scale of valuation was lowered from the scale of the preceding assessment. But what trace is there of this having been the case? None whatever;



in fact, the principle of every one of the assessments is unknown. Before I examine the assessment for each division of the parish it may be useful to state what was the principle adopted in the case of a recent poor-rate assessment made by the order of the board of guardians for the borough of Tamworth under the recent statute, 25 & 26 Vict. c. 103; an assessment carried out by Mr. Hill himself, assisted by two builders, a surveyor and two overseers. The principle was first to estimate the gross annual value, and then, in order to fix the rateable value, to make the following deductions, according to the kind of property in each case, viz. for land only, 5 per cent.; land and houses, 10; houses (above 60*l.* in value), 20; cottages, 25; warehouses, mills and factories, 25. Now, in the poor-rate, upon which the church-rate was founded, no such graduated scale seems to have been adopted. To sum up, then, this part of the case. It would appear that the assessments for the poor-rate were made at different times for the different divisions of the parish, but all many years ago; that the rates of deduction made from the gross estimated rental in order to fix the rateable annual value, where stated, varied as between one division of the parish and another, and in Wilnecote varied considerably between different properties; in no case either the principle which fixed the deduction, still less that which fixed the variation, being discernible. In four of the townships the rate of deduction is unknown. It is hardly possible that a church-rate, the assessment for which was founded upon these various assessments, could be fair and uniform. That these assessments were uniform there is not a shadow of direct proof; there is only the fact, which, indeed, is not to be forgotten, that these assessments did serve to fix the poor-rates and the church-rates for the parish for many years without dispute; and the bare assertion of Mr. Hill, Mr. Shaw (men of great local experience, but directly interested in supporting the church-rate), and of one or two others, that in their opinion the assessments worked fairly and uniformly throughout the parish. But one argument adduced by them in support of this view shows how small is the value of these general assertions. The rate is attempted to be justified in the pleadings and in the evidence, on the ground that, taking one township with another, the rateable annual value was about 8*l.* per acre. It need hardly be said that equality between townships is not necessarily equality between all the individual properties in those townships, and, indeed, has nothing to do with the matter. But to carry the case further, I will now assume, contrary to my opinion, that these various assessments were uniform, so that, at the date of the last of the assessments being made, all the divisions of the parish were assessed at the same rate. But the question now must be considered, were they fair in 1861? This could only be the case if two conditions were observed: first, if all new properties which had arisen since the date of the assessment had been not only inserted in the list, but rated at a corresponding scale; secondly, if all the properties in the original assessment, and all the new properties from the date of their being inserted in the list, had advanced in value at a uniform rate. The first of these conditions Mr. Shaw deposes was observed. He says: "About twenty-five or thirty years ago a valuation of all properties within the said parish for poor-rate was made by competent professional valuers, and from that date to this (with the exception of a recent alteration in the township of Wilnecote) the assessments to the poor-rate have been made upon the rateable value established by such valuation; and from time to time, as new properties have sprung up and come within the sphere of rating liabilities, the same have been immediately estimated, when

required, by competent professional valuers, and since 1848 the same has been done under the Act 11 & 12 Vict. c. 103, s. 7, and, so far as regarded rateable value, on the scale of the said valuation heretofore particularly referred to, by which means all the properties throughout the parish, new and old, were kept comparatively equal, and the proportionate equality maintained justly throughout the whole parish, in accordance with the system and principle which had for so many years prevailed in this parish, and which I depose, speaking from an accurate knowledge thereof, is a just, fair and equitable principle." Again: "Of course mines, collieries, and new works of various kinds have sprung up during the last twenty-five years, but as they so sprung up they were inserted in the rates in the mode I have explained in chief. The new properties, as they arose, were brought to the rateable value by the same scale as pre-existing properties; the assessment has been altered as additions were made to properties, and as new properties sprung up, but always on the principle I have so often set forth, viz., the valuation made twenty-five or thirty years ago." Further, it seems very doubtful whether, in estimating the value of the collieries and the factories, the fixed machinery has been taken into account. [The learned Judge then commented on the evidence on this point, and continued.] The result seems to be this, that there is beyond doubt a great quantity of fixed machinery in the parish; and that the churchwardens are unable to show at what rate it was valued, or even that it was valued at all. They simply copied the assessment of the houses containing fixed machinery from the poor-rate book. But, supposing there were no omissions in the poor-rate book, and that every new property, fixed machinery and all, as it came into existence, was inserted in the book; still, in order that justice should be observed, these supplementary assessments should be upon the same scale as the original ones. But this would manifestly require the adoption, not of the same rate of deduction from the gross estimated annual value, but of a lower rate; for since the old properties were yearly becoming more valuable, the original assessment became more and more an undervalue, and consequently, to avoid disproportion, every assessment of a new property should be upon a lower scale than the anterior assessments. I have been unable to discover any evidence that any change was made in the scale of valuation from time to time. But, supposing every assessment was fair at the time when it was made, could the whole be fair for 1861? If there were no changes at all, of course it would be so. If there was a change in all the properties, and to the same or nearly the same degree, the assessment would at the end of twenty-five years be nearly equal. But if changes had taken place, if some properties had greatly increased in value and some remained stationary or decreased, the assessment to a rate made upon it would be unequal, and if unequal unjust. The question therefore is narrowed to this inquiry: looking at the whole parish, has there not been such a variation in the value, such a change from the assessments of 1838, as would make the rate unequal? This question may be investigated in two ways: first, the reasonable probability of what must have occurred; what in the ordinary course of such matters must have taken place save from the occurrence of extraordinary circumstances; secondly, by examining the evidence given in this case, the new rate for Wilnecote and other testimony. First, then, as to the probability of unequal changes having taken place. Consider the circumstances of the case. Tamworth, an extensive and populous parish, seven divisions—the borough itself, Castle Liberty, and five townships—in all covering 10,000 acres, a population of many thousand persons, the number

[ARCHES.]

HILL AND BAILEY v. HASKEW.

[ARCHES.]

of assessments, upwards of 2000; different kinds of property, town houses and country houses, cottages, factories, collieries; agricultural land, both pasture and arable. The interval of time to be covered is twenty-five years at the least. During this period population must of course have multiplied and wealth increased; houses must have been rebuilt, enlarged, pulled down; some lands must have come into better, others fallen into worse cultivation, others, again, remained as they were. Special disturbing causes are not absent. Two new railroads have been established, and several mines and collieries opened. I speak not of the assessments on railroads, or collieries, or mines (I will presume they have been duly rated), but of their necessary effect upon the other property, the increased demand for houses, for gardens, for all the produce of the land. It is, I think, wholly impossible that the increase of population, of trades, of collieries, of any species of manufacture, should not in twenty-five years most materially alter the valuation, and alter it not merely by increasing the values of all properties uniformly, but by the changes, the essential changes, in the relative values of individual properties. It is, I believe, impossible that all property should have increased equally. Demand, which augments value, affects in different proportions the properties adjacent and those distant. I am strongly impressed with the conviction that this reasoning will not easily admit of an answer; but I am not content to rest upon it without much further investigation. I must look to the evidence and alterations as proved by the evidence, and not rely upon theory. Secondly, and now as to the evidence. Mr. Shaw is the only witness who ventures positively to assert that all the properties throughout the parish have increased at a uniform rate. This evidence in one respect deserves particular attention, for Mr. Shaw is a gentleman of knowledge and ability, and has undoubtedly used the most praiseworthy diligence to make the rate conformable to law according to the principle he deemed it right to adopt. But, for the reasons I have already given, I must say that I am greatly surprised at the statement that the value throughout the whole parish has increased, and that the increase has generally been uniform. I cannot but doubt the possibility of this evidence being correct; I cannot reconcile it with the other evidence which I am about to quote. Mr. Dean is of opinion that the value of land has increased more than the value of houses. Mr. Clarkson admits that in the borough the value of cottage property has increased disproportionately to the house property. Mr. Dumolo is of the same opinion. Mr. Hill admits the same. But he proceeds to justify the retention of the old assessment unchanged, for the following curious reasons: He says, "I should think such increase (in the cottage property of the borough) has been in the ratio of from 40 to 50 and 100 per cent, which, taking the proportion which the cottage property in quantity bears to the entire property within the borough, and diffusing such increased cottage value over the whole, it would, in my opinion, about give an increase of 10 per cent. on the borough of Tamworth within the last twenty-five years on the rateable value of the whole property therein." By the process of diffusion, any rate could be proved fair. Mr. Dumolo recognises that some townships, Wigginton and Amington, have not advanced like others, Bolehall and Wilnecote. Testimony to the same effect is given by Mr. Clarkson. The effect of this evidence is, as might be expected, that the values of all kinds of property have increased, but not in the same proportion; it would indeed have been nothing short of a miracle if they had, for the same causes could not have affected all different kinds of property in the same degree. It is

quite manifest that, if this evidence be true, a rate made on the old assessment must be unequal both as regards the whole parish and the individual ratepayers. In conclusion, I am well aware that there are many facts and much evidence in this case which might properly form the subject of discussion, and which I have omitted to notice—omitted to notice because they are not, in my opinion, necessary to show the foundation of my ultimate conclusion. My judgment is founded exclusively upon the admitted facts in the case and evidence for the plts. I am under the necessity of pronouncing against the validity of this rate. I have no doubt that the churchwardens themselves considered the rate to be fair. But the fact is that, instead of taking care that the rate should be just to each person, they were bent upon making the rate conformable to the poor-law assessment, and of observing the ancient proportions in which each township had contributed to both church-rates and poor-rates. I am of opinion that the original basis adopted by the churchwardens is wholly untenable; that it would have been next to impossible, by all the care and attention that could be bestowed upon it, that a valid, equal and fair church-rate could be framed; and further, that a poor-rate founded on a valuation of twenty-five years' standing could not afford the means of making a fair church-rate; and further, that the alterations were wholly insufficient to remove inevitable inequalities, which indeed are proved by the evidence. I have already stated the reasons, the facts and evidence which lead me to this conclusion. In making a church-rate the greatest precision is necessary; we have for this position the high authority of Bayley, B.; but there is another and more important reason: neither this court, nor even the Judicial Committee sitting as an ecclesiastical court, has any authority to correct or amend a church-rate in any particular. Such is, as I have no doubt, the unquestioned state of the law, and no wonder difficulties arise, for the law has remained unamended from time whereof memory of man is not to the contrary—a great contrast to the poor-law, which has from time to time been amended and rendered more just and practical. I well know it may be said, what were the churchwardens to do with a three-halfpenny rate and 2400 ratepayers? What but follow the accustomed practice: why incur greater trouble and expense? The answer is, no reasons of convenience can alter or make law; and I cannot venture to depart from what I believe to be unquestionable law; indeed the law of the case has not been questioned by the counsel for the churchwardens, and, knowing the learning of those counsel, I should have been much surprised if it had. As to costs, I must condemn the churchwardens in all costs, except those occasioned by the introduction of the question of rating the prebendal lands; these the deft. must pay.

On the representation of the counsel for the deft. the question of apportionment of the costs was reserved for the further consideration of the court, but on the 23rd May, after hearing counsel on the point,

Dr. LUSHINGTON adhered to the decision as stated above.

Nelson and Son, proctors for the plts.

E. W. Crosse for the deft.

[IRELAND.]

REG. v. RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS.

[IRELAND.]

## COURT OF QUEEN'S BENCH.

(IRELAND.)

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

CROWN SIDE.

## REG. v. THE RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS. (a)

*Public highway—Mandamus—Stat. 11 & 12 Geo. 3, (Ir.) c. 31—10 & 11 Vict. c. 34—10 & 11 Vict. c. ccliii. (loc. and pers.)*

*The trackway along a canal, vested in the Grand Canal Company by stat. 11 & 12 Geo. 3 (Ir.) c. 31, is a public highway, and since the passing of the Towns Improvement Act is to be repaired by the Improvement Commissioners in whose district it is:*

*So held, by O'Brien, J. and Hayes, J.: dissentientibus Lefroy, C. J. and Fitzgerald, J.*

*The proper remedy to compel the commissioners to repair is by mandamus:*

*So held, by O'Brien, J. and Hayes, J.: dubitante Lefroy, C. J., and dissentiente, Fitzgerald, J.*

This case came on upon demurrers to the pleas put in to the return to a writ of *mandamus*, and also to certain rejoinders filed to the replications to those pleas.

The facts of this case sufficiently appear in the argument and judgments.

*Jellett and M'Donough, Q. C.* for the defts.—Three questions arise in this case: first, as to the liability of the commissioners to keep the road in question in repair; secondly, as to the structure of the pleadings on behalf of the Crown; thirdly, as to the applicability of the writ of *mandamus* in a case of this description. With respect to the first question, it is to be determined very much with reference to the condition of things antecedent to the Towns Improvement Act 1847, and also with reference to the provisions of the Rathmines Improvement Act of 1847, and of the Rathgar Improvement Act 1862. The allegation of the Crown is, that within the Towns Improvement Act and the Rathmines Improvement Act, this is a highway which the commissioners are bound to repair. Sects. 47, 48 and 49 of the Towns Improvement Act are relied upon by the Crown, and also sect. 3, the interpretation section, by which the word "street," when used in the Act, is to mean "road;" and sect. 28 of the Rathmines Act, 10 & 11 Vict. c. ccliii., is that under which the Crown says it has the right to compel the commissioners to keep this road in repair. But this portion of the road cannot be considered a public highway in any sense. The only modes by which a highway could be created at common law were by prescription, by dedication, by Act of Parliament, or as a way of necessity. The Act under which this trackway was formed is the 11 & 12 Geo. 3 (Ir.), c. 31, ss. 33 & 34, *Rex v. The Inhabitants of Netherthong*. The correct way of making a turnpike-road a public highway is to declare it so by Act of Parliament. There is no authority or principle to show that under such terms as are used in sect. 33 of the 11 & 12 Geo. 3 (Ir.) c. 31, and having regard to the circumstances, the trackway along the canal, which is private property, is to be deemed a public highway. The purpose of the Act was to carry out a private speculation. By sect. 33, the clear profits of the undertaking are to be divided among the proprietors. With respect to the dedication of a road by the owners to the public, there must be two things concurrent—an intention by the owner to dedicate, and

an adoption of the act by the public. If the user by the public is referable to the purpose of affecting some particular object of the owner, and not to the purpose of creating a highway, a public highway will not be created: (*Barracough v. Johnson*, 8 Ad. & Ell. 99; *Rex v. Richards*, 8 T. R. 684.) The states of affairs established by the statutes in fact amount to an arrangement made by the township of Rathmines, the grand jury of the county and the corporation of Dublin; sects. 28 & 29 of the Rathmines Improvement Act: (*Blakemore v. The Glamorganshire Canal Company*, 1 M. & K. 162.) Sects. 23 & 24 of the Rathgar Improvement Act 1862 are very important; so also sects. 25 and 26, and stat. 7 & 8 Vict. c. 106, ss. 62 to 68, exclude the power of putting a turnpike-road in repair within this district. The powers of the grand jury originally were given by sects. 64 and 65 of the 6 & 7 Will. 4, c. 116. The effect of sect. 65 was to throw on the owners of turnpike-roads the duty of keeping them in repair. This is either a turnpike-road by stat. 11 & 12 Geo. 3, or else a private road established by a mercantile company for their own purposes; in either cases it does not fall within the definition of a highway. All the profits go to the canal company, and none to the commissioners. The remedy, if any, against the commissioners is by indictment; sect. 49 of the Towns Improvement Act:

*Reg. v. The Trustees of the Oxford and Witney Turnpike Roads*, 12 Ad. & Ell. 427.

The *Solicitor-General* (Lawson, Q. C.) and *Sullivan, Serjt.* (with them *Griffith*) for the Crown.—If this road was dedicated to the public one year before the passing of the Rathmines Improvement Act, it is enough. We charge that this was at the time of the Act so dedicated, and then nothing but an Act of Parliament could do away with the effect of the dedication. The trackways were not vested in the company by the Act of 11 & 12 Geo. 3, c. 31; all that the Act did was to give them power to erect toll-bars on the trackway. Then, as to the substantial question in the case. Are the Rathmines commissioners bound to repair this road? We say that they are. It may be that the canal company is bound to do so also, but that does not get rid of the liability of the commissioners. The effect of the stat. 11 & 12 Geo. 3, c. 31, is to constitute this a public highway to all intents and purposes. Any person tendering the toll is at liberty to use the road; and the company could not exclude any one who complied with the terms mentioned in the Act. [*Fitzgerald, J.*—Would there not spring from the statute an obligation on the company which takes the tolls to keep the road in repair?] That may be; but the Crown is at all events entitled to make the commissioners repair the road; the commissioners may then recover over against the company, and force it to keep the road in repair, and apply the tolls for that purpose. The definition of a highway will be found in *Dovaston v. Payne*, 2 Sm. L. C. 94, and this comes within it. The setting up of toll-bars would not destroy the liability of the inhabitants of a parish to repair a road:

*Rex v. The Inhabitants of St. George's, Hanover-square*, 3 Camp. 222;

*Reg. v. The Inhabitants of Lordmere*, 15 Q. B. 689;

*Sutcliffe v. Greenwood*, 8 Price, 535;

*Rex v. The Inhabitants of Oxfordshire*, 4 B. & Cr. 194;

*Reg. v. The Inhabitants of Brightside Bierlow*, 13 Q. B. 988;

*The Northam Bridge Company v. The London Railway Company*, 6 M. & W. 428;

*The Surrey Canal Company v. Hall*, 1 M. & Gr. 392.

One of the objects of the Rathmines Improvement Act, incorporating the general Towns Improvement Act, is to keep the roads in repair, so that this is one of the objects to which the rate can be applied. That Act was amended by the Rathmines and

(a) From the *Irish Jurist*, by permission.

[IRELAND.]

REG. v. RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS.

[IRELAND.]

Rathgar Improvement Act of 1862, s. 23 of which is important. It is a mistake to say that the grand jury have no power to repair a turnpike-road; sect. 50 of the general Grand Jury Act gives the largest powers of repair to the grand jury. We submit that on the authorities this is clearly a public road; that the commissioners have power to raise rates on the district for the repairs; and that if they please they have power to compel the canal company to apply their tolls on the repairs. The proceeding by *mandamus* is correct:

*Reg. v. The Bristol Dock Company*, 2 Q. B. 64;

*Reg. v. The Severn and Wye Railway Company*, 2 B. & Ald. 646.

The only authority on the other side is the dictum of Lord Denman in *Reg. v. The Trustees of the Oxford and Witney Turnpike Roads*, 12 Ad. & El. 427, but he never intended to decide the general principle, and if he did, he has overruled himself in *Reg. v. The Bristol Dock Company*.

*M'Donough*, Q.C. replied.

*Cur. adv. vult.*

June 23.—FITZGERALD, J.—In this case, the question arises on the return to the writ of *mandamus*, and the subsequent pleadings. I shall advert very shortly to the *mandamus*. [His Lordship then shortly stated the *mandamus*.] The commissioners, in their return, say first, "that the said road in the annexed writ mentioned and described, or any part thereof, is not, and before or at or during any of the said several times in such writ in that behalf mentioned, never was a public highway," and stopping there, there is a full and complete return to the writ. On that there is a full return, and all the questions in the case could have been raised on it; but, very probably with a view to raise more completely the question of law, it goes on to state a number of matters which set up argumentatively the same proposition. [His Lordship then read the rest of the return.] That I have called an argumentative statement of certain matters which, if well founded, would show that the road in question was not a public highway. I do not propose to follow the pleadings further; they are very complicated, but whether in the return or traverse, the facts necessary for the decision seem to be conceded on both sides. There is no fact in controversy, and I make out that two questions of law arise: first, is the road in question a street within the meaning of the statute 10 & 11 Vict. c. 84—a street or road, which the defts. are bound to keep in repair? and secondly, is the proceeding by *mandamus* the proper remedy in the case? The facts appear to be, that before the statute 11 & 12 Geo. 3, c. 31 (Ir.), the road was one of the trackways of the Inland Navigation Corporation. By the Act of Geo. 3, constituting the Grand Canal Company, the property of the corporation, including the trackways, were transferred to the Grand Canal Company, and this piece of roadway is one of the trackways which were so vested in the Commissioners of Inland Navigation, and which were so transferred. The further facts are that, subsequently to the passing of the 11 & 12 Geo. 3, c. 31 (Ir.), the Grand Canal Company erected a toll-bar across this trackway, and from that time to the present the public have enjoyed the privilege of passing along the trackway, and using it for all purposes, paying a toll to the company, and that since the passing of that Act it has remained vested in the company, and has been, subject to this user, in the possession, use, and enjoyment of the company, and furthermore it is a road which, if repaired at all, has been so by the company, and has not been the subject of grand jury presentment. I propose to offer an opinion on the case independent of the pleadings. I cannot understand why the

parties should not have raised the question in a convenient form for the court, as there is not a single fact in controversy between them. The first of the statutes relating to the duties of the Rathmine Commissioners is the Rathmines Improvement Act, 10 & 11 Vict. c. ccliii. (loc. and pers.) The 4th section of that Act provides that the Towns Improvement Act of 1847 shall be incorporated with it. The 25th section recites, "that by the County of Dublin Grand Jury Act, the grand jury of the county of Dublin are empowered to make presentment for the making and maintaining of roads and bridges within the county comprising the Rathmines district, and that the making and maintaining of such works within the district are transferred to the commissioners, and the expenses thereof made chargeable upon the rates authorised to be levied by the commissioners;" and it then enacts "that from and after the passing of this Act it shall not be lawful for the grand jury of the said county to make presentment for the making or maintaining of any road or bridge, or any other work within the said district, which the said commissioners are hereby authorised and empowered to make or maintain, and that in consideration of the said district being hereby made chargeable with the cost of making and maintaining the roads, bridges, and other works which the said commissioners are hereby authorised to make and maintain within such district, it shall not be chargeable with the cost of making or maintaining any other like works within the county or barony save and except those the cost of which, under the said Act of the 7th and 8th years of Her Majesty's reign, are chargeable upon the county at large." And I may say generally of this Act, that in erecting Rathmines into a township, the general intention of the Act as to works or roads, was to place the commissioners in the same position as the grand jury had previously been in, while on the other hand the district was, save for certain purposes, exempted from grand jury taxation. The question will shortly turn on the statute 10 & 11 Vict. c. 84, and some difficulty will arise from its being one of those Acts in which an attempt was made to provide in one Act for two countries having in this respect totally different institutions. The Act is one which may be incorporated with special Acts. In the interpretation clause, without which there scarcely would have been a question, it is said that the word "street" shall extend to and include any road, square, court, alley and thoroughfare within the limits of the special Act. I advert specially to this, that the word "street" is to be interpreted as meaning road or thoroughfare. We now turn to the clauses of the Act under the head of "paving clauses," and by the 47th section it is enacted "that the management of all the streets which at the passing of the special Act are, or which thereafter become, public highways, and the pavements and other materials, as well in the footways as carriage-ways of such streets, and all buildings, materials, implements, and other things provided for the purpose of the said highways by the surveyor of highways or by the commissioners, shall belong to the commissioners. Now, we have not in this country anybody corresponding to the surveyors of highways in England, and it is on this that the difficulty arises, but I believe we never had—certainly not since the grand jury system came to be worked—any such body. It will be observed that by sect. 47 it is the management of the streets which is vested in the commissioners, but with the management were transferred to them the pavements and other materials, and the buildings, &c., provided for the purpose of the said highways. Then by sect. 48 the commissioners, and none others, shall be the surveyors of all high-

[IRELAND.]

REG. V. RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS.

[IRELAND.]

ways within the limits of the township, and within those limits they shall have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force. Again, I observe on this section that really, if it is applicable to Ireland, I do not know what its meaning is, or what the powers of the commissioners are, they being the powers of surveyors of highways. I have already adverted to the fact of there being no such body in Ireland as that of surveyors of highways, and no laws that I am aware of applicable to Ireland vesting in surveyors of highways any powers at all. Then sect. 49 enacts "that the commissioners shall be guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act;" that is for refusing or neglecting to resort to or put in force the powers which surveyors of highways have under the laws in being. Again I advert to this section, that the misdemeanor created by it is for neglecting to exercise the powers of surveyor of highways, and that for that neglect they may be indicted for a misdemeanor. Now, it will be seen that these provisions are wholly inapplicable here, and yet they are the things that we have to deal with, there being no such law in force in Ireland as that alluded to in them, and really I do not know how this liability was to be carried out. The 50th section, which enacts that the trustees of any turnpike-road shall not collect any toll on any road within the limits of the special Act, or lay out any money thereon, is important. This section was not much adverted to, but it seems to me to have a very important bearing on the case, because, while on the one hand it deals with the question of ordinary turnpike-roads and the trustees of those roads, who are generally acting under some Act of Parliament for the public, it leaves wholly untouched the trustees of the Grand Canal Company, who are not trustees for the public, so that while the 50th section deals with the case, if there had been one here, of a public road vested in trustees for the public, it leaves the 11 & 12 Geo. 3, c. 81, and the powers and rights constituted by it, untouched. By sect. 51 "the commissioners may from time to time cause any or all of the streets under their management, or any part thereof respectively, to be paved, flagged, or otherwise made good, and the ground or soil thereof to be raised, lowered, or altered in such manner and with such materials as they think fit; and they may also pave or make, with such materials as they think fit, any footways for the use of passengers in any such street, and cause such streets and footways to be repaired from time to time." These are the sections which it is important to advert to. But it will be seen that whatever rights the whole constitute, there must have been a Queen's public highway—nay, more, it must have been one under such circumstances as that the surveyors of highways, if any such, would have been bound to exercise their powers on it, and in respect of which the inhabitants would have been liable to an indictment. The Rathgar Improvement Act is also recited in the *mandamus*, but it has no more bearing on the case than the other. It just exempts the district provided for by it from grand jury taxation, and transfers the roads to the commissioners; but such was the general intention of those two Acts, to create self-government, to vest powers in commissioners, and to give them, if such could be, the powers of surveyors of highways, and to declare them guilty of a misdemeanor, and subject to be indicted in case of their refusal or neglect

to exercise their powers, just as the inhabitants of the parish or township would have been liable, before the passing of the special Act, to have been indicted. The question will be found to turn, not on the special construction of any one of these provisions, but on the provisions of the 11 & 12 Geo. 3, c. 81 (Ir.), for it appears to me that the character of this road turns very much on the provisions of that statute. That is the Act which enables the present company to carry on and complete the Grand Canal. It will be necessary to advert to three of its sections. The first is sect. 16, by which certain things there specified are transferred to the new company. But to pass from that we then come to sect. 83. I should say that by the sections antecedent to that one, this new company is in its character a trading company; that is, a company associated together to carry on business as water carriers, and to make profits in that way. Accordingly for the profit of their canal they are empowered by the Act of Parliament, by the sections antecedent to sect. 83, to take certain tolls and rates, but as they had certain other property, sect. 83 provides "that it shall and may be lawful for the said company to erect one or more turnpikes upon and across any of the trackways which now are or shall be made on either side of the said navigation, and to take and receive the following tolls, for which they may distrain and sell, as is usual at other turnpikes." The road in question on the pleading appears to be one of the trackways mentioned in the statute 11 & 12 Geo. 3, c. 81. The company are not authorised to turn these trackways into public roads, nor are the trackways turned into public roads, but they are empowered to take tolls. The section then enumerates what those tolls are to be, but those tolls are not for the public, but are the private property of the canal company. Sect. 34 provides "that such toll shall be paid only at one gate, and but once in any one day, and that no road which is now public shall be thereby obstructed." Upon referring to these sections the obvious meaning of them is, that these trackways are not public roads, and that no regulation of the canal company shall interfere with the public traffic. But the Act of Parliament takes a distinction itself between a public highway and a trackway for the use of which the company is entitled to take toll. It appears from the pleadings that one of these trackways is that road from Latouche's-bridge to Clanbrasil-bridge, on which the company have created toll-bars, and on which they have permitted the public to traffic; but they have exercised the entire control and dominion over it, and, for aught that appears on the pleadings, this is still one of the other trackways used as such, or property a right to use which is vested in them by the Act of Parliament; and I am not aware of any Act which authorises any one to take from the company that trackway. Now we will see the importance of the Towns Improvement Act. Sect. 51 of that Act enacts that "the commissioners may from time to time cause all or any of the streets under their management, or any part thereof respectively, to be paved, flagged, or otherwise made good, and the ground or soil thereof to be raised, lowered, or altered, in such manner and with such materials as they think fit; and they may also pave or make, with such materials as they think fit, any footways for the use of passengers in any such street, and cause such streets and footways to be repaired from time to time." That section is incorporated with the Rathmines and Rathgar Acts, but would not apply to the case of the Grand Canal Company, who are the owners of a road, in respect of which they are entitled to take tolls, and not trustees of a public road. On these Acts the question which I propose to consider is, whether this

[IRELAND.]

REG. V. RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS.

[IRELAND.]

trackway has become a Queen's highway, so as to bring it within the meaning of the Towns Improvement Act, and transfer the liability to repair to the Rathmines Commissioners, and authorise them to go on the trackway and repair it while it remains vested in the company. With respect to this obligation to repair, a number of cases were cited to establish that, though a road be a turnpike trust, still the common law remedy on the parish to repair would exist, and might be enforced by *mandamus*, though the trustees are entitled to take tolls for the purpose of repairs. I will refer to one only, *Reg. v. The Inhabitants of Lordsmere*, 15 Q. B. 689. The question there was whether the parish was bound to repair a road passing within its limits, which had been constructed by the trustees of a turnpike trust, originally created for twenty years, but still in force, and the question was, whether that was a case in which the parish was bound to repair. It was contended that, according to the common law of England, the parish was bound to repair every public highway within its limits, and that it mattered not whether that was of ancient origin or of recent origin; but that once it became a public highway by dedication, the parish was bound to repair. Such was the question raised in that case, and Lord Campbell says there: "If the township is liable at all, it can only be on the ground that the road was a common Queen's highway; and, therefore, if the township is liable, the road is properly described. The question therefore is, whether it be proved that, at the time when the grand jury found the bill, the road was a common Queen's highway? I think that it was one, for statute Geo. 4, c. lviii., authorised the trustees to make the road, as a turnpike-road; and in the preamble the Legislature declare that the road would be a convenience and advantage to the public at large. The Act does not in so many words say that the road shall, when made, be a public highway; and great reliance was placed by the deft.'s counsel on the absence of any such express words. I consider that, however, immaterial; for the Act gives the public a right to use the road, and makes it open to the public. Besides, if express words were necessary, the Act incorporates stat. 3 Geo. 4, c. 126, which does contain words to that effect. Then it is argued, in effect, that the imposition of tolls on those using the road prevents it from being a public common highway. The deft.'s counsel were forced to admit that, if an ancient highway were turned into a turnpike-road, the imposition of tolls would not prevent its continuing to be repairable by the parish; but a distinction was made between an old and a new highway in that respect. But I am of opinion that the rule of law is, that the parish is liable to repair all highways, whether new or old. I concur in what is said on that subject by Abbott, C.J. in *Rex v. Netherthong*, "By the general rule of law, the inhabitants of any district who were liable to the repair of all the roads there, previously to the introduction of a new highway, are also liable to the repair of that highway. Where the new road has been made by private persons, dedication by the owner of the soil, and user by the public, and adoption by the parish, are, according to my notion of the law, material circumstances, as proving that an irrevocable licence to use the way has been given to the public, and as being evidence that the way is a public common highway: the liability of the parish to repair is a consequence of its being a public highway. In the present case, the road has become a highway, not by the dedication of the owner of the soil, but by virtue of the Act of Parliament which gives all persons a right to use it for the purposes of traffic till the Act expires, that makes the road a public highway; and an incident to that is, that the township must repair it." He then goes on to deal

with the case of *Rex v. Mellor*, where the period during which, by the Act, the road was to be a highway had expired before the road was out of repair, and the court determined that it had ceased to be a public highway. The distinction was taken in *Reg. v. The Inhabitants of Lordsmere*, that so long as the Act continued in force the road was a public highway, and the parish was therefore liable. Now, I take it from that, that in reference to all roads in England, before any liability to repair can arise in the parish, they must be roads irrevocably dedicated to the public by the private owners, and accepted as public highways, or if they are made by Acts of Parliament, there must be words in the Acts which make them Queen's public highways; and as to the imposition of tolls, it appears to me that that would scarcely make any difference as to the character of the road, once it was established to be a highway, for the trustees are trustees of the highway to maintain it. The tolls are a fund to maintain it, but if they are insufficient, their existence does not supersede the liability of the parish. In the cases which arose in reference to roads established by Act of Parliament in England, it will be found that by the Act they were made Queen's public highways; and therefore, by that observation, I dispose of those cases. It therefore remains to be considered whether this is a Queen's public highway? and on the best consideration I can give, I think it is not so, in that sense which would transfer it to the commissioners of the township of Rathmines, and make them liable to repair it. What I rely upon as showing this is, that this is still one of the trackways of the canal, subject to be used by the company in its whole extent, subject to their user as a trackway for the purposes of their navigation; and from all I can see, it may be necessary now or hereafter to use the entire of it; but there it remains as their private property, though subject to any rights the public have acquired in the meantime. But has there been any dedication of this road to the public, or an acceptance of the road by it? I can find none such. It is not a dedication to say, "Upon this road, which we must retain, we give you liberty to pass, paying a toll which will go into our private funds." How have the company dedicated this in a manner that would make it a Queen's highway, would vest it in the Rathmines Commissioners, would have formerly authorised the surveyors of highways, if any, to enter on and repair it, so as to make it more convenient for public traffic; and would now authorise the commissioners to enter on it and repair it as they think fit? What is there either in the 11 & 12 Geo. 3, c. 3, to declare this to be a public highway? The distinction is even taken in the Act between this trackway and a public road; and there is in the provisions about toll-bars a declaration that they are not to interfere with the use of any public road. Well, I can find nothing in the subsequent dealings inconsistent with the position which the Legislature gave the canal company, when it passed the 11 & 12 Geo. 3, c. 31, and authorised them to erect a toll-bar. Now, a matter was stated in the course of the argument which we cannot take into consideration. It is said that a diversion had taken place, and that the true trackway was a path along the canal. That may be the case, but it does not appear on the pleading, and we can only take into account what there appears. On the whole, therefore, it appears to me that this, being a portion of the trackway of the canal, has not become a Queen's public highway within the meaning of the 11 & 12 Vict. c. 34, or within the meaning of the interpretation clause of that Act. The second question was debated when the case was before us on the conditional order, namely, whether a *mandamus* was in this case the proper remedy, or, rather, whether it was a remedy

[IRELAND.]

REG. v. RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS.

[IRELAND.]

at all. On the part of the prosecutor it was said to be the proper remedy; and authorities were cited in which it was said that the courts in England had granted a *mandamus*. On the other side authorities were cited, in which it appeared to be decided that the courts in England never granted a *mandamus* to compel commissioners to repair, but left the parties to their remedy by indictment. One reason was that it was more convenient, and also that the fine imposed on conviction would be expended on the repairs of the road. However that may be, that is not the question I propose to consider, but the question as to whether a *mandamus* is the proper remedy, having regard to the fact of the liability, if any, on the Rathmines Commissioners, being imposed by the Towns Improvement Act, and the neglect to perform it being declared to be a misdemeanor and punishable by indictment by the same Act which imposes the obligation. I allude to the 40th section, which says that "the commissioners shall be deemed guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act." The question was before the court on the conditional order, and in making absolute the order, the court guarded itself against intimating any opinion on the question. The Lord Chief Justice, in delivering judgment, expressly stated that the object in making absolute the order was, that the question might be raised more solemnly on the return, and I myself, in adding an observation or two, took care to guard myself in like manner. The impression on my mind was, that it was improvident to make the order absolute, because an indictment was the true remedy. I find, from the note taken by the reporter of the court, that in following the Lord Chief Justice, I pointed out that the insertion of the remedy in the statute not alone affects our discretion in issuing the writ, but takes away the discretion. That point appears to have been decided in *Rex v. Robinson*, 2 Bur. 799, where Lord Mansfield laid down the law as follows: "The rule is certain, that where a statute creates a new offence, in prohibiting and making unlawful anything, which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful, by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other, and this is the resolution in *Castle's case*, Cro. Jac. 643;" and the ruling in *Castle's case* supports Lord Mansfield. Now, the way I apply that is this. The obligation to repair is the creature solely of statute. It could not be otherwise, as the commissioners themselves are created only by statute, and in respect of the township, there was no obligation to repair before, as the obligation lay on the county of Dublin through the grand jury. So the same statute which creates the obligation gives the remedy by indictment, and I read it "punishable by indictment and not otherwise," unless by a class of cases on the Grand Jury Acts, where an information may be filed. No doubt has ever been cast upon *Rex v. Robinson*. It has been recognised in many cases, especially in *Rex v. Carlisle*, 3 B. & Ald. 161, and applying that rule to the present case, it appears to me that though this is a *mandamus* sought for by the Attorney-General prosecuting on the part of the Crown, this is not a question of discretion; that the discretion is taken away, and that though we made the order absolute, still it is open to us on the return to the writ, as a matter of law on which we have gone wrong. On those grounds, therefore, I

am of opinion that judgment should be given for the commissioners.

HAYES, J.—When I look at this brief, and find that some twenty-seven points have been put forward to be relied on, I feel I am under a personal obligation to Mr. Jellett for having put them under a sort of hydraulic pressure, and reduced them to three points, which I therefore take up. The first question is, whether a writ of *mandamus* is properly applicable to cases of this description, or whether the party should not be left to an indictment. The next is as to the structure of the pleadings. The next is the question as to the liability of the defendants to repair the road in question. As to the first, the 49th section of the Towns Improvement Act, which is incorporated with the Rathmines Improvement Act, enacts [his Lordship read the section, which has been already given], and it is contended, on the authority of the case of *Reg. v. Robinson*, that the remedy by indictment alone is applicable; but the answer to that, I take it, is a short one. This is not the case of an offence created by statute, which, while creating the offence, also appoints a specific remedy. The offence of neglecting to repair a highway, whosoever may be the party liable to it, whether parish, individual, or any other person, the offence is one at common law, and all the statute does is to transfer to the commissioners the liability which had rested on the parish, but which in Ireland, since the grand jury system was introduced, has been discharged by presentment. The question, then, is, can the remedy by *mandamus* be resorted to as a concurrent and more efficacious remedy than that by indictment; and was the court right in granting the *mandamus* as it did? It purports to be granted on the prayer of the Attorney-General. No case indeed was cited of such a grant, but if we are to be governed by the analogy of the writ of *certiorari*, the exercise of the court's discretion is so much a matter of course that the Attorney-General might almost demand it as a matter of right. The case most strongly relied upon against the propriety of granting the *mandamus* was that of *Rex v. The Trustees of the Oxford and Witney Turnpike Roads*. There two parties had a contest as to the repair of a road. One of them applied for a *mandamus*, and the Court refused it. Though I do not altogether concur in the observations of Lord Denman, I think the court was right. It is an abuse of the writ to make it merely ancillary to a contest between individuals. The case here is very different. The Attorney-General alleges a duty in a public body, and a neglect of that duty, and so he comes here not so much to punish, as to remedy a public mischief. I think that a case within the scope of the writ, and that the court was right in making absolute the conditional order for the *mandamus*. The next question is as to the pleadings. The 79th section of the Common Law Procedure Act 1856 is important. It enacts that "the provisions of the Common Law Procedure Amendment Act (Ireland) 1853, and of this Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of *mandamus* issued by the Court of Queen's Bench, but subject to any general rules which the said court may make, and which it is hereby empowered to make in relation thereto." This enactment seems to have been lost sight of by both sides. Neither party applied to the court for permission to file a surrejoinder. Passing by this as a mere irregularity, let us look at the general purport of the return. It is averred that this never was a highway. If this is so, *cadit questio*. Then the defendants go on to state several matters intended to show that the road was not such a road as the defendants are bound to repair. The return being in the nature of a plea in excuse, the



[IRELAND.]

REG. v. RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS.

[IRELAND.]

defts. may set out any number of matters which are not inconsistent with each other; and the defts. having set out as many several matters as they think fit, the prosecutor is authorised to plead to, or traverse all or any of the material facts so pleaded. He is not obliged to plead to the whole return, but may select such portions as he thinks material, and make them the subject of a traverse or a plea in confession and avoidance. We now come to the third question. By the 11 & 12 Geo. 3, c. 31, the Grand Canal Company was incorporated for the purpose of carrying on to completion a project which had been undertaken by commissioners, but which was then still unfinished. From the 2 Geo. 1, the Legislature had been engaged in a grand scheme for promoting the inland navigation of the country. Very large sums of money had from time to time been voted, but as the difficulty and expense of the undertaking seemed to increase with its progress, it was resolved in 1771 to have recourse to private enterprise, and then a joint-stock company was formed. By sect. 16 of the 11 & 12 Geo. 3, all the property then vested in that inland corporation, and all moneys granted for the same purpose, were transferred to the Grand Canal Company, and full powers were given to it for completing the works; and as a remuneration for the expense to which they should be put, power was given to them by the 27th section to levy certain rates and duties, therein mentioned, on goods and passengers carried on the canal. By sect. 33 the company is entitled to take tolls on vehicles passing along its trackway, for which tolls it may distrain and sell; and sect. 35 enacts that the clear profits which shall arise to the company from the several duties vested in them by the Act, or so much thereof as shall be thought proper, shall at fixed periods be paid to and amongst the respective proprietors of the joint stock, in proportion to their shares and interests therein. Now, before passing to a later period of legislation, it may be well to notice the state of the law then as to turnpikes. In 1729 the first turnpike-road Act was passed in Ireland. During the ten years then following, Acts were passed for turnpikes on twenty-nine different lines of road. Each Act begins with a recital that the road to which it relates is out of repair and dangerous and cannot be kept in repair by the ordinary course appointed by the laws and statutes of the realm. It then constitutes a board of trustees to levy tolls from passengers, and gives the trustees powers of distress and sale. It then directs the tolls so levied to be applied first in defraying the expenses of procuring the Act, and then in defraying the expenses of repairing the road, and paying salaries, and the trustees are empowered to borrow money. By the 3 Geo. 3, c. 11, special provisions are made as to the tolls on the trackways of the Inland Navigation Corporation. The 5th section enacts, that in order to preserve and keep in repair the several track-roads which then were or thereafter might be made along any canal or navigable river, by the direction of the said corporation, it should from and after the 1st May 1764 be lawful for the said corporation to erect or cause to be erected, one or more gate or gates, turnpike or turnpikes, in, upon, or across any track-road or other road, which now is or hereafter by the direction and order of the said corporation shall be made along or on the banks of any canal or navigable river, and also such toll-house or toll-houses as they shall judge necessary; and the corporation may from time to time appoint such toll and duties to be there demanded, received and taken, as mentioned in the section, as they shall think fit and reasonable; and all the tolls or duties which shall be collected or received, the necessary charges of collecting the same being first deducted, shall be applied to repair and keep up the said road, and if

not wanted for that use, to such other use for the benefit of the works undertaken or to be undertaken by the corporation; and then it gives a power of distress and sale for levying the tolls. Now let us observe here, that the Inland Corporation was maintained not as a public body for its own advantages like the canal company. It was a great company constituted for a great public object; it was supported by taxes laid on the public, so as to create a fund to carry out the project, and therefore not a farthing was to be laid out for the benefit of the Inland Navigation Corporation, but all was to be laid out for the works themselves. Let me here mention also that this is the more important because it appears from the pleading before us that the piece of road here was one of the very pieces of ground for which this enactment was made. This was the state of the law previous to the passing of the Grand Canal Act, at the time these trackways were vested in the corporation for public purposes. There can be no reasonable doubt, then, whether we consider the language of the statute, or the facts, that the trackway was one of the highways of the kingdom, and that the erection of turnpikes was tolerated only by reason of the necessity of securing a fund for the repair of the road. I find nothing in the 11 & 12 Geo. 3 which militates against this. Even without the aid of modern authorities, I would not hesitate to hold that, as soon as the Grand Canal opened for traffic, and turnpikes were raised, it became at once in every part of it a public highway in dedication, over which all subjects of the King had free right of passages at all times, and it could not be said to be in the exclusive possession of the company. The acts also of the company are evidence of a dedication. Are we to be told that what till then was unquestionably a public road was by force of that Act reduced to a private road, and the public denuded of rights which they had enjoyed, and for which they had paid? It is said that the tolls here are to be for the benefit of the shareholders. But it is averred in the return that this trackway had never been repaired by grand jury presentment, and this being the ordinary course, therefore the trackway could not be a highway. This leads me to say a word as to the jurisdiction of grand juries over public roads. At common law the obligation vested in the parishes, and this continued in full force till the institution of the grand jury system, which, I believe, derives its origin in the 10th Car. 1. Now, the object of that was not to annul, but to supersede it by providing a more effectual means of repair. But even the public roads were not exempt from grand jury supervision. Accordingly, by 17 Geo. 3, c. 50, the treasurer of the road might be summoned before the grand jury and examined, and if money was found to be in the treasurer's hands, the grand jury was entitled to make an order to have it expended on the repair of the road. Then we have the 36 Geo. 3, c. 55 (Ir.), sect. 87 of which enacts that nothing in the Act contained "shall extend, or be construed to extend, to take away from any grand jury the power or the obligation of repairing any turnpike-road within their counties, but that every such turnpike-road may be repaired or widened, or footpaths made thereto, in like manner and under the like regulations as if that Act had not been made. It is true that that Act is not applicable to the county of Dublin, but it is a strong legislative declaration, that making a road a turnpike-road does exempt it from grand jury supervision; but this supervision is not to be exercised unless the road is in a bad state of repair. [His Lordship then referred to *Re v. Netherthong*; *Re v. Oxfordshire*; and *Reg. v. Brightside Bierlow*, and continued.] Such being the state of the law at the time of the passing of the Rathmines Improvement Act, by the incorporation of the Towns

[IRELAND.]

REG. 11. RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS.

[IRELAND.]

Improvement Act, the management of all streets was transferred to the commissioners. The inhabitants of the district were exempted from grand jury cess, and the commissioners by sect. 49 were declared guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and by sect. 50 it was enacted that the trustees of any turnpike-road should not collect any toll upon any road within the limits of the special Act, or lay out any money thereon. In consideration of the township being made chargeable with the cost of making and maintaining the roads, bridges and other works which the commissioners were authorised to maintain and make within the district, it is enacted by sect. 28 of the Rathmines Improvement Act, that the district should not be chargeable with the cost of making or maintaining any other like works within the county or barony, save and except those, the cost of which under statute 7 & 8 Vict. c. 106, are chargeable upon the county at large. By the Rathgar Improvement Act of 1862, 25 Vict. c. 25 (loc. and pers.) the commissioners are still more sedulously invested with jurisdiction over the roads in their townships. Sect. 23 of that Act enacts that the "grand jury of the county of Dublin shall not have any jurisdiction, power, or authority with respect to the making or maintaining of any of any road or bridge within the district, but all roads and bridges within the district shall be made and maintained by the commissioners at the cost of the district, and the grand jury shall not have any jurisdiction, power, or authority with respect to any other works within the district; and by sect. 24 the commissioners are to have the like jurisdiction, power and authority as to making and maintaining roads and bridges within the district as by statutes 6 & 7 Will. 4, c. 116, and 7 & 8 Vict. c. 106, are vested in the grand jury. Such, then, being the state of the law, little more is required than a calm consideration of it to lead us to a conclusion as to the invalidity of this return. Many cases have been cited: from them all it appears to me that we must hold this to be a highway, and that not the less so because there is a turnpike on it. We need not consider whether sect. 50, as to the collection of tolls, empowers the commissioners to collect tolls; be that as it may, the duty of the commissioners, as it appears to me, is to repair the road.

O'BRIEN, J.—There are two principal questions in this case. It is not my intention to discuss the various matters which are stated in the pleadings. I agree with my brother Hayes's observations in respect to them, and I think, notwithstanding their complication, we are in a position to decide the questions arising in the case. One is, whether the commissioners must repair the road in question; the next is, whether the writ of *mandamus* is the proper remedy? Even if we were now to consider whether we should make the conditional order absolute, I should come to the conclusion that it was a proper case for a *mandamus*. Granting that there is another remedy, I believe the general principle will be found collected in Tapping on *Mandamus*, p. 24-5, that though, as a general rule, a *mandamus* will not issue where there is another equally effectual remedy, yet it will issue where the remedy is not equally convenient. Now, what will be the result of the judgment on *mandamus* for the Crown? That the commissioners will be directed to do the act required. In the case of an indictment the only result will be a fine. It is true, that the fine may be applied in the repairs. It is, therefore, to be considered that the application here is by the Crown, not by an individual, or by even a public officer; but here is an application by the Crown to

compel the commissioners to do a duty which is thrown on them by the Act of Parliament. I shall refer to a case on this very subject; I allude to *Reg. v. The Bristol Dock Company*, 2 Q. B. 64. In that case the writ issued, and a return was made to it, and upon the argument on the return, one objection taken was that the *mandamus* was not, and that an indictment was the proper remedy in the case. Here is Lord Denman's judgment upon that particular point, "On argument, objection was taken to the writ, because it only enjoined the doing that for omitting which the company are liable to indictment. But we think, even if such an objection did not come too late after the writ has issued, that it is entitled to no weight. Those who obtain an Act of Parliament for executing great public works are bound to fulfil all the duties thereby thrown upon them, and may be called upon by this court so to do. If this breach of contract causes a public nuisance also, that cannot dispense with the necessity of a specific performance of the obligation contracted by them." Here the commissioners assume to themselves the duty which these Acts impose. I think, therefore, that that authority, and those cited in Tapping at the page which I have mentioned, show that the objection cannot be sustained even if it were open, as to which I see great difficulty once the writ has been granted. However, the other question is one which it is perfectly open to the parties to raise here, namely, whether this is a highway, the obligation to repair which is thrown on the commissioners? Now, the first Act to which I shall refer is the General Towns Improvement Act of 1847, which is incorporated in the two special Acts. The 3rd section of that Act contains these words: "The word 'street' shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act," and the 47th, 48th and 49th are the sections which bear more immediately on the question in the case. The 47th says that "the management of all the streets, which at the passing of the special Act are or which thereafter become public highways, and the pavements or other materials, as well in the footways as carriage-ways, of such streets, and all buildings, materials, implements, and other things provided for the purposes of the said highways, by the surveyors of highways, or by the commissioners, shall belong to the commissioners." And sect. 48 says that "The commissioners, and none others, shall be the surveyors of all highways within the limits of the special Act, and within those limits shall have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force; and the inhabitants of the district within the said limits shall not in respect of any lands situate within the said district be liable to the payment of any highway rate, grand jury cess, or other payment in respect of making and repairing roads within the other parts of the parish, township, barony, or place in which the said district or any part thereof is situate." This was an Act of Parliament intended to apply both to England and to Ireland. It is certainly a very inconvenient mode of legislation, because words and phrases are used in a general Act of this sort, which are wholly inapplicable to the state of things in Ireland. So that what we must do, unless there is something manifestly repugnant, is to apply it so far as the state of things in Ireland enables us to do. A good deal of stress was laid by Mr. M'Donough on the phrase "surveyors of highways," and on the fact that no such office was known in Ireland. Be it so: the result is that the provisions as to surveyors of highways do not apply to Ireland; but the substantial part of the section, that relating to the management of streets, and the

[IRELAND.]

REG. V. RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS.

[IRELAND.]

vesting of pavements and materials, &c., in the commissioners, does apply: as also that part of sect. 48 which exempts the inhabitants of the districts from payment of highway-rate and grand jury cess. They comes sect. 49, enacting that "the commissioners shall be deemed guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act." That seems to me to put the remedy by indictment against the commissioners on the same footing as the remedy by indictment against the inhabitants. Well, I believe, in the recollection of any one no such thing was known as an indictment against the inhabitants of a parish in this country; and I think, if there was an indictment against the commissioners to be supported by this section alone, it would be very difficult to maintain it. Well, we now come to the Rathmines Improvement Act, which incorporates the general Towns Improvement Act, and sect. 28 recites the transfer of the powers of the grand jury to the commissioners. It is said that this cannot apply in the present case, because in point of fact the grand jury never presented for or interfered with this road, but on looking at the 28th and 33rd sections of the Rathmines Act, and the corresponding sections of the Rathgar Act, it is manifest that, though their effect was to transfer to the commissioners all the powers of the grand jury, there is nothing to limit their powers to what the grand jury had. The commissioners had had by the general Act the fullest powers to manage all streets within their district. The grand jury had certainly nothing to do with this particular road, but there is nothing in the 28th section of the Rathmines Act either expressly or by implication to show that the commissioners are only to deal with the roads which the grand jury had. Then the question is, is this a road the repairing of which is cast on the commissioners? In my opinion it is. The state of the law, the several Acts of Parliament relating to the canal company, have been fully stated by my brothers. I shall only refer to one, the 11 & 12 Geo. 3, c. 31 (Ir.). The 38rd section of it allows the company to erect turnpikes on their trackways, and to take tolls, and sect. 34 provides "that such toll shall be paid only at one gate, and but once in any one day; and that no road which is now public shall be thereby obstructed." That provision as to public roads not being obstructed cannot be relied on as drawing any distinction between the trackway and public roads; but the Legislature gave the public a right to use that as a highway, provided they paid a toll. The power of the company is limited to the amount of the toll, and to its being paid but once. Subject to those provisions, I think the company had a right to the road, and I think it is a public road within the meaning of those subsequent Acts. What is the definition of a highway? A very short definition will be found in the note to *Dowston v. Payne*, 2 Sm. L. C. 128. It is there said, "A highway is a passage which is open to all the King's subjects." The writer goes on to say: "Mr. Wellbeloved defines it to be a thoroughfare; but there are still doubts whether a highway must necessarily have been originally a thoroughfare; and it seems, at all events, that if a highway were stopped at one end, so as to cease to be a thoroughfare, it would in its altered state continue a highway: (per Patteson, J., *Rex v. Marquis of Downshire*, 4 A. & E. 718.) However, I have adopted the above definition as the safest; since, whether or no a passage to be open to all the King's subjects need be a thoroughfare, it is clear that

every passage which is open *de jure* to all the King's subjects must be a highway." That this is a highway to which the public have a right to resort, is clear. That case in 15th Q. B. 689 is decisive on that proposition. It will be observed, in reading the judgment of Lord Campbell and of the other judges of the court, that they held that the fact of the party who dedicated the road having a toll on it does not prevent it from being a highway. Upon that state of things, what is the reason why these parties should not be bound to repair? Is it the fact that the canal company receiving the toll may be the party primarily liable. That may be; but the commissioners are answerable to the Crown, and if the canal company have received tolls, and are bound to keep the road in repair, it is open to the commissioners to proceed against them. Upon these grounds, I think that our judgment should be for the Crown.

LEFROY, C. J.—On the first question in this case, I am of so doubtful an opinion, namely, whether a *mandamus* would lie, that I would rather concur with my brother Fitzgerald, for the purpose of leaving it an open question to have more consideration than it has had from me. The inclination of my mind is to follow the doctrine laid down by Lord Mansfield in the case cited by my brother Fitzgerald. On that part of the case I give no definite opinion, but I concur for the present in the view taken by my brother Fitzgerald. With respect to the main question, whether this was a public road, the duty of maintaining which was thrown on the commissioners because it was a public road, I must say, if I were to go into the case as I should desire to do, I could do little more than take the line and follow the course which has been so clearly, and, in my mind, so satisfactorily taken by my brother Fitzgerald, leading to the conclusion which he came to, and in which I fully concur, that this was not a highway within the meaning of either the special Act or the Towns Improvement Act. The ground upon which it has been argued that this was a public road, was by speaking of a dedication—a dedication created by the Act of Parliament or authorised by it, and acted upon, or created by the company *pleno jure*, having got the property—the land, which they have by their Act dedicated to the public. Well, now, with respect to the act of dedicating it to the public, and making these trackways public roads, or making it imperative on the company to contract or control their absolute right over these trackways; see what the effect of giving that construction to the Act of Parliament would be. It would literally make it *folo de se*. Can any man who ever saw the way in which the canal company carry on business in respect to these trackways, suppose that they could for an hour carry on business if they were subject to be interrupted by the general use of the public going along the road, while their horses were drawing their boats by the same road? And while that is going on, the whole body of the public is to be at liberty to take up the trackway as it pleases! The object of the Act of Parliament was to give the company the power of allowing the public to use the road, simply as a source of revenue, so far as they conveniently could; but they were not forced to relinquish to the public this right of ownership, which was essential to their enjoyment of their property. The object was to allow the company to turn these trackways to account, for their benefit, so far as they conveniently could; and they were allowed to erect toll-gates and take tolls, and with a view to raise a revenue so far as they conveniently could, they are allowed to open these trackways to the public, as often, and so long, as they may find it convenient and

V.C. S.]

CUBITT v. SMITH.

[V.C. S.]

compatible with the carrying on of their work. They were obliged to make a profit as far as they could, consistently with the Act of Parliament, but are we to consider that as a grant to the public of a right which would be totally inconsistent, if it were to be carried out, with the great principle of the Act, which is to benefit this great public concern, and to induce persons to engage in it by giving them the property in these trackways, and enabling them to make as much profit as possible, not to place them in a state of impossibility of carrying on their work, but to give them an additional advantage? As has been observed by my brother Fitzgerald, there is a plain distinction on the face of the Act between the public highways and these trackways. The very provision showing this distinction is decisive, and therefore I confess without repetition; and I could not, without repetition, add anything to the line of argument which he has taken, without going further into the case than this. Looking at the object and recitals of the Act, I would say that it would be giving it a monstrous construction and making it *felo de se*, if the construction now contended for were to prevail. I concur with my brother Fitzgerald in *omnibus*; on the first question in order that it may remain open, but as to the other I have no doubt at all.

The Court being equally divided, Fitzgerald, J., as the junior judge, withdrew his judgment, and there was

*Judgment for the Crown.*

#### V. C. STUART'S COURT.

\* Reported by JAMES B. DAVIDSON and EDWARD WISELOW, Esqrs., Barristers-at-Law.

Wednesday, Nov. 9, 1864.

CUBITT v. SMITH.

*Building contract—Regulations of the Board of Works—Costs.*

\* Where a man, under contract to build according to a specified plan, and according to the Metropolitan Building Acts, commenced building according to the plan, which was in some particulars in contravention of the Building Acts, and upon being cautioned by the board, stopped building, and refused to proceed; it was

\* Held, that he was bound to rebuild in conformity with the plan, modified so as to meet the requirements of the statutes.

This bill was filed for the purpose of enforcing the performance of a contract entered into on the 7th April 1859, between the plts. Mary Anne Cubitt, George Cubitt and Andrew Cuthell, executrix and executors of the will of the late Thomas Cubitt, and the deft. George Smith, builder; whereby the plts. agreed to demise to the deft. a piece of ground and wharf on the south-east side of the Pimlico-road, and south-west side of St. George's-road, abutting south-east on the Grosvenor-canal, together with a house to be erected thereon, as thereafter mentioned, together with the exclusive use of the canal, for the term of sixty-six years from Lady-day 1858, at the rent of 70*l.* per annum.

The deft. agreed that he should not be entitled to the lease thereby agreed to be granted until the house thereby agreed to be built should have been built and roofed in; and he also agreed that he would, within eighteen months from the date of the agreement, erect and build, in a good and workmanlike manner, a brick dwelling-house, with all proper and necessary drains, fence walls, and appurtenances, of the value of 700*l.* at the least, such house to be built not less than three stories high

above the basement, and in elevation to be of a character corresponding with the house erected by Messrs. Lambert and Chapman, on the north-east side of St. George's-road, fronting the Pimlico-road, and near to the premises thereby to be demised, "or according to an elevation, section, plan and specification to be previously approved of, in writing, by the plts., and according to the Act or Acts of Parliament for the time being in force for the regulation of buildings in and near the metropolis, and to the satisfaction of the plts. or their successors in title, and of the surveyor for the time being of the ground landlord of the said premises, not only as regarded the mode of doing the work, but also as to the quantity, quality, species and scantling of the timber and other materials to be used." There was a proviso for re-entry if the deft., his executors or administrators, should not in all things perform that agreement, so far as the same related to and ought to be performed by him.

Soon after the execution of the agreement the deft. entered into possession of the land, and had ever since made use of it for his purposes of business as a builder.

After eighteen months, the time specified in the agreement within which the building was to be commenced, had elapsed, the deft. began to build the house according to a plan signed by one of the plts. The boundary wall on the east side and the foundations had been completed, and brickwork had been carried to the height of about three feet. The front line of the intended house next Pimlico-road projected three feet beyond the adjoining one, the occupier of which objected to the house being built in that manner, and complained to the Metropolitan Board of Works, who thereupon informed the deft. that he must build in a line with the adjoining house.

The bill alleged that the plt. (Cuthell), at the request of the deft., went to look at the building, and after having done so, informed the deft. that he considered there would be no difficulty with the Board of Works if he explained the matter to them, and met their views so far as they were reasonable, and the deft. promised that he would do so, and modify his plans so as to meet their views. The deft., however, did not proceed with the building, and the ground on which he had commenced it, with scaffold poles erected on the front and flank, and inclosed by an unsightly fence, was then in the same condition in which it was when the deft. stopped building in the latter part of 1861.

The plts. further stated that they were unable to obtain a lease of the premises comprised in the agreement from the ground landlord until such a house as that described in the agreement had been built, and they were therefore compelled to take the present proceedings.

The bill prayed that the deft. might be decreed to erect and build, in a good and workmanlike manner, &c., on the said piece of ground fronting the Pimlico-road, a brick dwelling-house with all proper necessary drains, of the value of 700*l.* at the least, &c. (following the language of the agreement), and near to the premises by the said agreement agreed to be demised; and to be built to the satisfaction of the plts., and of the surveyor for the time being of the ground landlord, &c.; the plts. being ready and willing to waive the benefit of the provisions of the said agreement relative to the approbation of themselves and the landlord's surveyor, if the court should decline to give the plts. the relief before prayed, without such waiver. Also, that the deft. might be decreed to accept a proper lease of the premises at the time and on the terms mentioned in the said agreement, the plts. offering to execute such lease. Also, for damages for the breach of contract.

V.C. S.]

PRICE AND ANOTHER v. KIRKHAM AND ANOTHER.

[Ex.]

The deft., by his answer, alleged that he had been in communication with the Board of Works, and had endeavoured, but without success, to remove or modify their objections to the intended house; but he denied that he had promised to modify his plans so as to meet their views, inasmuch as the alterations required by the board would have had the effect of depriving him of the benefit of the foundations, for which he had, with the knowledge of the plt., paid the sum of 400*l.*, and also of taking away a portion of land eligible for building.

*Malins, Q.C. and Fischer*, for the plts., contended that the deft., according to the agreement, was bound to build a house. He must either complete that already commenced, and take upon himself the responsibility of acting in defiance of the regulations of the Board of Works, or erect one afresh, in conformity with those rules. On the other hand, the plts. were perfectly willing to relieve the deft. from his contract altogether, by receiving back the land and applying it to their own purposes. One of these alternatives must be adopted; and they asked for the costs of the suit.

*Bacon, Q.C. and G. S. Law*, for the deft., argued that, owing to the intervention of the Board of Works, it had become impossible specifically to carry out the agreement. To build in accordance with the plan therein specified would be to act in direct opposition to the board, and that the deft. was not prepared, and could not be compelled, to do so. The house had been commenced in accordance with the plans specified in the agreement, and the plts., at the time of its commencement, had raised no objection. 400*l.* had been already spent by the defts. in its erection, and this sum would be lost were he compelled to begin again. It would be a peculiar hardship, and one which the court would not inflict, but rather leave the plts. to their remedy at law. They cited

*Norris v. Jackson*, 1 J. & H. 319;

*Bruce v. Wehnert*, 25 Beav. 348.

**THE VICE-CHANCELLOR.**—The agreement is pre-emptory in its provision that a house shall be built which shall be in accordance with the Acts of Parliament for the time being in force for the regulation of buildings in and near the metropolis. That is a perfectly clear and sensible stipulation, and it is one which bound both parties. The deft., however, undertakes to show that, by the terms of the agreement, he was bound to erect a building which would be in violation of the regulations of the Board of Works; or, in other words, that he was bound by the agreement to erect a building which would be in violation of its own terms, which was nonsense. A plan has been approved of, which in every respect shows what the elevation, and the form, and the dimensions of the house were to be. There was an inadvertence as regards the site of the house as delineated upon the plan, and it was not such as to meet with the approval of the Board of Works. But there is not enough to show that the site might not be adapted to the regulations of the board. It is said, however, that if it were so adapted the deft. would be exposed to a loss of 400*l.*, and that therefore the agreement ought not to be performed by him. The cases cited are of no authority in this case, because here a plan has been approved of by both parties, and all done except as to the site, and that is to be regulated by the regulations of the Board of Works. The bill prays that the deft. may be decreed to erect a building according to the plan approved of, except so far as it relates to a site of the house, which must be according to the Acts of Parliament in force for the regulation of

buildings in and near the metropolis. The declaration will be, that the agreement must be specifically performed, and it appearing that a plan has been approved of except as to the site, the deft. be ordered to erect a house accordingly, save that it must be in accordance with the Acts for the regulation of buildings in and near the metropolis. If it had not been for the course pursued by the deft. I would have made the decree without costs, the demerits being equal upon both sides; but under the circumstances I will not deprive the plt. of his costs.

Solicitors: for the plts., *James and John Hopgood*; for the deft., *Law, Hussey and Hubert*.

## COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Friday, Nov. 11, 1864.

PRICE AND ANOTHER v. KIRKHAM AND ANOTHER.

*Loan society—Principal and surety—Bond—Action on against surety—Notice to surety of principal's default—Equitable defence—Printed rules of society, how far binding on surety.*

In an action upon a bond and a promissory note, defts. pleaded, by way of equitable defence, in substance, that the bond and note were made by defts. as sureties for P. in his lifetime, to secure the payment by P. to a loan society whereof plts. were treasurer and secretary, of 50*l.* by weekly instalments of 5*s.*, and that the said bond and note were made upon the terms and conditions that defts. should only be liable thereupon to the extent of any deficiency in the amount of such payments by P., and that in the event of P. becoming more than four weeks' payments in arrear, the committee (whereof the plts. were members) should immediately inform defts. of the same. Averments of P. becoming more than four weeks in arrear, and failure of the committee, or plts., or any person, to inform defts. thereof until a long and unreasonable time after P.'s death, and after the death of a co-surety with defts., whereby defts.' risk as sureties was improperly increased, and they were precluded from enforcing payment by P., and were greatly damaged:

Held, that a rule, in a book of printed rules of the society, stating that "if any member who has had his share advanced becomes more than four weeks' payments in arrear, they (the committee) should immediately inform the sureties of the same, and have power to institute legal proceedings against them," even if it were binding and obligatory upon members of the society as between themselves, yet was no part of the contract between the plts. who were members, and the defts. who were not members, and did not enable defts., as sureties, to set up the want of such notice as an equitable defence to plts.' action.

**Declaration.**—First count:

On the joint bond of defts. dated 8th Dec. 1856, whereby they became bound to plts. in 100*l.* conditioned for payment of 50*l.* on 1st Jan. 1857 and afterwards on 1st Jan. 1857 said 50*l.* became and was due and payable to plts. and was still unpaid. Second count:—On the joint promissory note of defts. of the like date for 50*l.* payable to plts. on demand for value received, and default in payment, and with the common money count. Claim 22*l.* 11*s.* 2*d.*

Pleas:

2. Equitable plea to first count. That the bond was made and entered into by defts. solely as sureties for one Poole in his lifetime, now deceased; that is to say, to secure the payment by Poole to a certain loan society, whereof plts. were treasurer and secretary respectively, of 50*l.* by weekly instalments of 5*s.* And the said bond was made and entered into by defts. upon the terms and conditions that defts. should only be liable upon such bond to the extent of any deficiency in the amount of the payments to be so made by Poole, and that in the event of Poole's becoming more than four weeks' payments in arrear, the committee (whereof plts. were then and during all the

[Ex.]

PRICE AND ANOTHER V. KIRKHAM AND ANOTHER.

[Ex.]

time herein mentioned members) should immediately inform defts. of the same. Averments of materiality of the observance by plts. of the said terms, of which plts. at the date of bond and always had notice, that Poole afterwards became more than four weeks in arrear; that neither the committee, nor plts., nor any person informed defts. of the same immediately, nor until the expiration of a long and unreasonable time after Poole's death and the death of a co-surety with defts., &c., whereby defts.' risk as sureties was improperly increased and defts. were precluded from enforcing payment by Poole.

3. Equitable to the first count. That defts. made the bond solely as sureties of Poole, and for the purpose of securing payment by him of the money, in plea 2 mentioned, by the instalments and in manner therein mentioned, and upon terms and conditions that defts. should be only be liable to the extent therein mentioned, whereof plts. then and always had notice. Averment of subsequent forbearance and giving of time by plts. to said Poole, without defts.' consent, for a good consideration for payment of the said instalments, beyond the time when the same respectively became due, to wit, until the death of the said Poole, whereby defts. were greatly damaged.

5 and 6. Equitable pleas to second count applicable to the promissory note, similar in terms to the second and third pleas to the first count applicable to the bond.

The plts. are the treasurer and secretary of the Derby and Derbyshire Mutual Loan and Investment Society. The defts. are sureties for a loan of 50*l.* advanced to one Poole, a member, since deceased. The amount actually advanced to Poole was 24*l.*, for which he had to repay 50*l.* by weekly instalments, the defts. joining in the bond and note as sureties only. Poole repaid to the society in his lifetime, by weekly instalments, 27*l.* 18*s.* 10*d.*; the last payment appears to have been made in May 1859. He died in Sept. 1859, and a co-surety about two years ago. No notice was ever given to either of the defts. that the loan had not been repaid until service of the writ in this action, in May 1862.

In rule 11 of the printed rules of the society is the following passage:—"If any member who has had his share advanced becomes more than four weeks' payment in arrear, they (the committee) immediately inform the sureties of the same, and have power to institute legal proceedings against them."

At the trial before Martin B., at the London sittings after last Trinity Term, a verdict was found for plts., and leave was reserved for defts. to move to set it aside, and enter a verdict for defts. on the ground that the facts disclosed an equitable defence, and leave was also given to amend the pleadings if necessary, and a rule having been accordingly obtained by Field, Q.C. to that effect in this term,

Hayes, Serjt. (with Mellor), for plts., now showed cause against it. [MARTIN, B.—I take it that, if on the facts there is a defence, the defts. are not confined to the plea as drawn, but will be entitled to frame their plea to meet the case.] The defts. were sureties for a member of the loan society, but were not themselves members of the society. On a member's obtaining a loan he has not only to pay the 5*s.* a-week, but he, together with a surety, enters into a contract such as that contained in the bond and promissory note on which this action is brought. Defts. rely on the clause in rule 11 as to the surety's having notice of the principal being in arrear. [BRAMWELL, B.—These rules are, so to speak, the constitution of the society, and as between the members rule 11 may be applicable, but how does it apply to the surety who is not a member?] Where there is a clause in an agreement between a principal and a debtor, in which there is a term in favour of the principal and surety, if there is a breach it will operate in discharge of the surety. But that is not so here. As between members, the rules are binding; but here there was no breach of contract, unless it is open to defts. to qualify the bond and note by setting up this rule, which is solely between the mem-

bers, and with which the sureties have nothing to do: (*Brown v. Langley*, 4 M. & G. 466; 13 L. J., N. S., 62, C.P.) In that case, too, a copy of the rules was given to the defts., which was not so here. Prejudice to the surety is the foundation of these cases: (*Watts v. Shuttleworth*, 1 L. T. Rep. N. S. 515; 5 H. & N. 235; 29 L. J. 229, Ex.; affirmed in error, 5 L. T. Rep. N. S. 58; 7 H. & N. 853.) But that case is distinguishable, for there it was part of the contract that the principal should insure, and it was a breach of that contract which prejudiced and so, as the court held, discharged the surety. Here there was nothing of that kind; in fact, by the indulgence given, the sureties are here only called on to pay about half the 50*l.*; whereas, had they been called on at the first moment, they would have had to pay all. [POLLOCK, C. B.—Surely no mere forbearance or abstinence of the creditor from suing the principal, provided he does not give time, releases the surety?] These rules cannot be imported into the contract as a matter of evidence; and secondly, they do not bind plts. to give the notice at all; they merely give them the power to do so if they choose. [PIGOTT, B. refers to *Gordon v. Rae*, 8 E. & B. 1065; 27 L. J. 185, Q. B.]

L. Kelly (with whom was Field, Q. C.) contra, for defts.—Rule 11 was obviously made not only to regulate the rights of the principal, but the position of the sureties to protect them. Nor is there any reason why that should not be so. What is the object or utility of the rule if the surety is not to have notice and be put on the *qui vive* as soon as the principal becomes in a precarious condition. The plea sets up a good equitable defence. It is obvious defts. were only sureties for the due performance of the contract by the principal. [POLLOCK, C. B.—Is there any case which says that a creditor is bound to exercise and enforce all and every condition which it may be in his power to do against a debtor?] Rule 11 is relied on as a contract between the parties on the faith of which defts. became sureties. True they entered into a bond to pay 50*l.* in two months, and a promissory note on demand for the same amount; but they knew that was not the real contract, but that the principal was to pay 5*s.* a-week. The general doctrine laid down in *Pooley v. Harradine*, in E. & B. 431; 26 L. J. 156, Q. B., is relied on by defts. here, that equitably, under the C. L. P. Acts, a surety may show that he is a surety, and then is entitled to all his rights as such—one of such rights in the present case being to have immediate notice of the principal's default. That case was affirmed in the Ex. Ch. in *Greenough v. M'Clelland*, 2 L. T. Rep. N. S. 570; 30 L. J. 15, Q. B. Had defts. been sued on the bond at the expiration of the two months, they might equitably have shown the circumstances under which they executed it. By plts.' default they have lost their remedy against their principal, and their risk is increased also by the death subsequently of a co-surety, and so they are greatly prejudiced.

POLLOCK, C. B.—I believe that we are all of opinion that this rule ought to be discharged. I cannot express my views better than in the language used by my brother Bramwell in the course of the argument. The general rule of law in respect to matters of this sort, where there is a surety, is this: the creditor is entitled frequently to make his demand for a certain period, and to enforce it in a certain way; but provided he does not tie his own hands up so as to prevent him from acting, he is not at all bound to do so. He may abstain from using any right that he possesses, and whether that is advantageous to the surety or not is not the question. The thing to be considered is, is he bound to do it? If he is not bound to do it, the

C. P.]

READ v. EDWARDS.

[C. P.]

surety cannot compel him. I think no case has been cited in any degree countervailing the doctrine that has been laid down, and for that reason I think the rule ought to be discharged.

BRAMWELL, B.—I am of the same opinion. Mr. Kelly does not dissent from what is stated by my Lord Chief Baron. But he says, here was a written contract that plts. would not go against the surety until after notice of the principal's being in arrear for more than the four weeks. That is the only question that he raises, and the only question that he could raise. I do not think more could have been said in favour of it than Mr. Kelly has said. I am of opinion there is nothing in the limited terms of the society's rules. It is a statement of the duties of the officer, who is to inform the surety if default is made in payment for more than four weeks, but it is not obligatory on him to do so as between the plts. and the surety.

CHANNELL, B.—I am of the same opinion. I do not dispute the doctrine in *Pooley v. Harradine*, that the defts., though apparently on the face of the bond the principal debtors, may show themselves by evidence *dehors* the contract to be only sureties, and may avail themselves of any equitable defence which a surety may be entitled to set up. There is no attempt here on defts.' part to set up any binding arrangement between the creditor and the principal debtor, which is *dehors* the contract, but only an attempt to show that the contract entered into with the sureties was a contract that entitled them to say that they were only to be sued after notice given to them, according to the rules, of the principal being more than four weeks in arrear, and I do not think that such was the contract.

FIGOTT, B.—I am of the same opinion.

*Rule discharged.*

Defts.' attorney, *R. H. Wilkins*, 19, King's Arms-yard.

### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

June 18 and July 4, 1864.

READ v. EDWARDS.

*Game—Action for damages done to by deft.'s dog—Scienter.*

*The deft. kept a dog which was in the habit of hunting on its own account, and had done so in the plt.'s wood, where he preserved game, of which fact the deft. had due notice: but notwithstanding he took no steps to restrain the dog, and he again got into the wood and killed and disturbed the game:*

*Held, in an action by the plt. against deft. for the damage done to the game, that the action was maintainable:*

*Also, that there should be no arrest of judgment, because the averment in the declaration that the dog was accustomed to pursue game should be taken to be proved in the sense in which the action was maintainable.*

*Declaration.—Second count:*

For that on divers days and times the deft. then knowing that certain of his dogs were accustomed to hunt for and pursue game, and also then knowing that the plt. preserved and had game in the wood and plantation of the plt. hereinafter mentioned, so negligently kept the said dogs near to the said wood and plantation, that through and by reason thereof the deft.'s said dogs broke and entered the said wood and plantation of the plt., called "Hacking-wood," situate at, &c., and trod down, damaged and destroyed the herbage, soil and underwood thereof, and ran about, hunted, chased, pursued, drove about and disturbed, and killed and destroyed the game, pheasants, hares and rabbits which were in the woods; by reason whereof large quantities of the said game, &c., were

greatly terrified and affrighted, and caused to leave the said wood and plantation and were injured; and by reason of the premises the plt. hath been and is seriously damaged and injured, and the plt.'s right to shoot and sport in the said wood and plantation hath been spoiled and damaged, and divers moneys heretofore expended and laid out in and about and incident to the raising, rearing, feeding, taking care of and watching the said game, &c., became and were wholly lost to the plt.; and the plt. was thereby caused to incur greater expense than he would have done in and about the watching and taking care of the said wood, game, &c.; and the plt. hath also thereby been deprived of the said game, &c., and of the enjoyment thereof, and of having such pleasure and recreation therein, which otherwise but for the premises he would have had; and also thereby the plt. hath been deprived of divers great gains and profits which otherwise and but for the premises he would have derived, and which might and would have accrued to the plt. therefrom, and from the disposal thereof.

To this count the deft. pleaded: 1. Not guilty. 3. That the dogs were not deft.'s. 4. That the wood was not plt.'s. 5. So far as related to the alleged right to shoot and sport, that the plt. had no right to shoot or have sport as alleged. 6. That deft. did not know that the said dogs were accustomed to hunt for and pursue game, nor did he know that plt. had and preserved game in the said wood.

Issue was joined on these pleas at the trial before Cockburn, C. J., when a verdict was found for the plt. on the second count with 5*l.* damages.

The following were the facts of the case:

The deft. kept dogs at his house, which was some distance from Hacking-wood, in which, as the deft. knew, the plt. preserved game and reared pheasants under hens; one of these dogs had been frequently seen by the plt.'s keepers hunting alone in this wood, and they cautioned the deft. about it, and told him he must keep it at home. The deft. did not, however, fasten the dog up, or do anything to insure its keeping at home; and in the early part of August the keepers found it with another dog, not proved to be the plt.'s, hunting in the wood, and in the act of destroying a large quantity of young pheasants, immediately around the coops in which the hens were confined. The plt. thereupon brought his action. A rule having been obtained, calling on the plt. to show cause why the verdict found for him should not be set aside, pursuant to leave reserved, on the grounds that there was no evidence of any infringement of the plt.'s right of shooting and sporting, and that the second count was framed for an infringement of the plt.'s right of shooting and sporting, and there was no evidence of any infringement of such right, or for a new trial, on the ground of misdirection in leaving to the jury the question of the deft.'s negligence, and in not telling them that the destruction of game was no ground of action; or to stay entry of final judgment on the ground that the second count disclosed no cause of action.

*Hayes*, Serjt. (*Metcalfe* with him) now showed cause.—The count is in case for damages done by an animal that ought to have been restrained by its owner. The *scienter* is that the dog was accustomed to hunt by itself and pursue game; but if the deft. contends that it is in the nature of a dog to hunt game, it might also be contended that it was in his nature to worry sheep, but nevertheless it is clear that an action would lie for negligently keeping such dog:

*Hartley v. Harriman*, 1 B. & Ald. 620;

*Cox v. Barbedge*, 13 C. B., N.S., 430.

Also, if a man fires a gun near the decoy of another, with intent to damage him, he would be liable to an action:

*Keble v. Hickerhill*, 11 East, 574, n.;

*Carrington v. Taylor*, 1b. 571.

[*KEATING, J.*—Though there is no property in game, is there not nevertheless a right to have it kept undisturbed?] Certainly, for the keeping of game is both lawful and profitable. It is different



C. B.]

REG. v. ROBERT DARE.

[Q. B.]

in the case of a rookery, because the birds are of themselves destructive, and not good for food, and are not protected either by common or statute law. They also cited

*Hannam v. Mockett*, 2 B. & C. 984;  
*Rigg v. Earl of Lonsdale*, 1 H. & N. 928;  
*Blades v. Higgs*, 13 C. B., N. S., 844; 7 L. T. Rep. 798;  
*The case of the Swans*, 4 Co. 82;  
*Reg. v. Head*, 1 F. & F. 350;  
*Reg. v. Garrahan*, 2 F. & F. 847;  
*Reg. v. Cheaper*, Den. C. C. 361;  
*Reg. v. Platt*, 4 E. & Bl. 860.

O'Malley, Q.C. and Keane, Q.C. appeared in support of the rule.—The *scienter*, and not the negligence, is the gist of the action. Here the *scienter* alleges that the dog was accustomed, not to kill game, but to hunt and pursue, and it has never been held that a dog must not be kept because it is his nature to hunt:

*Mayson v. Keeler*, 1 Lord Raym. 606;  
*May v. Burdett*, 9 Q. B. 101.

Trespass will not lie for anything which a dog may do without the will of its master:

*Brown v. Giles*, 1 C. & P. 118;  
*Mitten v. Pandrye*, Poph. 161;  
*Ree v. Huggins*, 2 Lord Raym. 1574.

The plt. must also show, in order to prove his declaration, that he had a complete property in it; but this being live game, he could not have such property.

*Cur. adr. vult.*

July 4.—WILLES, J.—In this case the declaration stated that the plt. was possessed of land on which he had pheasants and other game, and the deft. was the owner of a dog which was accustomed to chase and pursue game, and that this mischievous disposition of the dog was known to the deft., its owner, who nevertheless was negligent in keeping him, and let him loose, and that the dog entered the plt.'s land and injured and destroyed the game thereon. That was the averment in the declaration, and at the trial, before the Lord Chief Justice of England, it was proved that the dog had a habit, not merely of chasing and pursuing game in a sense in which all or most dogs have that propensity, but that this dog had the habit of going out and hunting game on his own account, and in that sense the jury found the declaration proved as to the alleged mischievous disposition of the dog; and it was also proved that the deft. the owner, notwithstanding, let the dog loose, and consequently, that he did get into the plt.'s land and injured a considerable quantity of game, including some young pheasants that were under hens. The Lord Chief Justice directed the jury to find for the plt., if that was their view of the facts, and they did so find for the plt.; but leave was reserved to move this court to enter the verdict for the deft. Mr. O'Malley obtained a rule to that effect, or, in the alternative, to arrest the judgment upon the ground that no such action was maintainable. The case was argued before my brothers Williams, Byles, Keating and myself. We took time to consider because of the novelty of the case; and I now proceed to deliver the judgment of the court. We discharge the rule to enter a nonsuit or a verdict for the deft., because the declaration was proved, and proved in a sense in which, according to our judgment, there was a cause of action. Had the case turned upon the question, whether the owner of a dog is answerable in trespass for every unauthorised entry of the animal into the land of another, which was the case adduced of the owner of an ox, we should have been slow to answer the question in the affirmative; but we are aware of no authority for the existence of this more extended liability; and there are reasons, upon which we need not now enter,

for distinction in this respect between oxen and dogs or cats, on account of the difficulty and impossibility of keeping the latter under absolute restraint, and the slightness of the damage which they ordinarily do in their wanderings; and the latter class of animals by the common usage of mankind are allowed a greater degree of liberty. In the present case, however, we must remember that it was proved at the trial that the dog which did the damage was of a peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account, and that this vice was known to its owner the deft., and that he notwithstanding allowed it to be at large in the neighbourhood of the plt.'s wood, in which he knew that game was kept; so that the entry of the dog into the wood and the destruction of the game were the natural and immediate result of the dog's peculiarity, which the owner knew of and did not restrain or prevent. We think that is no answer to the action, because the law, as at present established by *Lord Escester's* case in this court, and in the Ex. Ch., recognises in the proprietor of land a right of qualified property in game whilst it is upon the land. With respect to the rule to arrest the judgment, we are of opinion that that part of the rule ought to be discharged, because, after verdict, we think the averment in the declaration that the dog was accustomed to pursue and injure game ought to be taken to have been proved in the sense in which the action would have been maintainable. It is a satisfaction to know that there was good proof in our judgment of a cause of action in the present case. Applying the ordinary rule to this portion of the rule to arrest the judgment, and reading the declaration in the sense in which I am inclined to think it ought to be read, the rule to arrest the judgment ought to be discharged, for the reasons I have mentioned.

*Rule discharged.*

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
 Barristers-at-Law.

Wednesday, Nov. 9, 1864.

REG. on the prosecution of the CHURCHWARDENS AND  
 OVERSEERS OF WENNINGTON v. ROBERT DARE.

*Poor-rates — Parochial Assessment Act — Deductions from gross estimated rental in respect of general sewers rate, &c.*

*In assessing property to the poor rate, deductions should be made from the gross estimated rental in respect of (if liable to such expenses), first, the general sewers tax; secondly, the rate for the maintenance and cleansing of the sewers and works connected therewith; thirdly, the sum annually expended in the repairs of sluices or floodgates upon the property; and fourthly, the sum annually expended in the maintenance and repairs of a sea wall.*

This was a case stated by the Essex Quarter Sessions upon an appeal against a poor-rate for the parish of Wennington, upon which the sessions confirmed the rate. The case stated as follows:—

The app. is the owner and occupier of a mansion house, and about 480 acres of land in the said parish of Wennington, and of this quantity 400 acres, or thereabouts, are situate within the limits of the Level of Wennington. The aforesaid parish of Wennington comprises in its whole extent about 1270 acres of land, of which quantity not quite 860 acres are situate within the limits of the said level of Wennington. A commission of sewers is legally existing under and by virtue of the statute 23 Hen. 8, c. 5, and the several other

Q. B.]

REG. v. ROBERT DARE.

[Q. B.]

statutes relating to sewers in the said county of Essex, called the Rainham Commission, within the jurisdiction of which (among others) is the said level of Wennington. The said 400 acres of land situate in the said parish, and within the level of Wennington, of which the app. is such owner and occupier as aforesaid, are duly taxed by the court of the aforesaid commission of sewers at an annual sum, amounting in the average to 50*l.*, for the general sewers tax, under the powers and authority of the Act 4 & 5 Vict. c. 45, and the app. duly pays such tax. The app. is also duly taxed and assessed by the court of the said commission of sewers under the authority of the statutes in that behalf, in a sum amounting in the average to 15*l.* yearly for the maintenance and cleansing of the sewers and works in the said level of Wennington, from which his said lands in the said level receive benefit and avoid damage, and this rate also the app. has always paid. There are under the jurisdiction of the said commissioners within the said level, and on the said lands of the app. a sluice or floodgate and gate by which the said lands only of the app. are benefited, and works are necessary to maintain the said lands in a state to command their rent. The aforesaid sluice or floodgate and gate are repaired and cleansed under the superintendence of the marsh bailiff, at an annual average expense of 10*l.*, which is borne by the app. The lands situate within the said level of Wennington abut on the river Thames, and are protected from being inundated and covered by the waters thereof by a sea wall fronting the said river, the whole length of which wall is 1 mile 6 furlongs and 23 poles. At a court of sewer held under the said commission, on the 16th April 1861, the jurors then duly empanelled on their oath presented (as the facts are), that the several persons named and mentioned in the second schedule thereunder written or thereto annexed, which was to be deemed and taken as part of that presentment, and their ancestors and predecessors, as being owners of the respective quantities of land within the said level, and the jurisdiction aforesaid, set opposite such their respective names and description on the same schedule, had from time immemorial been used and accustomed to repair and of right ought to have repaired and the said several persons still of right ought to repair at their own respective costs and charges, when and as often as requisite, in respect of their said lands and their respective estates therein, and by reason of their being such owners thereof, the several and respective quantities of walling within the said level, and at the respective parts or places mentioned or specified and set forth in the said last-mentioned schedule. And that the several persons so named and mentioned in the said last-mentioned schedule were then the owners of the particular lands therein also mentioned opposite to such their respective names and descriptions, and as such owners and in respect of such lands and their estates therein respectively, ought by reason of the immemorial custom and usage aforesaid to support, maintain and repair the said walling at their own respective costs and charges, in the proportions mentioned and set forth in the same schedule opposite such names and descriptions respectively, and at the respective parts or places therein also in that behalf mentioned and described. In the second schedule annexed to the said presentment the app. is mentioned to be liable to repair 4 furlongs 88 poles of the said walling as owner of 88 acres 3 roods and 30 perches of land situate within the said level, and also another length of 1 furlong 16 poles of the same walling as owner of 67 acres and 9 perches also situate within the said level. The said 88 acres 3 roods 30 perches and 67 acres and 9 perches respectively from part of the said 400 acres within

the said level, of which the said app. is such owner and occupier as aforesaid, and the app. in fact maintains and repairs the said 4 furlongs 88 poles and 1 furlong 16 poles of walling, and the expense of the maintenance and repair thereof amounts on an average to 40*l.* yearly. The owners of the other lands mentioned in the said schedule, comprising altogether about 400 acres only out of the entire lands situate within the said level, repair the remainder of the sea wall according to their respective liabilities. The app. was rated in the poor-rate appealed against, and which was made in accordance with the valuation list approved by the committee acting under the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103), as under. [Here the form of the rate was set out.]

In assessing and rating the app. to the said rate no deduction or allowance whatever was made for or in respect either of the general sewers tax or the said rate for maintaining and cleansing of said sewers, nor for or in respect of the respective amounts expended by the app. for the repairing and cleansing of the said sluice and floodgate and gate, or for the maintenance and repairing of the said sea wall; and it is admitted that, if such deductions had been made, the assessment in other respects would be proper and just. The app. contended before the assessment committee, that he was entitled to a deduction in respect of all the said sums, but they refused to make any allowance in respect of any of them. The appeal to the sessions was then brought, and the questions raised thereby were whether the app. was entitled to have a deduction made from the gross rateable value of his aforesaid property in respect of any or either, and which, of the said several sums.

The questions for the opinion of the court are:

1. Whether, in the aforesaid rate, the app. is entitled to a deduction from gross estimated rental of his said property in respect of the general sewers tax.

2. Whether, in the aforesaid rate, the app. is entitled to a similar deduction in respect of the amount at which he is rated as aforesaid for the maintenance or cleansing of the sewers and works in the said level.

3. Whether, in the aforesaid rate, the app. is entitled to similar deduction in respect of the sum annually expended by him in the maintenance and repairs of the said sluice or floodgate and gate upon his said lands.

4. Whether, in the aforesaid rate, the app. is entitled to a similar deduction in respect of the sum annually expended by him in the maintenance and repairs of the said sea wall.

If the court should think the app. is entitled to a deduction on all or any one or more of the said items, then the order of sessions is to be quashed with costs, and the rate appealed against is to be amended in conformity with the judgment of the court. If the court should be of opinion that the app. is not so entitled in respect of any of the aforesaid matters, then the order of sessions is to be confirmed with costs.

By the 6 & 7 Will. 4, c. 96, s. 1 (the Parochial Assessment Act), it is enacted that,

No rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and of the commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.

Lush, Q. C. and Murphy now appeared for the repps. in support of the order of sessions, and contended that the deductions claimed by the app.

M

[Q. B.]

REG. V. THE MIDLAND RAILWAY COMPANY.

[Q. B.]

were not to be made in assessing the property, for that they were not such as came within the meaning of the Parochial Assessment Act; that the general sewers rate falls upon the landlord, and not upon the tenant, and is a landlord's, and not a tenant's tax (*Palmer v. Earith*, 14 M. & W. 428); and that none of the four heads of deduction ought to be allowed:

*Reg. v. The Inhabitants of Vange*, 8 Q. B. 242;

*Baker v. Greenhill*, 8 Q. B. 148;

that it is nothing more than a rentcharge, which falls upon the landlord.

*Mellish*, Q.C. and *Philbrick*, for the app., argued that he was entitled to the deduction contended for, since the sewers rate was imposed with reference to expenses necessary to maintain the premises in a state to command the rent, and so came within the words of the Parochial Assessment Act: (*Rex v. Adames*, 4 B. & Ad. 61.) They referred also to the 23 Hen. 8, c. 5 (the Statute of Sewers), and the 4 & 5 Vict. c. 45, s. 1.

COCKBURN, C. J.—I am of opinion that our judgment should be for the app. The question is whether, for assessing this property, in ascertaining its rateable value a deduction should be made in respect of the sewers rate? It may be put in two ways for the app. The Parochial Assessment Act says, that the premises are to be assessed "at the rent at which they might reasonably be expected to be let from year to year, free of all the usual tenant's rates and taxes and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent." Now it may be said in behalf of the app., that these sewerage rates are tenant's rates, and that they come within the words of the section, "other expenses, if any, necessary to maintain them in a state to command such rent." Now, whether or not these latter words refer only to expenses incurred by the individual proprietor himself, or will include also expenses put upon him by Act of Parliament, is a nice question which it is not necessary to determine, for I think there is authority for holding that these are tenant's taxes. The 3rd section of the Statute of Sewers (23 Hen. 8, c. 5) enacts that the commissioners are to tax, assess, charge, distrain, and furnish after the quantity of their lands, tenements and rents by the number of acres and perches, after the rate of every person's portion, tenure, or profit; and by the 8th section it is enacted that if any person being assessed or taxed to any lot or charge for any lands, tenements, or hereditaments do not pay the said lot and charge according to the ordinance of the commissioners, they may decree and ordain the same lands, tenements and hereditaments from the owners to any person for payment of the same. I apprehend therefore that they are to assess every person according to his estate. Now what is the condition of the imaginary tenant under the Parochial Assessment Act? That Act supposes a person a tenant from year to year, and he is liable to assessment to the sewers rate according to the quantity of his property, and I find nothing to show that the reversioner is to reimburse the tenant. There is nothing expressed to that effect, or to indicate that the tenant is to come for the tax to his landlord. It seems to me that this is a tenant's tax, and being such it is a tax which a tenant from year to year would have to pay, and accordingly is one which is to be deducted in calculating the rateable value of the premises. This applies to the first two heads. There is certainly a greater difficulty with reference to the other two heads; but upon consideration I think that these come within the words "other expenses necessary to maintain them in a state to

command such rent." They are expenses necessary to the maintenance of the property to command the rent; they are certainly expenses not incurred by the owner himself, but are incurred in pursuance of a general scheme.

MELLOR, J.—I had certainly some doubts in the course of the progress of the case arising from the way in which the facts were stated, but upon the whole I agree with my Lord that these are tenant's deductions which he would calculate upon when taking the premises.

SHEE, J.—It appears that the app. has been charged upon 400 acres, with respect to which no account has been taken of a sewers rate. That brings us to the consideration of the Parochial Assessment Act, and it appears by that statute that, in order to ascertain the amount of rate payable, the tenant is to be assessed upon the net annual value, that is to say, upon the rent at which the premises might reasonably be supposed to let from year to year, free of all usual tenant's rates and taxes, &c. Now, it appears that this sewers rate is assessed upon the lands and upon the occupier of them. It seems to me that the sum at which they would be let would be the rent, subject, amongst others, to this charge. Then there are also to be deducted other expenses necessary to maintain the premises in a state to command such rent. Upon the whole, it appears to me to be impossible to ascertain the annual value of the premises without taking into consideration this charge.

*Judgment for the app.*

Attorneys for the apps., *Surridge and Francis*, Romford.

REG. on the prosecution of the PARISH OFFICERS OF BADGORTH (resps.) v. THE MIDLAND RAILWAY COMPANY (apps.)

*Poor-rate—Railway company—Rateability—Easement—Right of running over the line of another company.*

*A railway running between G. and C. was owned by the G. W. R. Company and the M. Company, each company owning one-half in length, but each company having the right to run over the half belonging to the other. The M. Company were assessed to the poor-rate of the parish of B. in respect of its occupation of the line in such parish, such portion of the line being the property of the G. W. R. Company:*

*Held, that the M. company had only an easement, and were not occupiers; and so were not rateable.*

This was a special case, stated by consent under a judge's order, pursuant to the 12 & 13 Vict. c. 45, s. 11, in order to determine whether the Midland Railway Company are liable to be rated to the relief of the poor of the parish of Badgorth, in the county of Gloucester. The case stated that—

There is a railway between Cheltenham and Gloucester (hereinafter called "the Railway"). It is between six and seven miles long, and passes through part of the said parish of Badgorth, it is of a mixed gauge both broad and narrow, the broad gauge being used by the Great Western Railway Company, and the narrow gauge used by the Midland Railway Company, as hereinafter mentioned. The railway was originally part of the line of the Cheltenham and Great Western Union Railway Company, and it was intended that it should have been made by that company under the authority of certain provisions contained in the stat. 6 Will. 4, c. 77: (see sects. 94 to 104.) At the time when the Act passed, it was contemplated that the Cheltenham and Great Western Union Railway Company would

Q. B.]

REG. v. THE MIDLAND RAILWAY COMPANY.

[Q. B.]

communicate with the Great Western Railway, which was and is a broad gauge line.

By sect. 98 it was in substance enacted that, upon payment by the Birmingham and Gloucester Railway Company to the Cheltenham and Great Western Union Railway Company of one-half of the money expended by them in making the railway, the Cheltenham and Great Western Union Railway Company should be trustees only of the Birmingham and Gloucester Railway Company of that half of the rail lying nearest to Gloucester, and that all powers vested in the Birmingham and Gloucester Railway Company should extend to it as fully as if the Birmingham and Gloucester Railway Company had found it under the authority of their Act. By sect. 100 it was enacted that the Birmingham and Gloucester Railway Company should have the sole direction and control of the said half of the railway lying nearest to Gloucester, and should collect and receive the tolls and profits which arise or become payable in respect of it. By sect. 101, after reciting that the railway would communicate with the Birmingham and Gloucester Railway, which last-mentioned railway would communicate with the London and Birmingham Railway, and the carriages to run and to be used on the said Birmingham and Gloucester Railway would also run and be used upon the said London and Birmingham Railway, it was enacted that the said line of railway between the depôts at Cheltenham and Gloucester should be made and formed in such manner, and with rails of such shape and width, as should be conveniently adapted for the use of carriages running on the Birmingham and Gloucester Railway and the London and Birmingham Railway. Provided always, that the said Cheltenham and Great Western Union Railway Company should, if they should see fit, lay down any additional rails between the depôts aforesaid, for the distinct purpose of their own traffic, all the expenses of which rails and all extra costs, whether incurred in the purchase of land, formation of embankments, or otherwise in the construction of that part of the said railway which might be occasioned by the adoption of such additional rails, should be exclusively borne and paid by the Cheltenham and Great Western Union Railway Company.

By sect. 102 it was enacted that the Birmingham and Gloucester Railway Company should repair the half of the railway lying nearest to Gloucester, including any rails or works connected therewith, which was exclusively necessary for the Cheltenham and Great Western Union Railway, and that the last-mentioned company should in like manner repair the half of the railway lying nearest to Cheltenham, including any rails or works connected therewith which are exclusively necessary for the Birmingham and Gloucester Railway Company. It was also enacted that each company should have free access to the depôts or stations to be formed at Cheltenham or Gloucester. The Birmingham and Gloucester Railway became by Act of Parliament amalgamated with the Midland Railway Company, and the Great Western and Union Railway Company became also by Act of Parliament amalgamated with the Great Western Railway Company.

The railway between Gloucester and Cheltenham was made in accordance with the provisions of the stat. 6 Will. 4, c. 77. It was formed of a double line, each line consisting of three rails, so as to render the railway suitable both for broad and narrow gauge traffic.

The original intention of the Legislature was departed from in this, that by arrangement between the two companies the railway was made by, and in the first instance at the cost of, the Midland Railway Company, instead of by and at the cost of the Cheltenham and Great Western Union Railway

Company; but eventually by means of certain statutes, and by payment of the Great Western Railway Company to the Midland Railway Company of one-half the cost of making the railway, the original scheme was carried into effect. The railway was opened in Oct. 1847, and from that time to the present, both the Midland Railway Company and the Great Western Railway Company have used it, the Midland Railway Company having always used the rails suitable for the narrow gauge, and the Great Western having always used the rails suitable for the broad gauge, consequently out of each line or set of three rails, one rail has been used by one of the companies only, another of the rails has been used by the other company only, and the third rail has been used by both the companies.

That portion of the railway which lies within the said parish of Badgworth constitutes part of the half of the railway which lies nearest to Cheltenham, and in Sept. 1861 both the Midland Railway Company and the Great Western Railway Company were rated for the relief of the poor of the parish of Badgworth in respect thereof.

A copy of the rate so made upon each of the said companies accompanies and forms part of this case.

The Midland Railway Company contend that under the circumstances herein stated they are not liable to be rated for the relief of the poor of the parish of Badgworth, in respect of the said portion of the railway which lies within that parish, and which forms part of the half of the line which lies nearest to Cheltenham.

The Midland Railway Company has, ever since the opening of the railway in 1847, wholly and exclusively repaired and maintained the half of the line which lies nearest to Gloucester, and have paid the policemen and other officers employed upon it; no part of that half of the line lies in the parish of Badgworth.

The Great Western Railway Company have wholly and exclusively repaired and maintained the half of the line which lies nearest to Cheltenham (including the part which lies in the parish of Badgworth) and have paid the policemen and other officers employed upon it.

The traffic of the Midland Railway Company very far exceeds, and is very much more profitable than the traffic of the Great Western Railway Company over the railway.

The Great Western Railway Company have given notice to the parish of Badgworth, that they insist on being assessed in respect of their own profits only.

In April 1855 an action was brought in the Court of Q. B. by the Great Western Railway Company against the Midland Railway Company, to recover tolls in respect of the traffic of the Midland Railway Company passing over that half of the railway (between Cheltenham and Gloucester) which lies nearest to Cheltenham. The claim was resisted by the Midland Railway Company, and the Courts of Q. B. and Ex. Ch. gave judgment in their favour against that decision. The Great Western Railway Company have appealed to the H. of L. The appeal is pending.

All the Acts of Parliament relating to the railway are to be taken and considered as part of this case, and may be referred to by either party.

The question for the opinion of the court is, whether the Midland Railway Company are liable to be rated to the relief of the poor of the parish of Badgworth in respect of that portion of the railway (between Cheltenham and Gloucester) which lies within the said parish, or of their use and enjoyment thereof.

Judgment in conformity with the decision of the said court, and for such costs as the said court shall adjudge, may be entered by motion by the party in

Q. B.]

REG. v. INHABITANTS OF CLECKHEATON—REG. v. PURDAY.

[Q. B.]

whose favour the same is given at the quarter sessions for the said county of Gloucester, next or next but one after such judgment shall have been given.

*Dowdeswell* and *Staveley Hill* appeared for the resp., but the Court called upon

*C. Hutton* for the apps., who argued that, under the facts stated in the case, the Midland Company were not liable to be rated, and that the rate should be wholly borne by the Great Western Railway Company.

*Dowdeswell*, in support of the rate, contended that the rate was good, and that the Midland Company are beneficial occupiers; that they are occupiers of the line:

*Reg. v. Bell*, 7 T. R. 598.

COCKBURN, C. J.—I think, when the facts are apprehended, the case is a very clear one. The whole question is, whether the part of the line in the parish for which the rate is made is in the occupation of the Great Western or the Midland Railway Company? Now the line itself is divided, and that part which is said to be liable to this rate is the property of the Great Western Railway Company. The Midland Company have certainly the right to run their carriages over it; but what is the difference between that right and that in so many cases where railway companies have running powers, except that here it is under the provisions of an Act of Parliament which does not profess to give such power? Really, it is nothing more than this: Here is a line divided into halves, one half belonging to one company, the other half to the other company, and then there is a provision that each company shall have a right to run over that part of the line which belongs to the other. This is nothing but an easement of one company over the line of the other. Here the soil is in the Great Western Railway Company, whilst the Midland Company has the right to run over it—what is that but an easement? It is said that the Midland Company run more trains and make more profit than the Great Western Company; but this makes no difference, they have only a right of running on the line. It has been said that we should hold this to be an occupation by the Midland, because, if we do not so hold, the Great Western will not be liable to be rated for the profits made by the Midland, and so there will be an inadequate assessment, as the Great Western cannot be assessed for the profits made by the Midland Company. But if it is established that the Great Western Company are liable, it will be an easy matter to ascertain the extent of their liability. If they do not get their fair profit from the line, it is because they have arranged for a valuable consideration in some other way. It is quite clear that the Midland Company have only an easement over the line.

CROMPTON, MELLOR, and SHEP, JJ. concurred.

*Order quashed.*

Attorneys for the resp., *Wilton and Son*, Gloucester.

Thursday, Nov. 10, 1864.

REG. v. THE INHABITANTS OF CLECKHEATON.

*Highway—Indictment for non-repair by order of justices—Costs—4 & 5 Will. 4, c. 50, ss. 94, 95.*

An order was made by justices under 4 & 5 Will. 4, c. 50, s. 95, for an indictment to be preferred for the non-repair of a "highway called Quaker-lane." Before the justices it was sought to fix the defts. with liability to repair the highway as a cart and carriage way.

*The indictment contained counts for a cart and carriage way, and also for a pack and prime way.*

At the trial the jury found that it was not a cart and carriage way, and the defts. admitted that it was a pack and prime way, and contended that it was not out of repair, and the jury found that as a pack and prime way it was not out of repair:

Held, that the prosecutor was not entitled to his costs under sect. 95.

*T. Campbell Foster* moved for a rule nisi for a mandamus to compel *J. B. Greenwood, Esq.* and certain other justices of the West Riding of Yorkshire, before whom an indictment for the non-repair of the highway hereinafter mentioned came on to be tried at the quarter sessions, to enter continuances for the purpose of granting the costs to the prosecutor under sect. 95 of the General Highway Act (4 & 5 Will. 4, c. 50).

The road in question being alleged to be out of repair, a summons was taken out against the surveyor of the highways of Cleckheaton under sect. 94, and came on for hearing at a special sessions. In the summons the road was described as a certain "highway called Quaker-lane, situate, &c.;" and the liability to repair being denied by the surveyor on the part of the inhabitants, the justices under sect. 95 made an order directing a bill of indictment to be preferred at the next quarter sessions against the inhabitants "for suffering and permitting the said highway called Quaker-lane to be out of repair."

Accordingly an indictment was preferred and found by the grand jury: and ultimately was tried at the last Midsummer Quarter Sessions, when a verdict was found for the defts. The indictment contained four counts. In the first two counts the road was described as a way for carts and carriages; and in the third and fourth counts as a pack and prime way. The jury found that it was not a way for carts and carriages; and that as a pack and prime way (which it was admitted to be by the defts.) it was not out of repair. The verdict was accordingly entered for the defts., and on an application by counsel for the costs of the prosecution, the Quarter Sessions refused them: (*Reg. v. Heanor*, 6 Q. B. 745.) It was now contended that the prosecutor had succeeded in establishing that this was a highway for foot passengers in respect of which the liability to repair was disputed. It must be conceded that the object of the prosecution was to establish that this was a highway for carts and carriages.

COCKBURN, C. J.—It is quite clear that the defts. only disputed their liability to repair this as a carriage and horse way, and *Reg. v. Heanor* decides that where the fact of the road being a highway is negatived by the jury, the prosecutor is not entitled to costs under sect. 95. Prosecutors cannot, by adding something in the indictment which was not in the contemplation of the justices at the time of making the order, entitle themselves to costs.

The rest of the Court concurring,

*Rule refused.*

Saturday, Nov. 12, 1864.

REG. v. PURDAY.

*Summary conviction—Appeal—Costs—Liability of prosecutor.*

Upon an appeal against a summary conviction, the quarter sessions have power to award costs against the prosecutor, although the convicting justices are the nominal resp.

Where, upon an appeal against a summary conviction, the appeal is called on, and the app. appears, but no

Q. B.]

REG. v. PURDAY.

[Q. B.]

*one appears for the resp., the sessions have power to quash the conviction with costs, as against the actual prosecutor.*

This was a rule to quash an order of quarter sessions of Great Yarmouth, quashing a conviction with costs against the prosecutor.

It appeared that an information was laid by a Mr. James Purday against one William Ashley, under the 5 Geo. 4, c. 83, s. 4 (the Vagrant Act), as a rogue and vagabond, for being found upon his premises for an unlawful purpose, whereupon he was convicted, and sentenced to one month's imprisonment, against which conviction he appealed, giving notice, &c., as provided for by the 14th section. At the ensuing quarter sessions for the borough of Great Yarmouth, at Midsummer last, the appeal was called on, when the app. appeared by his counsel, but no one answered for the resp. The Recorder thereupon quashed the conviction with costs against the prosecutor below. Upon afterwards inquiring who Mr. Purday was, Mr. Purday, who had been all the time in court, answered that he was there, whereupon the Recorder inquired of him why he had not taken proper means to support the conviction. To which he replied that he thought the magistrates would have done so, but that he was then ready to give the same evidence he did before the justices. (There was a conflict in the affidavits as to what really took place in court, but the bench gave credit to the foregoing statement.) The sessions then proceeded to other business, and nothing further took place upon the subject.

*Bulwer* now showed cause against the rule, and contended that the recorder was right in the course he adopted, for that the appeal having been regularly called on, and no one appearing for the resp., he was justified in quashing the conviction and in giving costs against the actual prosecutor; notwithstanding the appeal was nominally against the conviction of the justices:

*Rex v. The Justices of Hants*, 1 B. & Ad. 654;

Lord Tenterden's Judgment, 659;

*Reg. v. Smith*, 29 L. J. 216, M. C.; 2 L. T. Rep. N. S. 437;

and that as the recorder had jurisdiction that court would not inquire how he has exercised it:

*Rex v. The Justices of Carnarvon*, 4 B. & Ald. 86;

*Ex parte Hopwood*, 15 Q. B. 121;

12 & 13 Vict. c. 45, s. 5.

*Keane*, Q. C., in support of the rule, contended that, as the appeal had not been heard, the recorder had no power to give costs; also that he could not give them as against the prosecutor in the court below, the appeal being against the conviction of the justices, and the prosecutor being no party to the appeal, and being merely bound over as a witness to appear and give evidence, and need not even have any notice of appeal. He endeavoured to distinguish the present case from those of *Reg. v. The Justices of Hants* and *Reg. v. Smith*. He further argued that, as the prosecutor was actually in court when the appeal was called on, the recorder ought, in the proper exercise of his discretion, to have heard his evidence.

*Cockburn*, C. J.—I am of opinion that in this case the rule should be discharged. The first question raised is, whether the Recorder of Yarmouth, under the circumstances, could treat this appeal as one over which he had jurisdiction to quash the conviction. Now, the ordinary course of practice throws upon the resp. the necessity of showing how the conviction can be supported, and it is the duty of the quarter sessions to give effect to the appeal and quash the conviction when, by the non-attendance of the resp., it

is shown that he is not prepared to support it. There is nothing in this case to show that the judgment of the sessions was not quite regular. The appeal was called on, no one appeared for the resp., and the conviction was thereupon quashed. Then an order is made whereby the prosecutor Mr. Purday is called upon to pay the costs. That is objected to on the ground that the 5th section of the 12 & 13 Vict. c. 45 does not warrant it, that notice of appeal by the 14th section of the 5 Geo. 4, c. 85, is to be given to the justice or justices of the peace whose act or determination shall be appealed against, and that it is they and they alone who are the resp. Now that raises a question of considerable importance, inasmuch as the power to give costs is provided for by sect. 5 of the 12 & 13 Vict. c. 45, which enacts that "upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable." Therefore, if the justices are to be considered as the parties in the appeal, Mr. Keane's argument ought to prevail. But upon authority it would appear that, although the notice of appeal is to be given to the justices, without the necessity of any being given to the prosecutor, the justices are not to be considered as parties, but it is the app. and the informant who alone are to be considered as such. It should be observed that this statute of the 12 & 13 Vict. c. 45 followed a previous statute (the 11 & 12 Vict. c. 43), which, by sect. 18, gives justices, upon a summary hearing, a power to give costs against the prosecutor or complainant. The subsequent statute then carries the power further, and enables a court of quarter sessions to give costs against the resp. If the magistrates below have the power to give costs against the informant, and upon an appeal the court of quarter sessions have not a similar power, it would be most extraordinary. I think the 5th section of the 12 & 13 Vict. c. 45, places both statutes in harmony with each other. But, independently of this, we have very high authority upon the subject. In *Rex v. The Justices of Hants* we have almost the same state of facts. In that case one Gloyne had laid an information under the Turnpike Act against a toll-collector, and thereupon he was convicted, and against such conviction he appealed; but at the quarter sessions Gloyne did not appear, whereupon the sessions quashed the conviction, and ordered Gloyne to pay the app. 10*l.* for costs. In that case, like the present, the notice of appeal was given to the justices only. Now, although in that case the prosecutor was entitled to half the penalty, the judgment of the court does not proceed upon that ground. Lord Tenterden, in his judgment, says: "The next question is, whether the justices had power to charge the prosecutor with costs? It is true the Act directs notice to be given to the justices, not to the party prosecuting or defending; but it would be a great anomaly to cause a justice who acts *bonâ fide* in the discharge of his judicial duty to pay costs. The question is, what is the meaning of the words, 'the party appealing or appealed against?' The party appealing here is manifestly the party convicted, and if that be so, the informer is the only person who can satisfy the words 'party appealed against.'" We have, therefore, a deliberate decision by Lord Tenterden on the very same point. The question again arose, upon this very Act of Parliament, before Hill, J., in *Reg. v. Smith*, and he came to the decision that the true construction of the 5th section of the 12 & 13 Vict. c. 45, in its application to the Vagrant Act, should be the same as that put by

Q. B.]

GILES v. SINEY—REG. v. BLUFFIELD.

[Q. B.]

Lord Tenterden in the case of *Rex v. The Justices of Hunts*. I cannot certainly take the opinion of any single judge for which I entertain a more profound respect than of Mr. Justice Hill. Then the point is raised that, suppose Mr. Purday is the proper party, yet, inasmuch as no evidence was given, there was nothing to show that he was, in fact, the informer. This was altogether a question of fact for the sessions. It may very well be assumed that, notwithstanding no notice of appeal had been given to him, he would have exercised sufficient vigilance to have ascertained if any notice of appeal had in fact been given. But we have nothing to do with that; it was a matter entirely for the recorder. He had means of knowing whether or not Purday was really the prosecutor. If he had been merely a witness, and had been improperly made the prosecutor, and so the recorder had improperly exercised his jurisdiction, it would be a difficult thing to say that such an order could not be quashed. But it is useless to consider that, for in point of fact it is clear that he was the prosecutor, and it would lead to most mischievous consequences if, because no evidence is given, because the resp. does not appear, the court is not to have power to award costs. We have only to deal with the fact that Purday is the prosecutor; and, being such, he is within this section of the statute. We have nothing to do with the question as to whether it would have been discreet in the recorder to have opened the question again. The appeal was called on in its regular course, the power to award costs was within the jurisdiction of the court, and the recorder had a right to order Purday to pay them.

MELLOR and SHEE, JJ. concurred.

COCKBURN, C.J. afterwards said that Crompton, J., who had left the court after the arguments, desired him to say he concurred in the judgment.

Rule discharged.

Monday, Nov. 14, 1864.

GILES (app.) v. SINEY (resp.)

*Evidence—Previous conviction—Incorrigible rogue.*

*The 9 Geo. 4, c. 83, s. 17 (the Vagrant Act), requires convictions under it to be returned to the next general or quarter sessions, and filed and kept on record.*

*Evidence of a previous conviction, therefore, under the Act can be proved only by proof of the record thereof; and neither oral testimony nor the minute-book of the convicting justices is sufficient proof thereof.*

Case stated by justices of the borough of Newbury, Berks, under the 20 & 21 Vict. c. 48.

At a petty sessions on the 3rd May 1864, Maria Giles, the app., being in custody on a charge of misdemeanor, on which she had been committed for trial, was brought before us at the instance of the said Amey Siney, charged with being a rogue and vagabond.

The charge was made under sect. 4 of the 9 Geo. 4, c. 83.

About the beginning of the year 1863, the resp. went to consult the app., who lives in Newbury, and has the reputation of being a cunning woman, about recovering some property which she supposed her mother, who had died about nine months before, had been possessed of. The app. said she should be able to get it for her, and asked for a pound to buy some stuff to work with, but at that time was only paid 5s. The resp. went to the app.'s house for the same purpose several times in the course of the year, and paid her various sums of money, and at the last visit, which occurred on the 22nd Dec. last, paid her

6d., which the app. said was for the purpose of raising her (the resp.'s) mother, and that she wanted that 6d. to do it.

The police for the borough proved on oath that the app. had been twice before convicted before the justices of the said borough of Newbury of being a rogue and vagabond. The justices had also before them the minute-books in which the convictions were recorded.

The justices on the above evidence convicted the app., "for that she, on the 22nd Dec. last, at. &c., did, by using subtle craft, deceive and impose upon one Amey Siney, &c.; she, the said Maria Giles, having been proved to have been on the 23rd Sept. 1853 adjudged to be a rogue and vagabond, and duly convicted thereof," and ordered her to be committed to the house of correction until the next quarter session for the borough of Newbury.

*Harington* for the app.—There was no legal evidence of any prior conviction. Sect. 4 enacts (*inter alia*), "Every person pretending, or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects, shall be deemed a rogue and vagabond." Sect. 5 enacts that every person committing any offence against the Act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be, and duly convicted thereof, shall be deemed an incorrigible rogue, and the justices may commit to the house of correction, there to remain until the next general or quarter sessions. Sect. 17 requires convictions to be transmitted to the next general or quarter sessions, and there filed and kept on record. It must be assumed now that the justices have returned the convictions to the sessions as required by sect. 17. That being so, the oral testimony of the police and the minute-books kept by the justices' clerk were inadmissible as evidence of the previous conviction. The only admissible evidence was proof of the recorded conviction: (*Reg. v. Ward*, 6 Car. & P. 366.) In *Rex v. Feoveley*, 8 A. & E. 806, the minute-book of the sessions was the only record of the proceedings at sessions. In drawing up a conviction it is always stated that it remains in full force and effect. There is nothing to that effect in the minute-book kept by the justices' clerk.

No counsel appeared for the resp.

COCKBURN, C.J.—I am very sorry to say that we have no alternative but to set aside the conviction. The evidence of the previous conviction was not such as ought to have been received.

The rest of the Court concurring,

Conviction quashed.

REG. v. BLUFFIELD.

*Highways—Formation of highway district—Outstanding rate—Whose duty to collect.*

*It is the duty of outgoing surveyors of a parish to collect an outstanding highway rate when, during their term of office the parish, is incorporated into a new highway district under 25 & 26 Vict. c. 61, and a highway board and district surveyor are appointed.*

*The words "and then remaining unpaid" in sect. 48, mean remaining unpaid at the end of seven days from the appointment of the district surveyor.*

Demurrer to a return to a mandamus.

The mandamus recited that W. Bluffield and G. W. Youd were elected highway surveyors of the parish



Q. B.]

CALEY v. LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

[Q. B.]

of Potton, Beds, on the 25th March 1862, for the year then next ensuing, and that during their year of office, on the 6th March 1863, they made a highway rate which was duly allowed by justices and published, and that an order was made by Erle, C. J., on the trial of an indictment against the inhabitants of Potton for non-repair of a highway, for the costs, 231*l.*, to be paid out of the highway rate; and that an order of quarter sessions was made on the 3rd March 1863 for dividing the county of Bedford into highway districts, under the 25 & 26 Vict. c. 61, and that the parish of Potton was within the Biggleswade highway district, and waywardens, &c. elected, and a highway board formed, and a treasurer and district surveyor appointed; that the highway-rate so made by the defts. had not been collected, and that it was required for payment of the costs of the prosecution, pursuant to the order of Erle, C. J., and that defts. had been required on behalf of the highway board of the Biggleswade district to collect the rate and pay over the same to the treasurer, and that the defts. had refused so to do. The writ then commanded the defts. to collect the rate and pay over the same to the treasurer.

Return. That the defts were elected under the 4 & 5 Will. 4, c. 50, and that before the expiration of their year of office the Biggleswade highway district was formed under the 25 & 26 Vict. c. 61, of which the parish of Potton formed part, and that a district surveyor was appointed by the highway board, and that seven days from such appointment have elapsed; that after such seven days they the defts. were no longer surveyors of the highways for the said parish of Potton, and had no power to collect the said rate.

Demurrer to the return and joinder therein.

D. D. Keane, Q. C., in support of the demurrer.—At the time of the formation of the highway district there was a subsisting highway rate, which had not been collected, and the question is whether it is the duty of the old surveyors to collect it. The question depends on sect. 43 of the 25 & 26 Vict. c. 61, which defines the relative duties of outgoing surveyors and the new highway board. By clause 2 of that section "The outgoing surveyor of every parish within the district shall continue in office until seven days after the appointment of the district surveyor by the highway board of the district of such outgoing surveyor, and no longer; and he may recover any highway rate made, and then remaining unpaid, in the same manner as if this Act had not been passed; and the money so recovered shall be applied, in the first place, in reimbursing any expenses incurred by him as such surveyor, and in discharging any debts legally owing by him on account of the highways within his jurisdiction; and the surplus (if any) shall be paid by him to the treasurer of the highway board, &c. And clause 3 enacts that the highway board shall, for all the purposes of the principal Act, except that of levying highway rates, be deemed to be the successor in office of the surveyor of every parish within the district." The outgoing surveyors are, under this section, the proper parties to collect this rate.

Sills was then called on to support the return.—The *mandamus* on the face of it does not show any right to the interference of the court. By sect. 43, the outgoing surveyors are only to continue in office seven days after the appointment of the district surveyor, and the return shows that that period has elapsed.

COCKBURN, C. J.—It never could have been intended that persons in arrear for highway rates should have perfect immunity unless the rate was collected within seven days after the appointment

of the district surveyor or of the new highway district. The outgoing surveyors have reserved to them the power of collecting the outstanding rate.

CROMPTON, J.—The outgoing surveyors, by sect. 43, are to collect this rate, and pay it over to the treasurer of the highway board, and then the board, by sect. 11, have the duty of paying the prosecutor these costs thrown on them.

SHEP, J.—The words in clause 2 of sect. 43, "and then remaining unpaid," mean remaining unpaid at the end of the seven days from the appointment of the district surveyor.

*Judgment for the Crown.*

Wednesday, Nov. 16, 1864.

CALEY v. LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

*Public Health Act—Levelling streets—Powers of local board.*

*Under sect. 69 of 11 & 12 Vict. c. 63 the local board of health have power only to require a street to be levelled with reference to any want of inequality or want of uniformity in the street itself. They have no power to require the level of a street to be raised or lowered so as to bring it into uniformity with the adjacent streets.*

Appeal against an order made by the stipendiary magistrate of Hull, under sect. 69 of 11 & 12 Vict. c. 63 (the Public Health Act), upon a summons, for "refusing to pay to the local board of health of the borough of Kingston-upon-Hull, 9*l.* 19*s.* 5*d.* for expenses incurred by the board in levelling and flagging the west side of Park-street, late College-street west."

The street in question began to be formed in 1841, between which date and 1852 the houses therein were built. Mr. Caley, the app., was the owner of certain premises in Park-street, and was served with notice, under sect. 69, "to level, curb and flag" the part of the street in front of his property, by making a foundation for the footway with a bed of sand two inches in thickness, to receive the flagging of six inches of strong gravel or broken chalk for the curbstone, the ground for receiving the above to be raised to the proper level with dry materials, and the footway to be paved with Yorkshire flags three inches in thickness.

The app. having neglected to do the work required, the board did it, and took out a summons to recover from him the expenses. In point of fact the footway was raised six inches in front of the app.'s property.

It appeared that Park-street was not a highway, and the app. contended that the board had no power under this section to call upon him to raise the soil of the footpath as required by the notice, but only to smooth the surface of the footpath in front of his property, and flag upon such smoothed surface. That if this were not so, the board might go on changing the level, and even calling on the owners to construct a viaduct.

The magistrate found as a fact that the level adopted by the board, having regard to the position of Park-street taken in connection with the surrounding parts, was the best that could be taken and a great boon to the public, the app. and the adjoining owners, and made an order for the payment of the expenses.

TINDAL ATKINSON, Serjt. (A. Peel with him) for the local board.—It is found in the case that this is a street which is not a highway, and the question turns on sect. 69 of the Public Health Act (11 & 12 Vict. c. 63), which enacts that, in case any present or future street, or any part thereof (not being a high-

[Q. B.]

YEWDALE V. CRAVEN.

[Q. B.]

way), be not sewered, levelled, paved, flagged and channelled to the satisfaction of the local board, the board may by notice in writing to the owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice. The section then provides that if the notice is not complied with, the board may execute the works, and the expenses shall be paid by the owners in default. It must be conceded that what the owners and occupiers were required to do was for the purpose of raising the street to the level of the adjoining streets, there being a descent which was found very inconvenient to the public. The word "levelling" in sect. 69 is sufficient to give the local board power to do this.

*P. Thompson* was not called upon.

COCKBURN, C. J.—It being conceded, as the fact was, that the street was raised for the purpose of bringing the roadway into uniformity with the level of the adjoining street, I am of opinion that the local board exceeded the powers conferred upon them by sect. 69 of the Act. That section only means that they may require occupiers and owners of premises to do anything that may be necessary, so as to make the level of the street itself uniform. And for this purpose we must look at it as if the street stood by itself, and there is nothing which empowers them to alter the level of a street so as to bring it into uniformity with other neighbouring streets. They cannot look to the convenience of the surrounding district. It may be true that the alteration would be a convenience to the neighbourhood if this street should be of the same level as the other parts of the neighbourhood; but the section only contemplates that the whole of any given street should be of one uniform level. I should have been disposed to consider that the case might have been within the powers of the local board, if these works had been done as incidental to the channelling or sewerage of the street, but that is not so here.

CROMPTON, J.—I am of the same opinion. It might be very hard on owners and occupiers, if because an old street was inconveniently raised or lowered, the street should be altered by the local board by making a deep cutting or a high embankment, so as to level it with the adjoining streets. I do not see any words in sect. 69 which will enable a local board to raise or lower a street so as to bring it to the same level with the surrounding district.

MELLOR, J.—By the section, the powers of the local board are confined to the execution of works in relation to levelling, &c. the street itself, and not with reference to the surrounding streets.

SHEE, J. concurred.

*Judgment for the app.*

YEWDALE (app.) v. CRAVEN (resp.)

*Poor-rate—Enforcing payment—Demand by agent.*

*A demand of payment of a poor-rate by a collector, appointed by the overseers and assistant overseer for the purpose of assisting in collecting the poor-rate, was held sufficient to entitle the collector to proceed by summons before a magistrate, to enforce payment in the usual mode by distress.*

*A summons for nonpayment of poor-rate, grounded on an information by the resp., the poor-*

*rate collector of the township of Calverley-with-Farsley (Yorkshire), was issued on the 21st April last against the said app. David Yewdale, and duly served upon him and made returnable on the 28th April last.*

The complaint against the app. was heard and determined at a petty sessions of the peace for the West Riding, held at Bradford, on Thursday, the 28th April last. The resp. J. Craven, who preferred the complaint, was the only witness examined. He produced and proved the rate or assessment for the township of Calverley-with-Farsley, and proved also that the app. D. Yewdale was duly assessed therein, and that he (J. Craven) had demanded of the app. within six months preceding the date of the information the rate due from the app.

The app. did not impeach or object to the accuracy of the general assessment, or of the amount of rate alleged to be due from him.

The resp. proved that he, several months before the information was laid by him, delivered to an inmate of the app.'s dwelling-house a notice, of which a copy is subjoined, viz.:

Calverley-with-Farsley, June 18, 1863.

Mr. D. Yewdale,  
Debtor to the overseers of the poor of the township of Calverley-with-Farsley.

Then followed a statement of the amount of the rate as being 1*l.* 4*s.* 10*d.*

N.B. Take notice, that all rates are due when called for, and if not paid within ten days you will be liable to be summoned for the recovery thereof.

ABRAHAM CRAVEN,  
Assistant Overseer.

The present annual overseers of the poor of the township of Calverley-with-Farsley are Isaac Hollings and John Wade, and Abraham Craven, the father of the resp., is the assistant overseer, all duly appointed. The latter is a paid officer, and part of his duties is to demand and collect the rates.

The resp. produced to the justices at the hearing the following authority:

Township of Calverley-with-Farsley.

We the undersigned, being overseers of the poor of the said township of Calverley-with-Farsley do hereby order and appoint J. Craven of Calverley to assist in collecting the poor-rate that may be due the 1st April 1864 and all subsequent rates made during the year 1864 for the said township of Calverley-with-Farsley. As witness our hands the 1st April 1864.

ISAAC HOLLINGS, } Overseers.  
JOHN WADE, }  
ABRAHAM CRAVEN, Assistant Overseer.

The attorney for the app. made the following objections, viz., that the rate had not been legally demanded; that the demand of the rate must be made by some person duly authorised to receive and give a legal discharge or receipt for it; that there is a collector of rates duly appointed by the poor-law guardians for the township of Calverley-with-Farsley; that such collector had demanded the rate of Yewdale, the app.; that such collector had no power or authority to depute another to demand the rate for him; that as no legal demand was proved, the magistrates had no power to proceed against the app. by distress-warrant, or otherwise, for enforcing the payment of the rate.

We overruled all the objections and adjudicated that the app. must pay the rate, and that in default of payment a distress-warrant would be issued, and if no distress could be had the app. to be imprisoned seven days.

The question for the opinion of the court was, whether the determination upon the facts and grounds previously stated was or was not erroneous in point of law?

*West for the resp.*—The only question is, whether the demand of payment, a demand being necessary before an order of justices to enforce payment could be obtained, was made by a properly appointed

Q. B.] BUCKLE v. WRIGHTSON—REG. v. INHABITANTS OF THE TOWNSHIP OF DENTON.

[Q. B.]

person. The assistant overseer is appointed by vestry, under a statute, and not by the overseers. He is therefore, when appointed, not a mere delegate, but a principal, and could therefore properly appoint an agent to collect the poor-rate.

*Made for the app.*—The collector was not properly authorised to collect the rate, and the notice left was not a sufficient demand.

COCKBURN, C. J.—The only point left for our judgment is, whether the demand was sufficient, inasmuch as it was made by the son of the assistant overseer. We think that he had a sufficient authority to demand the rate, and therefore that the decision of the justices was right.

CROMPTON, MELLOR and SHEE, JJ. concurred.

*Judgment for the resp.*

Attorneys for the app., *Terry and Watson.*  
Attorney for the resp., *Lancaster.*

Saturday, Nov. 19, 1864.

BUCKLE (app.) v. WRIGHTSON (resp.)

*Towns Police Clauses Act 1847—Hackney carriages plying for hire without a licence.*

*A local Act for the town of Darlington incorporated the Towns Police Clauses Act 1847, which provides for the licensing by the local authority of hackney carriages, and imposes a penalty for plying for hire without such a licence:*

*Held, that it is no answer to an information for plying for hire without such a licence, that the hackney carriage is licensed by the Inland Revenue authorities under the 2 & 3 Will. 4, c. 120.*

This was a case stated under the 20 & 21 Vict. c. 43, upon the dismissal by justices of an information laid against the resp. for permitting the use of his cab in the town of Darlington without being licensed by the local authority.

It appeared that the town of Darlington is under the management of a local Act, which incorporates the Towns Police Clauses Act 1847 (10 & 11 Vict. c. 89), sect. 37 of which provides for the licensing to ply for hire of hackney carriages within the town, sect. 45 enacting that if the proprietor of any such carriage permits the same to be used as a hackney carriage plying for hire without having obtained a licence as aforesaid, he shall for every such offence be liable to a penalty not exceeding 40s. At the hearing before the justices it appeared that no such licence had been obtained. It was, however, urged as a defence, that the resp. had a licence from the Inland Revenue Office under the 2 & 3 Will. 4, c. 120, for his carriage as a stage carriage, and need not, therefore, obtain a licence under the local Act. The justices, taking this view of the case, dismissed the information.

*Sawyer* now contended that the justices were wrong, for that the Inland Revenue licence, being intended only for purposes of revenue, could not supersede the licence under the local Act, which was intended for purposes of police.

No one appeared for the resp.

COCKBURN, C. J.—Certainly we should require something positive to show us that the provision in the Towns Police Clauses Act, which is evidently intended for police purposes, are superseded by the enactment with reference to the inland revenue. These clauses in the local Act are intended to insure proper superintendence, which is not the object contemplated by the Revenue Act. The justices ask us to remit them the case if they are wrong, and there-

fore we express our opinion that the revenue licence does not supersede the local licence.

*Case to go back to the justices with the opinion of the court.*

Tuesday, Nov. 22, 1864.

REG. v. THE INHABITANTS OF THE TOWNSHIP OF DENTON, IN THE COUNTY OF LANCASHIRE.

*Costs—Road indictment—Plea of "guilty"—Frivolous and vexatious defence—5 & 6 Will. 4, c. 50, s. 98.*

*By sect. 98 of the 5 & 6 Will. 4, c. 50 (the General Highway Act), the court before whom any indictment shall be preferred for not repairing highways may award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment was frivolous or vexatious. Where, therefore, upon such an indictment the defts. pleaded "guilty:"*

*Held, that, inasmuch as the defts. had made no defence, the court had no power to award costs.*

This was a rule calling upon the prosecutor to show cause why a writ of *certiorari* should not issue to remove into this court an order of assize made by Willes, J., upon an indictment against the defts. for a nuisance (non-repair of a highway), to which they pleaded "guilty," allowing the costs of the prosecution, amounting to 129l. 12s. 7d., and directing such costs to be paid by the said defts. to James Hepworth, the prosecutor, out of the highway rate of the said parish.

It appeared that the highway in question passes through the township of Denton and other townships, and is a turnpike-road, and that the trustees by their Act (21 Vict. c. 87) are required to apply, out of the funds coming to their hands, an annual sum of 500l. in the repair of the said road, of which sum 132l. was to be expended in the township of Denton; that this sum had always been found to be insufficient to keep the said road in repair, and that from time to time (about once a-year) the trustees made application to the justices, under the statute 4 & 5 Vict. c. 59, for orders on the several townships for contribution towards its repairs; that the township of Denton having always resisted the trustees, it was resolved to prefer an indictment against them for non-repair. Accordingly, at the Liverpool Spring Assizes 1863, an indictment was preferred and found against the defts. for non-repair. On the 5th of the following August—three days before the commencement of the assizes at which the indictment was to be tried—a letter was received by the attorney for the prosecution from the attorneys of the defts., stating that their clients, acting under the advice of counsel, would plead guilty, at the forthcoming assizes, to the indictment. The letter referred to other subjects, also in connection with the road in question; that the prosecutor had fully prepared for trial at this time; that the defts. pleaded guilty at the said assizes, before Blackburn, J., who imposed a fine of 1000l. upon the following terms, namely, "that it should not be levied until the judge who comes at the winter assizes gives leave, such judge to have full power to remit the whole or any part of the fine, &c., the object being that the township may in the interval proceed with all due diligence to repair the road, and that the judge may have a hold over them if they do not; the judge, by agreement, to have the same power over the costs that I have." That at the ensuing winter assizes held in Dec., 1863, the matter of the said indictment was respite until the following spring assizes which were held in March 1864, before Willes, J., when the matter coming on before him it was ordered that

Q. B.]

REG. v. BRIGGS—WATSON v. MARTIN.

[Q. B.]

the fine of 1000*l.* should stand, and be levied upon the inhabitants, with a direction to enforce the same to the extent of 467*l.* only, exclusive of the costs and charges of executing the said writ, to be applied, &c., and it appearing to the said court and justices here that the defence made by the inhabitants of the said township of Denton to the said indictment is frivolous, and the said court and justices here having therefore awarded costs to the said James Hepworth, the prosecutor of the said indictment, to be paid by the inhabitants of the said township of Denton, and having directed the amount of such costs to be ascertained and taxed by the proper officer of the said court, and the same having accordingly been ascertained and taxed by him at the sum of 129*l.* 12*s.* 7*d.*, it is further ordered by the said court and justices here that the said sum of 129*l.* 12*s.* 7*d.*, being the amount of the said costs so ascertained and taxed as aforesaid, be paid by the inhabitants of the said township of Denton to the said James Hepworth, the prosecutor of the said indictment.

By sect. 98 of the 5 & 6 Will. 4, c. 50 (the General Highway Act), it is enacted.

That it shall and may be lawful for the court before whom any indictment shall be preferred, for not repairing highways, to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment was frivolous or vexatious.

*Manisty*, Q. C. and *Hopwood* now appeared to show cause against the rule, and contended that the judge had under the circumstances jurisdiction to give costs, for that the word "defence" in the 98th section must be taken in the sense of the opposition which is resorted to, and not merely the technical defence set up upon the trial; and that inasmuch as the defts. gave the prosecutor no intimation of their intention to plead "guilty" until three days before the assizes at which the indictment was to be tried, they were guilty of vexatiously defending it; that the word "defence" should have the same liberal interpretation as the word "tried" in the 95th section, which in *Reg. v. The Inhabitants of Haslemere*, 3 B. & S. 813, was held to be operative where the defts. had pleaded "guilty." [COCKBURN, C. J.—My difficulty is whether this is not a *casus omissus* of the Act of Parliament? Can it be said that a party who pleads guilty has made a frivolous defence? I quite agree that the prosecutors are fairly entitled to the costs they have been put to, but how can it be said that the defts. have made a frivolous defence when they have made no defence at all?] They should have informed the prosecutor earlier, and before he had incurred his costs of preparing for trial, that they intended to offer no defence; they were really defending throughout. [COCKBURN, C. J.—Surely defending means doing something, not merely lying by.] If after the indictment is found the defts. so act as to lead the prosecutor to believe that it is to be tried out, that is defending—their conduct is a defence.

*Mellish*, Q. C. and *Milward*, contra, were not called upon.

COCKBURN, C. J.—I certainly regret very much that there is no power in such a case, where the defts. plead "guilty," for the court to give the prosecutor his costs. All that the statute says is, that where the defence is frivolous or vexatious, costs may be given. It really has been argued that doing nothing is such a defence—that is saying that nothing constitutes a defence. I think that in this case, as nothing was done by the defts., there was no defence. We cannot undertake the functions of the Legislature; and as this state of things was not provided for, the order could not legally have been made.

CROMPTON, J.—I entirely agree. When no defence is made it cannot certainly be properly said that there has been a frivolous defence.

MELLOR and SHEE, JJ. concurred.

*Rule absolute* (as affecting the clause of the order relating to the costs).

Attorneys for the prosecution, *J. and J. Hibbert*. Hyde.

Attorneys for the defts., *Brooks, Marshall and Brooks*, Ashton-under-Lyne.

Thursday, Nov. 24, 1864.

REG. v. BRIGGS.

*Quo warranto*—Relator—Sufficiency of interest of.

Where, upon a rule for a *quo warranto* information against A. for exercising the office of a town commissioner, to which he had been elected by ratepayers, the relator was (as it was alleged) not entitled to vote, yet, as he was an owner of rated property in the town:

*Held*, that he had sufficient interest to be a good relator.

This was a rule calling upon a Mr. Briggs to show cause why an information in the nature of a *quo warranto* should not be filed against him for exercising the office of a commissioner of the town of Harrogate. It appeared that Harrogate is managed by a body of commissioners constituted under a local Act, seven of whom are elected each year in the month of April by the ratepayers, and that at the last election Mr. Briggs had a majority over certain other candidates, but that (as it was alleged) a certain number of those who voted for him (sufficient to put him in a minority) were not duly qualified. The relator was a Mr. Carter, who, it was alleged in showing cause, was not qualified to vote, though an owner of rated property in the town.

*Kemplay* showed cause, and contended that Mr. Carter was not qualified to vote at the election, and, therefore, as having no interest in the election, could not fill the position of relator:

*Reg. v. Thirwood*, 38 L. J. 171, Q. B.

COCKBURN, C. J.—It is not because a person has not a right to vote at an election that he has not an interest in it. His tenant is rated, and the rates therefore are taken into consideration in the rent. He is owner of property in the town, and how therefore can it be said he is not interested in the election of the governing body?

CROMPTON, J.—The object of having a relator who has an interest is, that a mere man of straw should not be put forward; but surely in such a case as this an owner of property in the town has an interest.

The rule was then argued upon its merits.

*Manisty*, Q. C., in support, was not called upon.

*Rule absolute.*

Saturday, Nov. 26, 1864.

WATSON (app.) v. MARTIN (resp.)

*Vagrant Act*—Instrument of gaming—Current coin—Conviction.

By the *Vagrant Act* (5 Geo. 4, c. 83) a person is designated as a rogue and vagabond who plays or bets in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance:

*Held*, that the current coin of the realm are not "instruments of gaming" within the meaning of the statute.

Q. B.] FISHER v. HOWARD—WILSON v. THE CHURCHWARDENS OF SUNDERLAND.

[C. P.]

*Where therefore the app. was convicted under this statute for playing in a public highway with halfpence at a game called "toss."*

*Held, that the conviction was bad.*

This was a case stated by justices under the 20 & 21 Vict. c. 48 upon a conviction of the app. as a rogue and vagabond under sect. 4 of 5 Geo. 4, c. 83 (Vagrant Act), which declares to be such "every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance."

The case stated that the app. was summoned to answer a complaint charging him, for that he the said Louis Watson, on the 29th May 1864, at Gomersal, in the West Riding of Yorkshire, did unlawfully play in a certain highway there situate with certain instruments of gaming, called halfpence, a certain game of chance, called "toss," contrary to the form of the statute in such case made and provided. On the hearing it was proved that on the day in question the app. and a number of other persons were seen by two police constables upon the highway in Gomersal, and that the app. was tossing up halfpence of the ordinary current coin of the realm, and that he and the other persons were betting upon the number of "heads" or "tails;" that the halfpence came down and that money passed between him and others on the result of such betting; that the attorney for the app. at the hearing raised the objection that halfpence were not instruments of gaming within the intention and meaning of the Vagrant Act. We convicted the app. and ordered him to be imprisoned in the House of Correction at Wakefield for the space of seven days, but we agreed to state a case for the opinion of this honourable court upon the objection whether halfpence are instruments of gaming within the intention and meaning of the Vagrant Act. If the court should be of opinion that halfpence used in the manner stated in the case are instruments of gaming, the conviction is to be confirmed, and if not, then the conviction is to be quashed.

No one appeared for the resp.

Quain appeared for the app., but he was not called upon.

CROMPTON, J.—We really cannot strain the Vagrant Act to the extent of holding that the current coin of the realm is an instrument of gaming; if so, every person who has money in his pocket might be said to have about him an instrument of gaming.

MELLOR and SHEE, JJ. concurred.

*Conviction quashed.*

FISHER (app.) v. HOWARD (resp.)

*Traveller—Who is—Refreshment-room at a railway-station—Prohibited hours.*

*A person who has taken a railway-ticket for a journey by railway at the usual time before the starting of the train, is a traveller within the meaning of the 2 & 3 Vict. c. 47, s. 42.*

*A. went to the Victoria-station, Pimlico, on a Sunday, and obtained a ticket to proceed by a train which was to leave the station at ten minutes before one o'clock p.m. At twenty minutes before one o'clock the refreshment-room at the said station was opened, and thereupon A. went in and was served with some fermented liquor:*

*Held, that he was a traveller, and that no penalty was incurred.*

This was a case stated under the 20 & 21 Vict. c. 48, upon a conviction by a metropolitan police magistrate of the app., who keeps the refreshment-rooms at the Victoria-station, Pimlico, for an offence under sect. 42 of the 2 & 3 Vict. c. 47 (Metropolitan Police Act), which enacts, "That no licensed victualler or other person shall open his house within the metropolitan police district for the sale of wine, spirits, beer, or other fermented or distilled liquors, on Sundays, Christmas-day and Good Friday, before the hour of one in the afternoon, except refreshment for travellers."

It appeared from the facts that a train was to leave the Victoria-station at ten minutes to one o'clock p.m. on Sunday, the 18th Sept., and that at twenty minutes to one o'clock the refreshment-room was opened by the app., and that twenty-five persons who had taken tickets for the train entered the refreshment-room, and were supplied with fermented liquors. There was no evidence to show where they had come from, or that they were residents in the metropolis.

C. Pollock now appeared for the resp., and contended that the persons supplied with liquors were not travellers. [CROMPTON, J.—Were they not travellers when they were on their way? It is sufficient to say that they were passengers in every sense of the word. They had taken their tickets. It is not necessary that they should have been in motion.] The Legislature must be taken to have known the existence of such places as refreshment-rooms at a railway-station, and in sect. 10 of the 27 & 28 Vict. c. 64, there is an express provision relating to them. Taking a ticket is evidence of an intention to travel; but it does not constitute a person a traveller. If being on his way constitutes a traveller, a person going along the Strand from his house to the station would be one, and so entitled to knock up the publicans for refreshment.

CROMPTON, J.—It is not necessary to say how that might be; but certainly when he has taken his ticket at the railway-station he becomes a traveller. We must deal with such a case as men of common sense, and, according to the common understanding of mankind, such a person is a traveller.

MELLOR, J.—It is obvious what was the intention of the clause, and it was certainly never intended to apply to such a case as this.

SHEE, J. concurred.

*Judgment for the app.*

#### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Wednesday, Nov. 9, 1864.

WILSON v. THE CHURCHWARDENS OF SUNDERLAND.

*Church-rates—Jurisdiction of justices—"Inhabitant."*

*A local Act of Parliament providing for the levying of a church-rate, gave a right of appeal to any person aggrieved by any assessments to be made by virtue of the Act, or by any distress or seizure to be made for the same or for the money so to be collected, to the quarter sessions to be held "within three months after such distress made:"*

*Held, that the appeal given was general, and not confined to cases where distresses had been actually made, and that, there being a general power of appeal, justices applied to for warrants of distress had no power to hear objections made to the validity of the rate.*

*Per Erie, C.J.—The word "inhabitant," as applied by a local Act of Parliament to a person qualified to act*

C. P.]

WILSON v. THE CHURCHWARDENS OF SUNDERLAND.

[C. P.]

*as vestryman of a parish, means an occupant of premises situated in the parish, and not necessarily a person living and sleeping in the parish.*

Case stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Sunderland, in and for the county of Durham, on the 28th May 1864, an application was made to us by the churchwardens of the parish of Sunderland near the sea, hereinafter called the *resps.*, to grant and issue out our warrant under our hands and seals, for the intent and purpose, to be caused to be levied by distress and sale of the goods of Joshua Wilson, Henry Wilson, Caleb Wilson, and Charles Wilson, hereinafter called the *apps.*, the sum of 7*l.* 0*s.* 7½*d.*, being the amount of a rate assessed upon them, the said *apps.*, on the 9th July 1863, by the rector and thirteen of the vestrymen of the parish of Sunderland near the sea, in vestry assembled, at a meeting duly convened, pursuant to and acting under and by virtue of the powers, authorities and provisions of an Act of Parliament passed in the fifth year of the reign of His Majesty King George the 1st (18th April 1719), intituled "An Act for making the town and township of Sunderland a distinct parish from the parish of Bishopwearmouth, in the county of Durham," a copy of which Act accompanies this case, and is to be taken as part thereof.

The *apps.* having been duly summoned, the same application was heard, the said parties respectively being then present, and we determined to issue our warrant to levy the said sum of 7*l.* 0*s.* 7½*d.* And whereas the said *apps.*, being dissatisfied with our said determination as being erroneous in point of law, have, pursuant to the 2nd section of the statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and the grounds of such our determination for the opinion of this court, and have duly entered into recognisances as required by the said statute in that behalf, now, therefore, we, the said justices, in compliance with the said application and the provisions of the last-mentioned statute, do hereby state and sign the following

## CASE.

Upon hearing the said application, the said rate or assessment was produced and proved before us, and the same is intituled and signed, and as far as concerns the said *apps.* is as follows:—"An assessment upon the yearly value of all houses, lands, tenements, hereditaments and estates whatever, and upon the value of the stock-in-trade and personal estates within the parish of Sunderland near the sea, in the county of Durham, for keeping in repair the church of the said parish, defraying the yearly expenses of the churchwardens respecting the same, for paying the rector his stipend, the parish clerk's salary, and for other the purposes mentioned in the Act of Parliament passed in or about the year 1719, intituled 'An Act for making the town and township of Sunderland a distinct parish from the parish of Bishopwearmouth, in the county of Durham.'"

[The case then set out an extract from the rate-book containing the assessments of the *apps.* and the description of the property in respect of which they were rated. It also set out the names of the rector and thirteen vestrymen by whom, on the 9th July 1863, the rate was made and ordered to be collected, and the allowance of the rate, on the 18th July 1863, by four justices of the peace for the county of Durham.]

It was also proved before us that the *apps.* are Quakers, and that they are the occupiers of the houses, warehouses and hereditaments in the said parish mentioned in the said rate, and set opposite their names therein, where they carried on their

trade and business, and were possessed of the stock-in-trade therein.

It was also proved that the parties making and signing the said rate were the rector and thirteen of the twenty-four vestrymen, and were members of the said vestry, chosen and acting under the said local Act, and were the whole of the members of such vestry present at a meeting duly convened; that the said rate had been demanded of the *apps.*; and that they had made default in payment thereof.

It was also proved on the cross-examination of the collector that at the time of their election and thenceforth up to the making of the said rate, nine out of the thirteen vestrymen who signed the said rate, although ratepayers, occupying houses and shops in the said parish, and carrying on their trades and businesses there, resided and slept in their private dwelling-houses in the adjoining township of Bishopwearmouth.

It also appeared by the said rate that stock-in-trade was rated therein, but that ships (many of the persons assessed being shipowners) were not expressed as rated therein, and also that the occupiers of 836 properties occupied in small tenements under the yearly value of 6*l.* each, and for which the landlords under the Small Tenements Act, 13 & 14 Vict. c. 99, were rated to the poor-rate of the said parish instead of the occupiers thereof, were not included in the said rate produced before us, nor were the landlords or occupiers thereof assessed for the same therein, and as to these it was proved by the collector of the said rate that the occupiers of these tenements were many of them paupers receiving parish relief, and that very few, if any of them, in his opinion, were able to pay the said rate, and that it had not been customary to include the said tenements in the said rate.

The parish of Sunderland is one of the parishes comprised within the boundaries of the borough of Sunderland, the mayor, aldermen and burgesses of which form the local board of health, and it was admitted that since the passing of the Municipal Corporation Act (5 & 6 Will. 4, c. 74) no scavenger has been appointed for the said parish of Sunderland under the said local Act of 1719.

On the case being called upon, and previous to any evidence being taken, it was alleged by the professional advisers of the *apps.*, that they disputed the validity of the said rate. It was also contended on behalf of the *apps.*, that the said Sunderland local Act of 1719 had, so far as it applied to the recovery of the rate, been repealed by the statute 5 & 6 Will. 4, c. 74, and that we had therefore no power to issue our warrant of distress. It was also contended on the part of the *apps.*, that the said rate was invalid, because nine of the thirteen persons who had made and signed the same were not properly elected vestrymen under the said local Act of 1719, inasmuch as they were not, nor was any one of them, resident and sleeping within the said parish.

It was also contended on behalf of the *apps.*, that the said rate was invalid, because of the omission of the said small tenements therefrom, and by reason that ships, as forming stock-in-trade, are not included in the said rate under the designation "ships."

It was contended on behalf of the *resps.*:

First, that the said Sunderland local Act 1719 was not repealed by the said Act of the 5 & 6 Will. 4, as alleged by the *apps.*

Secondly, that we the justices had no jurisdiction on this application to inquire into or decide on the legal constitution of the said vestry or qualification of the said vestrymen, nor on the validity of the said rate.

C. P.]

WILSON v. THE CHURCHWARDENS OF SUNDERLAND.

[C. P.]

Thirdly, that even if we the said justices had jurisdiction to decide on the legal constitution of the said vestry, or the qualification of the said vestrymen, that by the said Sunderland local Act of 1719, it was not required that the vestrymen should be resident and sleep within the said parish, but only that they should be inhabitants of the said parish occupying rateable hereditaments therein, and paying rates, and that therefore the said nine persons so acting as vestrymen were duly qualified to act as such.

Fourthly, that if even we the said justices had jurisdiction to inquire into and decide on the validity of the said rate, the objections of the said apps. were untenable, and not sufficient to justify us the said justices in refusing to grant our said warrant.

We, the said justices, being of opinion that our jurisdiction was not ousted by the apps. disputing the validity of the rate, and that the said Sunderland local Act of 1719, and the powers therein authorising us to issue our warrant of distress, were not repealed or affected by the said statute 5 & 6 Will. 4, c. 74, but were and are still in force; that we had no jurisdiction to inquire into or decide on the constitution of the said vestry, or the qualification of the members thereof, nor into the validity of the said rate, and that the objections made by the apps. to the said rate were not sufficient to justify us in refusing to grant our said warrant, gave our determination against the said apps., and have signed our said warrant, but have suspended the issuing and delivery thereof on the goods of the said apps. until the opinion of this court be obtained.

The questions of law issuing on the above statements for the opinion of the court therefore are:

First, whether, the apps. having stated that they disputed the validity of the rate, our jurisdiction to hear the cause and grant our said warrant was or was not ousted.

Secondly, whether the said Sunderland local Act of 1719, or the power thereby given to us to issue our warrant for levying the said rate, has been repealed by the statute 5 & 6 Will. 4, c. 74.

Thirdly, if not, whether we, the said justices, on the hearing of the apps. for the said warrant, were bound to inquire into, and had jurisdiction to decide on, the legality of the constitution of the said vestry, or the qualification of the members of such vestry.

Fourthly, if we had such jurisdiction, whether it is required by the said Sunderland local Act that the vestrymen chosen thereunder should be inhabitants inhabiting and sleeping in the said parish.

The local Act mentioned in the case contained provisions for raising rates for keeping the church in repair, paying the stipends of the rector and parish clerk, and the salary of a scavenger to be appointed by the rector and vestrymen.

The vestrymen were to be "twenty-four substantial and creditable inhabitants of the parish of Sunderland," to be chosen by the inhabitants "paying scot and lot." The rector and thirteen of the vestrymen were to be a competent vestry for making rates and carrying out the Act. On default of payment of rates, four justices of the peace for the county of Durham were authorised to grant a warrant of distress.

The appeal clause was as follows:

And if any person shall find him or herself aggrieved by any assessments to be made by virtue of this Act, or by any distress or seizure to be made for the same, or for the money so to be collected, in such case he or she may appeal to the justices of the peace to be assembled at any general quarter sessions of the peace to be held for the said county of Durham, within three months after such distress made, who are hereby empowered to hear and finally determine the same.

A. Wills appeared for the apps.—The justices have no jurisdiction at all in cases where Quakers

have been rated, or the validity of the rate is disputed; but if they had any jurisdiction at all in this case, they were bound to go into the merits of the case. The principle laid down by the Court of Q. B. in the cases of *Reg. v. The Justices of Kingston*, E. B. & E. 256, and *Ex parte May*, 2 B. & S. 426, is, that where an appeal to the quarter sessions is given, the justices to whom application is made for a distress-warrant have no power to go into the merits of the case. But the power of appeal given here is an illusory one; it only exists after a distress has been submitted to. [Byles, J.—The distress mentioned in the appeal clause is merely the *terminus a quo*; the three months are to be counted.] The justices were bound to go into the merits. The rate was made by thirteen vestrymen, five only of whom were really inhabitants of the parish—that is to say, living and sleeping in the parish. He referred to

5 & 6 Will. 4, c. 74;

58 Geo. 3, c. 127;

*Blackett v. Blizard*, 9 B. & C. 851;

2 Stephen's Laws of the Clergy, 1827;

1 Burn's Ecc. Law (9th ed. by Phillimore), 415 k;

58 Geo. 3, c. 69 (Sturges Bourne's Act);

Richardson's Dict. "Inhabitant."

Lush, Q. B. (*Prideaux* with him).—The jurisdiction of the justices was ministerial only, to issue the distress. As to the objection to the vestrymen, from the time of the Statute of Bridges the word "inhabitant" has been taken to mean "occupier," and is not necessarily an occupier living and sleeping on the premises:

*Reg. v. Hall*, 1 B. & C. 186, per Abbott, C. J.;

*Reg. v. Barwick*, 7 T. Rep. 73;

Note to Sturges Bourne's Act, in Welsby's edit. of the Statutes.

ERLE, C. J.—The apps. first of all dispute the jurisdiction of the justices on the ground that they are Quakers, and therefore that the jurisdiction of the justices has been taken away by statute. But we think that the statute relating to church-rates generally does not apply to rates levied under this local Act, over which the Ecclesiastical Courts have no control. The next objection is, that the rate was not properly made because the vestrymen making it, or the majority of them, did not sleep within the parish of Sunderland. If that was a valid objection to the rate, it could have been raised by appeal against the rate. It is said that an appeal is only given by the local Act in cases where distress-warrants have been issued, and it is said to be unreasonable that persons should have to submit to a distress before being able to appeal. If this be so, it is, comparatively speaking, a small inconvenience; but the reasonable construction of the Act is, that a person rated has a right to appeal as soon as the assessment is made, the time within which the appeal must be made being limited only in cases where a distress-warrant has been issued. There was a clear right of appeal either before or after distress. In the next place, if the justices could go into the consideration of the construction of the vestry, which I do not think they could, must an inhabitant of the parish be necessarily a person sleeping within it? From the time of the Statute of Bridges, passed many centuries ago, the word "inhabitant," in statutes relating to levying rates, has been construed to mean an occupier of land within the rateable district. I know of no instance of limitation to occupiers of a parish sleeping in it. The one exception is, in cases relating to settlement of the poor, where the refinements which took place led to most inconvenient results. I should be strongly inclined, if I had to decide this case on the meaning of the word "inhabitant," to decide it in favour of the resps., but it is not essential to do so. I think that judgment should be for the resps.



BYLES, J.—I do not dissent from what has been said by my Lord as to the meaning of "inhabitant." It is an elastic word, varying according to the meaning of the Act of Parliament in which it occurs. But, according to the cases in the Q. B., where the statute gives an appeal, magistrates cannot enter into objections to the rate; and here an appeal is given. If the magistrates could have gone into this question, where should we stop? It was a question of the qualification of the elected vestrymen. Equally well might questions arise respecting the qualifications of the numerous electors. It would become difficult, under such circumstances, to levy any rate.

KEATING, J.—I give no opinion respecting the meaning of the word "inhabitant," for it is unnecessary to do so, though I do not dissent from what has been said by my Lord. I concur that judgment should be for the respas.

*Judgment for the respas.*

Attorney for apps., J. W. Hicken.

Attorneys for respas., Maples and Teesdale, for Wright, of Sunderland.

#### EDDISON AND OTHERS V. BROOKES.

##### *Inclosure—Local Act—Rateability for expenses of Act.*

*A local inclosure Act empowered commissioners, amongst other things, to allot lands to the vicar "or other the persons entitled to tithes," and to the vicar in respect of glebe lands, as an equivalent and compensation for their claims, and to divide the remainder among persons interested in the lands. It directed the commissioners, before making any allotments, to mark out for sale a portion of the lands, and sell the same for the purpose of paying the expenses of carrying out the Act, and in case the amount raised by the sale should be insufficient, to make up the deficiency by a rate to be made "upon the several persons interested in the lands to be inclosed, except the said vicar and persons entitled to tithes." It directed also that the allotments, except the allotments to the "vicar and other persons in lieu of tithes," should be fenced by the persons to whom they were allotted, and that the allotments to the "vicar and other persons in lieu of tithes" should be fenced at the expense of the inclosure expenses fund:*

*Held, that as the word "other" was omitted in the clause excepting the vicar and persons entitled to tithes from being rated to the additional rate, and as the framework of the Act seemed to show that the omission was intentional, the vicar was exempt absolutely from rateability in respect of the land allotted to him for glebe as well as for the land allotted to him for tithes, and that the exemption was not intended to be in respect of lands granted in lieu of tithes only.*

Special case, without pleadings, stated for the opinion of the court, under the provisions of the C. L. P. A. 1852, s. 46.

The p'ts. were the Commissioners of the Nottingham inclosure, and the def't. was the vicar of St. Mary, Nottingham. The writ was issued to recover 487*l.* 7*s.* the amount of two rates levied by the commissioners upon the vicar in respect of glebe land, with interest thereon.

The question arose under a local Act of 8 & 9 Vict. c. vii., intituled "An Act for inclosing lands in the parish of St. Mary, in the town and county of the town of Nottingham," with which the General Inclosure Act of 41 Geo. 3, c. 109, was incorporated.

The case set out sects. 6 and 14 of the public Act, and sects. 86 and 87 of the local Act, respecting the manner in which claims were to be made,

and shares to be allotted; and sects. 86 and 89 of the local Act, which provide for the payment of the expenses of the inclosure in the following manner:

##### Sect. 86:

For defraying the costs of carrying the local Act into execution the commissioners shall, at such period as they think proper (before any allotments are set out to the persons entitled to rights of common, to the lord of the manor, persons entitled to tithes, and to the owners and proprietors of the lands to be inclosed) mark and allot for sale such portion of the lands as they shall judge sufficient in value to defray the expenses of obtaining and executing the powers of the Act, and shall from time to time sell such lands as therein mentioned.

##### Sect. 89:

If at any time it shall appear to the commissioners, either before or after the execution of their award, that the money to arise by such sales shall not be sufficient to defray the expenses aforesaid, the deficiency shall be made up and raised from time to time by a rate, to be made and levied upon the several persons interested in the lands to be inclosed (*except the said vicar and persons entitled to tithes*, and the mayor, aldermen and burgesses in respect of the lands for places of public recreation, &c.), in such shares and proportions, within such time, and to be paid to such persons as the commissioners shall from time to time direct.

Sects. 90, 93, 94 of the local Act provide for the recovery by the commissioners of the sums so payable for expenses, and enable tenants for life and other persons under disabilities, or their trustees, to charge the allotments with such sums.

By the local Act it is recited in the preamble that Henry Smith, Samuel Fox and other persons therein named claimed to be owners or proprietors of, or otherwise interested in, some of the lands to be inclosed, and other persons also claimed as therein mentioned; and then reciting that Earl Manvers was, or claimed to be, entitled to corn tithes arising or accruing from the lands to be inclosed; and the Rev. J. W. Brooks, the now def't., as the vicar of the parish of St. Mary, was, or claimed to be, entitled to the vicarial tithes arising or issuing out of such lands or some part thereof; and that William Watson and others claimed, as devisees under the will of Micah Gedling, to be entitled to the tithes or tenths of hay arising out of certain parts of the lands to be inclosed; and the charitable trustees of the said town, as trustees of the free grammar school of the said town, were, or claimed to be, entitled to the tithes or tenths of hay arising or issuing out of certain other portions of the said lands.

By the local Act it is further provided that the commissioners are to allot parts of the lands to be inclosed as follows:—

By sect. 53, for the purposes of public recreation.

By sect. 54, for a public cemetery.

By sect. 55, for the lord of the manor.

By sect. 56,

The commissioners shall allot and award unto the vicar of the said parish of St. Mary and unto the said Lord Manvers, William Watson and others, devisees in trust under the will of Micah Gedling, and the charitable trustees of the town of Nottingham, trustees of the free grammar-school, or other the persons who may be entitled to corn tithes, vicarial tithes, or tithes or tenths of hay or other tithes, and to the said vicar in respect of glebe lands and rights of common belonging to such vicar, such parcels of the lands to be inclosed as in the judgment of the commissioners shall be a full equivalent and compensation to such persons severally and respectively for their several and respective claims, when substantiated to the satisfaction of the commissioners, in, over, or upon the lands to be inclosed.

By sect. 57 the commissioners are to allot part of the lands to be enclos'd to the freemen of Nottingham and to the Foftstead owners and inhabitant householders.

And by sect. 66, after the said several allotments have been made, the commissioners shall divide, allot, and award the remainder of the lands to be inclosed into and amongst the several owners and proprietors thereof, and persons who shall be entitled to any estate, right, or interest therein, in such shares and proportions as the commissioners shall adjudge and

C. P.]

EDDISON AND OTHERS v. BROOKES.

[C. P.]

determine to be proportionate to the value of their respective rights and interests therein.

The local Act, sect. 69, enacts,

The several allotments to be made in pursuance of this Act (except the allotments to the mayor, aldermen and burgesses, for places of public recreation, &c., and the allotments to the said vicar and other persons in lieu of tithes), shall be inclosed, ditched and fenced at the expense of the respective persons to whom the same shall be allotted, in such manner and within such times as the commissioners shall by their award, or any writing under their hands, direct; and the fences to be made shall for ever afterwards be repaired and maintained by such persons as the commissioners shall by their award direct.

Sect. 70:

The allotments to be made to the said vicar and other persons in lieu of tithes shall be well and sufficiently inclosed and fenced on all such parts and sides as shall not be directed to be fenced by any other proprietor, or as shall not adjoin any inclosed land, or be bounded by any sufficient watercourse or other sufficient fence; and the expense attending the inclosing and fencing the same shall be discharged out of the inclosure expenses fund; and all such inclosures and fences, when made, shall for ever thereafter be kept in repair by the said vicar, or by the persons for the time being entitled in possession of the said allotments.

The lands to be inclosed consisted of about 1200 acres. A small portion consisted of two pieces of waste land upon which it was alleged the inhabitant householders and freemen only had a right of pasturage. All the remainder of the lands consisted of lands of freehold tenure belonging to different proprietors, owners of land in fee-simple, but subject to a right of pasturage thereon for a limited number of cattle during certain periods of the year, and this right of pasturage existed only in the freemen and the occupiers of a few old houses called Foftsteads. The owners of the lands had no right of common over the lands, but owned the land subject to the easement of pasturage as aforesaid; and, on the other hand, the persons entitled to the right of pasturage owned no portion of the lands to be inclosed.

The landowners let the lands for beneficial rents, they being entitled to the land during the valuable part of the year, getting the crops, the commoners only getting the aftermath. The landowners were very numerous, and amongst them was the vicar of St. Mary, as the owner of glebe lands. Such glebe lands were in every respect under the same conditions as the lands of other landowners.

Amongst the claims delivered to the commissioners were claims by numerous landowners specifying the quality and situation of the land claimed for, and the estate therein of the person making the claim.

Earl Manvers made a claim for corn tithes; William Watson and others, devisees of Micah Gedling, claimed for hay tithes; and such devisees also made a claim for lands belonging to them as landowners.

The charitable trustees claimed for hay tithes, and such charitable trustees also made a claim for lands belonging to them as landowners. And all such claims, as well for tithes as for landowners, were duly substantiated to the satisfaction of the commissioners.

Amongst the claims was the following, made by the vicar of St. Mary:

I claim to be entitled, as vicar of the church of St. Mary, to the several pieces of land described in the annexed terrier lying in the open and commonable fields of the parish of St. Mary, and to all rights and interests therein, subject, nevertheless, to certain common rights during part or parts of each year. I further claim, as such vicar, to be entitled to all tithes of milk, calves, lamb, wool, agistment, turnips, green peas, tares, and green crops of every description, potatoes, pigs, eggs, poultry, and all other tithes excepting only the tithes of corn, grain and hay, arising or accruing due as well upon the said open and commonable lands as upon all other the lands of the said parish, excepting only certain portions thereof which have already been exonerated from tithes.

[The case then set out the terrier.]

At the hearing before the commissioners Lord Manvers substantiated his claim for corn tithes. William Watson and others, devisees of Gedling

deceased, and the charitable trustees of the free grammar-school, severally substantiated their claims for hay tithes, and the vicar of St. Mary also substantiated his claim for tithes.

Allotments of land were severally made by the commissioners to Lord Manvers, to Gedling's devisees, to the charitable trustees, and to the vicar of St. Mary, in lieu of such tithes, and to the full value thereof as adjudged by the commissioners.

In addition to such allotments for tithes, distinct and separate allotments were also made to said Gedling's devisees and to the said charitable trustees in respect of the lands claimed by them.

Distinct allotments amounting to 18a. 3r. 37½p. were also made to the vicar of St. Mary in respect of and in lieu of the lands claimed by him as glebe lands, and such allotments were made according to the same conditions and upon identical terms as far as regards value and in every other respect as the lands of other landowners. Such allotment of 18a. 3r. 37½p. was in addition to the allotment made to the vicar in lieu of tithes.

The effect of the inclosure and of the allotments awarded by the commissioners was to convert the lands claimed, from mere agricultural lands used chiefly for pasture subject to common right as above and capable of no other use, into freehold lands free from restrictions and incumbrances, applicable for building or any other purpose, and raising their value to a very large amount, and the land allotted to the vicar took these advantages in common with lands allotted to the different landowners.

The commissioners have paid out of the inclosure funds the costs of fencing such allotments so made to Earl Manvers, Gedling's devisees, the charitable trustees, and the vicar of St. Mary, in lieu of tithes, but have not paid the cost of fencing the other allotments made to the said persons as landowners, or the allotments made to the vicar in respect of the glebe lands.

In carrying the local Act into execution, the commissioners marked out and allotted for sale certain portions of lands, and sold the same as directed by the statute, and applied the proceeds in carrying the Act into execution, but the moneys arising from such sales not being sufficient to defray the expenses of executing the Act, the commissioners have duly made certain rates under sect. 89 of the local Act upon the several persons interested in the land to be inclosed, and in such rates the commissioners have rated the vicar in respect of his glebe lands claimed by him, and have also rated Watson and others, Gedling's devisees, and the charitable trustees in respect of the lands severally claimed by them, but the commissioners, have not rated the Earl Manvers, Gedling's devisees, the charitable trustees, or the vicar of St. Mary, being the several persons entitled to tithes in respect of the allotments made to them respectively in lieu of tithes.

The vicar of St. Mary contends that he is not liable to be rated in respect of the lands allotted to him in lieu of the glebe lands claimed by him. The commissioners contend that he is liable to be rated in respect of his glebe land.

The question for the opinion of the court is, whether the vicar is liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as glebe lands. If the court should be of opinion that the vicar is liable to be so rated, then judgment is to be entered for the p'ts. for 487l. 7s. 0d. and costs of suit. If the court should be of a contrary opinion judgment is to be entered for the def't. with costs of suit.

Boden, Q. C. appeared for the p'ts. and argued that the exception from rates contained in sect. 89 of the

C. P.]

TAYLOR v. HUMPHREYS.

[C. P.]

local Act applied only to lands allotted to the deft. in lieu of tithes.

*Mellish, Q. C.* (A. *Wills* with him), for the defts., contended there was no limitation express or implied of the vicar's exemption from rateability, and that it applied to all allotments made to him as vicar.

*ERLE, C. J.*—I think that the vicar is not liable to be rated in respect of his allotment for glebe lands to the general expenses of the Inclosure Act. The Inclosure Act gave the commissioners power under sect. 86 to mark out before making any allotment such portion of the lands as they should judge sufficient in value to defray the expenses of obtaining and executing the powers of the Act, and to sell the same from time to time. Sect. 89 gave them power to make an additional rate if the land so marked out should not prove sufficient; and the commissioners are to make the additional rate on all persons interested in the lands to be inclosed, "except the said vicar and persons entitled to tithes, and the mayor, aldermen and burgesses in respect of the lands for places of public recreation." Mr. Boden contends that this means "except the vicar so far as he is interested in the lands in respect of his tithes." Mr. Mellish contends that it means "except the vicar" absolutely. I think that the vicar is excepted absolutely. By sect. 56 the vicar is placed in the first class of allottees. Several classes of allottees are named, and then come what I may call the residuary allottees. Some of the prior classes are to receive compensation for a great variety of existing interests, and the vicar is one of them. He is to receive compensation for his glebe lands, and also for his tithes, in company with such persons as have an interest in the tithes. Then come the allotments to freemen, also for existing interests, and to certain householders. Then comes sect. 66, empowering the commissioners, after these prior claims shall have been disposed of, to divide the residue among the persons having rights and interests in the lands. Sect. 86 provides that the commissioners shall sell a portion of the lands before making any allotment. The vicar has not any interest in the quantity of land which the commissioners shall sell, for he only has as much of the land as is equivalent to his tithe and glebe, and therefore the fund from which the payment of expenses was to come was, in the contemplation of the Act, to be irrespective of the vicar and his allotment. Then comes sect. 89, providing for an additional rate if required. It seems to me to stand to reason that those persons who have not paid enough under the first provision should pay more to make up the deficiency. It is certain also that sect. 89, without looking to the general framework of the Act, may be well read in favour of this view. Mr. Boden reads it, "except the vicar and other persons entitled to tithes," and when the word "other" is inserted, it always means that the persons included come in the same class as the persons previously mentioned. But when the statute has intended this it has said so in unmistakeable terms. Sects. 69 and 70 make it perfectly clear that the allotments to the vicar and other persons in lieu of tithes, are to be fenced at the public expense, and the allotment to the vicar in respect of glebe at the vicar's expense. They speak of the "vicar and other persons entitled to allotment in lieu of tithes" as one class; whereas sect. 59 is absolute in its exception of the vicar, leaving out the word "other," which is strong evidence that the Legislature intended to make a distinction in this section between the vicar and the other persons entitled to allotments in lieu of tithes. Judgment ought, I think, for these reasons to be for the deft.

*BYLES, J.*—I am of the same opinion, though I

confess that, when the argument began, my impression was otherwise. On due consideration, I think that it is clear that the literal construction is the true one, and as to the literal construction there can be no doubt. The proportion to be paid by any person of the expenses of the Act is not a charge on the land, but on the person in respect of the land. If the vicar were liable to it, it might be levied by action, or by a proceeding in the nature of an *elegit*, and the whole revenue of the vicar might be sequestrated, for he would have no power to charge the living.

*KEATING, J.*—Looking at the general scope and object of the Act, and the way in which sect. 56 deals with the vicar, I think that he was intended to be exempted in sect. 89. It seems that the vicar has, in fact, been dealt with by the commissioners like other landowners, and has received his allotment for glebe out of the residue of the lands. But, looking at sect. 56, it is clear that the Legislature intended that he should be fully compensated in respect of his tithes and glebe in the first instance. Concurring with the interpretations of the other sections given by the Lord Chief Justice, I also think that judgment ought to be given for the deft.

*Judgment for the deft.*

Attorneys for the plts., *Taylor, Hoare and Taylor.*  
Attorneys for the deft., *Benbow, Tucker and Saltwell.*

Nov. 9, 11 and 18, 1864.

TAYLOR (app.) v. HUMPHREYS (resp.)

*Public-house—Sale of beer, &c., during prohibited hours on Sunday—11 & 12 Vict. c. 49—Travellers—Who are?*

*The app. kept a public-house about two miles from Birmingham. On a certain Sunday morning a policeman entered the house between the hours of eleven and twelve and found thirty-two persons in the rooms, passages, and at the bar, some of whom were drinking and some smoking. An information having been laid against the app. under the 11 & 12 Vict. c. 49, it was proved before the magistrates that two of the persons found in the house had left their own homes at Birmingham that morning, and having taken a walk of between seven and eight miles had stopped at the app.'s for refreshment on their way home. With regard to the others it was assumed that they resided at Birmingham.*

*The magistrates having decided that the persons in the house were not travellers within the 4th section of the Act, convicted the app.:*

*Held, on appeal from this decision, that a person was a "traveller" within the meaning of the Act, who went out from home from any motive of business or pleasure except the desire of excessive drinking, and by reason thereof required refreshment; and that it was for the justices to say (placing reliance on their local knowledge) whether the app. believed with reason that his guests were travellers taking refreshment as such, or were making a pretence to that character for the purpose of profaning Sunday and passing it in drinking.*

This was an appeal from a conviction by justices. The following is the case as stated for the opinion of this court.

It was proved by the evidence of Thomas Place, a police constable, that at twenty minutes past eleven in the forenoon of the day mentioned in the information he went to the deft.'s house, and finding the door closed, but unfastened, opened it and walked in, and found thirty-two men and women were in the house, of whom some were seated in the tap-

[C. P.]

TAYLOR v. HUMPHREYS.

[C. P.]

room, others standing in the passage leading from the front door, and in which the bar window is situated. Some were drinking, or had ale before them, and some of the men were smoking. The deft.'s daughter was engaged in drawing beer for the company.

The deft. told Place they were all strangers, upon which Place replied, "I suppose you call them travellers." He said, "Yes, they are travellers." Several got up and said they came from Birmingham.

They were strangers to witness, and had the appearance of Birmingham artisans, and it was assumed or admitted that they came from Birmingham. Their conduct was orderly. The deft.'s house is situated a little more than 2½ miles from the centre of the town, and the borough extends within about 1½ miles, and is built upon and up to the boundary from which rows of houses or detached villas stretch to the village of Moseley.

Two of the customers on the occasion were called as witnesses, and proved that they were inhabitants of Birmingham, and had walked from the town through lanes and fields that morning, thereby extending their walk, the one to seven the other to eight miles before reaching the deft.'s house, where they had ale and bread and cheese on their way home; they stated that they did not leave home with the intention of calling at deft.'s house. It was also proved by them that they were asked if they were travellers before being supplied, and that they said they were. These witnesses were at that time within about two miles of their residence, and the few whose addresses were ascertained appeared to be inhabitants of that part of Birmingham nearest Moseley, and within a mile and a half or two miles of it; of course some might have come a further distance.

For the defts. it was contended, first, that there was not sufficient evidence of opening; as no distinct opening had been proved, the justices were of opinion that the fact of persons being in the house, especially in the entrance passage and at the bar, although the policeman had not actually seen the door opened, was sufficient to enable them to draw an inference that the house had been opened, and considering also that the witnesses for the defence proved admission had been obtained without difficulty, were of opinion that the evidence was sufficient on this point.

It was then contended that the company were travellers; that they lived in another parish; and that on their representing themselves to be travellers the landlord was bound to supply them.

On the whole case the justices were of opinion that, for all that appeared to the contrary, the company assembled had come from Birmingham, many of them a distance of less than two miles; that although the fact of a man being a traveller was not actually a question of distance, he must be on a journey or a wayfarer; but first, in the case of such as they assumed had only come from the near end of Birmingham, proceeding on foot a distance of less than two miles did not constitute a journey; and next, as to the others, who were shown to have taken a longer walk, and to be at so short a distance from their homes, that they had ceased to be travellers in the same degree as if the same individuals had arrived in Birmingham and had applied for refreshments at a tavern in the same street as their own residences. They were of opinion that the fact of the public-house not being in the same parish as the residences of the customers was unimportant; that under the circumstances the persons were not travellers; and that the inquiry made at the entrance, of the customers, could not be considered *bonâ fide*; and they fined the deft. the sum of forty shillings and costs.

[MAG. CAS.—VOL. III.]

*Hayes*, Serjt. for the apps.—The persons admitted into the house were artisans of Birmingham, walking out into the country on Sunday morning and needing refreshment by reason of that walk; they applied to the app. for the same, and I contend that the app. was justified in providing them with what they required. They were "travellers" within the meaning of the Act, as the proper definition of the word is, any person who fares abroad either from a desire of the enjoyment of country sights and scenes, or from any other motive of business or pleasure except the desire of excessive drinking, and that any supply of the refreshment needed by reason of such faring abroad might be construed to be refreshment for a traveller. He cited

*Atkinson v. Sellers* 28 L. J. 12, M. C.; 82 L. J. 178;  
*Taylor v. Humphreys*, 30 L. J. 242, M. C.; 4 L. T.  
Rep. N. S. 514.

*Keane* for the resp.—These persons were not travellers within the true intent of the statute, and persons who choose to walk out merely for the sake of a walk cannot be called so; if they could, there would be no reason why any person residing in London should not start from his own house on a Sunday morning, walk a mile or so, and then turn back and call at the first public house he may chance to come to and require the landlord to open his house to him. Then it is for the app. to disprove the charge and show that the magistrates were wrong; and, although evidence has been brought forward as to two of the persons found in the house, nothing has been proved as to the remaining twenty-eight, and I submit that with regard to them there has been no evidence to show that they were travellers, and therefore they must be taken not to come within the exception. He referred to

*Tennant v. Cumberland*, 23 J. P. 15.

*Cur. adv. vult.*

*Nor. 18.*—*ERLE, C. J.*—In this case the question is, whether the evidence supported the information; and the answer depends on the meaning of the word traveller in the statute. It has been contended for the apps. that, as the persons admitted into the house were artisans of Birmingham, walking out in the country on Sunday morning, and needing refreshment by reason of that walk, therefore, they are travellers, taking refreshment within the words of the Act; that the inhabitants of Birmingham and other similar towns may well desire to emerge from a crowded region covered with brick and smoke, and are legally and morally right in gratifying that desire by taking a walk into the country during the hours best suited for a sight of the sun, on the only day on which labourers are free—in other words, on Sunday morning; that the prohibition against supplying any fermented liquors, or indeed any sustenance whatever, on Sunday, till half-past twelve o'clock, imposed on all throughout Great Britain who have any licence whatever to sell cider or beer, or wine, or spirits, attaches to a very large portion of the class who gain their livelihood by supplying food for strangers and the homeless, and that the wants of the persons maintaining themselves in the area between the Lands End and the North of Scotland are very various, and, considering the variety of habits incidental to living in town and country, sea and land, mountain and marsh, north and south, surface and mine; and as this prohibition is subject to an exception, that exception was probably intended to be capable of extensive application in proportion to the prohibition, as the intention of the Legislature in the prohibition was to promote the better observance of the Lord's-day in general, and in particular by excluding those who yield too

N

C. P.]

THE VESTRY OF CHELSEA v. KING.

[C. P.]

much to the attraction of the public-house, by excluding those from their accustomed haunts, to bring them to places of worship, and so to the paths of piety and virtue; that this intention of the Legislature might also be in part promoted by permitting resort to the beauties of nature at proper seasons, and allowing wholesome refreshment needful for the comfortable enjoyment thereof; and that their intention would probably be in part defeated by confinement in noisome air and deprivation of wholesome sustenance when needed; and that therefore the word "travellers" ought to be construed, as all those who fare abroad, either from a desire of the enjoyment of country sights and scenes, or from any other motive of business or pleasure, except the desire for excessive drinking, and that any supply of the refreshment needed by reason of such faring abroad might be construed to be refreshment to the traveller. He further contended that, as the exception of refreshment to a traveller is contained in the clause creating the prohibition, the burden of proving that the prohibition has been infringed, and that the case is not within the exemption, is cast on the informer (see *Gill v. Scrivens*, 7 T. R. 27; *Rez v. Pratten*, 6 T. R. 559); and also that, if the publican believed and had reason to believe when he supplied the drink that he was supplying refreshment to a traveller, he ought not to be convicted. This argument of my brother Hayes for the app. is, we think, well founded, and that the statute ought to be construed on the principles that he has contended for. We think that a person would be a traveller within the exception, if he came abroad from any of the motives above suggested as legitimate, and by reason thereof needed refreshment; but if he came abroad merely because he desired to go to a public-house and obtain drink he would not. The circumstances under which a guest is admitted and supplied would be matter for discretion in deciding whether the publican had reason to believe, or did believe, that he was a traveller within this description, either when he admitted him, or when he afterwards supplied him; such as, whether he was a stranger or a neighbour, whether he delayed longer, or took more than was consistent with the need of refreshment; the distance also would be relevant; but no rule can be laid down for a defined distance, as that which may be short for the vigorous may be long for the weakly. The cases decided on the matter support the app.'s argument. In *Atkinson v. Sellers*, the magistrates convicted because the deft. had taken a drive for a few miles on a Sunday afternoon, they being of opinion that business was necessarily included in the travelling; but the Court quashed the conviction. Cockburn, C. J. says, that a man cannot be said to be a traveller who goes to a place merely for the purpose of taking refreshment; but if he goes to an inn for refreshment in the course of a journey, whether of business or pleasure, he is entitled to demand it, and the innkeeper is justified in supplying him. Crowder, J. says, the only real distinction is between a man living in the neighbourhood or at a distance; whether he is travelling for pleasure or business cannot make any difference. In *Taylor v. Humphreys*, the magistrates convicted because the party walked out on Sunday afternoon four miles for pleasure; the Court quashed the conviction on the ground that a man might be a traveller though he was walking for pleasure, and had not exceeded the distance above mentioned, and they adopted the reason given by the Chief Justice in the last-mentioned case. The context of the statute supports the app.'s argument. Sect. 1 prohibits every licensed victualler and every beerhouse keeper in Great Britain from opening his house for the sale of, or from selling, any fermented or

distilled liquors on Sunday before 12-30, except as refreshment for travellers. Sect. 3 prohibits every licensed victualler, and every public beerhouse keeper, and any person licensed or authorised to sell any fermented or distilled liquors, and any person claiming to sell wine by retail by reason of being free of the Vintners' Company, or any other right or privilege, from opening his house for the sale of any article whatever during the prohibited hours, except as refreshment for travellers. Sect. 4 prohibits every person from opening any house or place of public resort for the sale of fermented liquors or distilled liquors, or from selling such liquors during the prohibited hours, except as refreshment for travellers. Sect. 5 empowers constables to enter any house or place of public resort for the sale of such liquors at any time. Sect. 6 makes every person offending against the statute liable to a penalty not exceeding 5*l.* for each offence, and declares that every separate sale shall be a distinct offence. These provisions are very stringent. For example, this app. might have been fined 160*l.*, that is 5*l.* for each guest. They do not bear upon the rich who have refreshment at their command; but they coerce the poorer classes throughout the island: salutary when they check the disorderly, pernicious when they molest the discreet. We consider that by construing the exception in the wider sense, we save from vexatious restriction many who have a right to be trusted with self-control, and at the same time leave the prohibition in force as far as the interests of real piety are concerned. The result is, the case will be sent back. We place great reliance on the local knowledge of the magistrates. They can tell whether the app. believed, with reason, that his guests were travellers taking refreshment according to the description above given, or making a pretence to that character for the purpose of profaning Sunday and meeting to drink. Probably it will not be worth while to proceed further against the app. upon the present facts, because, unless he raises the question again by his future conduct, the information will not have been without effect. If he does raise the question again, then the principles here explained may probably guide to a decision in accordance with our view of the law.

*Judgment for the app.*

Monday, Nov. 13, 1864.

THE VESTRY OF CHELSEA (apps.) v. KING (resp.)

*Metropolis Local Management Act 1862—25 & 26 Vict. c. 102, s. 73; 57 Geo. 3, c. 29, ss. 67, 68—Nuisances.*

*The Act of 57 Geo. 3, c. xxix. (local and personal), for the better paving, improving and regulating the streets of the metropolis, and "removing and preventing" nuisances and obstructions therein, by sect. 68, enacts that penalties shall be inflicted on persons keeping swine within forty yards of a street. This Act extended to the district comprised within the weekly bills of mortality. The Metropolis Management Amendment Act 1862 extended the powers of improving and regulating streets and for the "suppression" of nuisances, contained in this Act, to the metropolis as defined in the Metropolis Management Acts:*

*Held, that the powers for the "prevention" of nuisances, including that of imposing penalties for keeping swine, contained in the former Act, were not extended by the latter Act to the larger area.*

Case stated by a police magistrate of the metropolis, under 20 & 21 Vict. c. 43:

James King, the resp., was summoned to appear before me, Henry Selfe Selfe, Esq., one of the ma-

C. P.]

THE VESTRY OF CHELSEA v. KING.

[C. P.]

gistrates of the police courts of the metropolis, sitting at the Westminster Police Court, upon a complaint made by Charles Sahee, on behalf of the vestry of St. Luke's, Chelsea, the apps., for unlawfully keeping swine in a yard within forty yards of a street called Symons-street, in the parish of Chelsea, within the metropolis, contrary to the statutes 57 Geo. 3, c. xxix., s. 68, and 25 & 26 Vict. c. 102, s. 73.

It was proved that the resp. kept certain swine in a yard called Brook's-yard, within forty yards of Symons-street.

It was not proved that they were so kept as to be in any way a nuisance, or injurious to health.

The statute 57 Geo. 3, c. xxix. does not apply to the parish of Chelsea, or to the place where the swine are kept, unless it applies to it by virtue of the statute 25 & 26 Vict. c. 102, s. 73.

The apps. contended that the whole of the 68th section of the statute 57 Geo. 3, c. xxix. was extended to the metropolis by the statute 25 & 26 Vict. c. 102, s. 73; that its provisions were imperative, and therefore that I was bound in point of law to convict the resp.

I doubted whether (the swine in question not being a nuisance nor straying in the street) the case came within the 73rd section of 25 & 26 Vict., c. 102, which extends to the metropolis only so much of 57 Geo. 3, c. xxix. as relates to the powers of improving and regulating the streets, and for the suppression of nuisances (see especially sect. 67 of the last-mentioned Act). And having regard to the provisions of the Police Act, 2 & 3 Vict. c. 47, s. 60, clause 5; and to the Nuisances Removal Act, 18 & 19 Vict. c. 121, s. 8, I dismissed the complaint on the ground that I was not bound in point of law to convict the resp.

The apps. being dissatisfied with my decision, and conceiving it to be erroneous in point of law, I request the judgment of the Court of C. P. whether I was bound in point of law to convict the resp.

(Signed) H. S. SELFE.

14th July 1864.

The following were the app.'s points: That the provisions of the 68th section of the 57 Geo. 3, c. xxix. are all of them powers of improving and regulating streets and for the suppression of nuisances. That the 68th section was in force at the time of passing the 25 & 26 Vict. c. 102. That the 68th section is not inconsistent with the Metropolis Management Amendment Acts. That the 68th section applies to the metropolis as defined by the Metropolis Management Acts, and therefore to the parish of Chelsea by force of the 73rd section of the Metropolis Management Act 1852. That the provisions of the 68th section relating to the keeping of swine are powers for improving and regulating streets. That the said provisions are given for the suppression of nuisances in the streets of the metropolis, that is, in the words of the title of the 57 Geo. 3, c. xxix. for removing and preventing them. That the other provisions mentioned in the case do not apply to prevent the nuisance or effect the object contemplated by the 68th section of the 57 Geo. 3, c. xxix.

The 68th section of 57 Geo. 3, c. xxix. (commonly called Michael Angelo Taylor's Act) is as follows:

And be it further enacted that no person or persons whomsoever at any time or times hereafter shall breed, feed, or keep any kind or species of swine in any house, building, yard, garden, or other hereditament, situate and being in or within forty yards of any street or public place in any parochial or other district within the jurisdiction of this Act, nor shall suffer any kind or species of swine belonging to him or them to stray or go about in any street or public place in any parochial or other district within the jurisdiction of this Act. And that any person or persons who shall so offend shall forfeit and pay for every such offence the sum of forty shillings, and shall also forfeit the said swine and every of them unto the commissioners or trustees, or other persons having the control of the pavements in any such parochial or other district; and that it shall and may be lawful for the

said commissioners or trustees, or other persons directed and appointed by them, or their surveyor or surveyors, inspector or inspectors, or any other officer, or person or persons directed and appointed by them, and for any constables and headboroughs, at all times hereafter all such swine to seize, take, drive, and carry away and sell for the best price that can be reasonably had; and the money thereby produced, after deducting all the costs and charges of and incidental to such seizure, removal, and sale, to pay to the treasurer or treasurers of the said commissioners or trustees, or other persons, or to such other person or persons as the said commissioners or trustees, or other persons as aforesaid, shall from time to time direct and appoint.

And the 73rd section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) enacts that,

The powers of improving and regulating streets, and for the suppression of nuisances, contained in the Act 57 Geo. 3, c. xxix. (local and personal), intitled "An Act for better paving, improving and regulating the streets of the Metropolis and removing and preventing nuisances and obstructions therein," shall, so far as the same is in force, and is not inconsistent with the provisions of the recited Acts and this Act, extend and apply to the metropolis, as defined in the recited Act and in this Act, including any unpaved streets, and notwithstanding any exceptions therein contained.

Keane, Q.C. appeared for the apps., and referred to

20 & 21 Vict. c. 43;

25 & 26 Vict. c. 102, s. 73;

57 Geo. 3, c. 29, ss. 67, 68;

2 & 3 Vict. c. 17, s. 60, par. 5.

No counsel appeared for the resp.

ERLE, C. J.—I think that this appeal must be dismissed. The 68th section of 57 Geo. 3, c. xxix. contains provisions that no person shall keep any kind of swine within forty yards of a street or public place under a penalty of forty shillings and the forfeiture of the swine. The Act extended to all places within the weekly bills of mortality of those days, and contains a great quantity of regulations for better paving, improving and regulating the streets of the metropolis and "removing and preventing" nuisances and obstructions therein. Afterwards came the Metropolis Management Amendment Act, 25 & 26 Vict. c. 102, which extends to a much larger area and takes in many districts which are in their nature rural, as well as districts which are densely populated. It embraces Woolwich, Fulham, Hampstead and other distant places. Over this large area the Metropolitan Board of Works have very extensive powers for the removal of actual existing nuisances. Is the power of removing a pig and inflicting a penalty, given by sect. 68 of the older Act, extended to the districts subject to the local board by sect. 73 of the subsequent Act, containing the following words: "The powers of improving and regulating streets, and for the suppression of nuisances, contained in the Act of 57 Geo. 3, c. xxix., intitled, &c., shall extend and apply to the metropolis"—so that a magistrate is bound to convict? I think not. The powers contained in 57 Geo. 3, c. xxix. might have been transferred *in toto*, and nothing would have been easier for the draughtsman of the later Act than to say so in general terms; but he has not done so, and has taken only a part of those powers. The words in the title of Michael Angelo Taylor's Act are, "removing and preventing nuisances." The words in the transferring Act are, "for the suppression of nuisances." It is clear that the Legislature did not intend to transfer all the powers of the old Act. The existence of a pig might be contemplated as permissible in the more extended area. Looking at the definition of the word "street" in the Metropolis Management Act, the most secluded footpath in a rural part of any district would be within the prohibition. Chelsea is, it is true, densely populated; but if we were to decide that Chelsea was within the statute, we must do the same with comparatively scantily populated districts. The power of suppressing nuisances is transferred to the Metropolitan Board; and this, I

C. P.]

DOGGETT v. CATTERNS.

[C. P.]

think, refers to the *modus operandi*, as far as I have looked through the statutes. The law would therefore stand that, within the ambit of the bills of mortality, keeping a pig within forty yards of a street is prohibited; but between that ambit and that of the Metropolitan Management Acts it does not expose the owner to forfeiture and to a penalty, unless it amounts to an actual nuisance.

BYLES, J.—I concur in every word that has been said by Erle, C. J. I have but one observation to make, and that is, that the rule that in construing a written document the surrounding circumstances are to be looked at applies equally to Acts of Parliament and to private writings. The moment that it appears that this statute applies to a large rural district, it becomes necessary to see if we are compelled to adopt the reading of the statute contended for by the counsel for the apps. We must not strain the Act. The Act of Michael Angelo Taylor contains two sets of powers, one for the "suppression" the other for the "prevention" of nuisances. The Act of 25 & 26 Vict. c. 102 transfers in terms to the metropolitan Board that for the "suppression" of nuisances which I conceive applies to existing nuisances, such as straying swine and others. The beneficial construction of the Act is also the true and literal one.

KEATING, J.—By 57 Geo. 3, c. xxix. the keeping of swine within forty yards of a street was made an offence, and also various other specified nuisances were made offences. The authorities, under the Local Government Act, had the largest powers in reference to existing nuisances in the metropolis, but not the power of preventing nuisances by punishing persons for such an act as keeping swine within forty yards of a street. That being so, the Local Management Amendment Act 1862 was passed. I have had great doubts if the Legislature did not intend to transfer the powers prohibiting the keeping of swine. I cannot say that these doubts have been all removed, but I am not sufficiently pressed by them to dissent from the judgment of the court.

*Judgment for the resps.*

DOGGETT v. CATTERNS.

*Gaming—Suppression of Betting Houses Act (16 § 17 Vict. c. 119), ss. 1, 5.*

*The deft., a betting agent and bookmaker, was in the habit of standing under certain trees in Hyde-park, and there making bets on horse races and receiving deposits. The plt., having made a bet with him and paid his deposit, brought an action for the return of the same;*

*Held that the deft. had brought himself within the meaning of the Act (16 § 17 Vict. c. 119), quite as much as if he had carried on his betting transactions in a room or booth, and that the plt. was therefore, under sect. 5 of the above Act, entitled to recover back his deposit in an action for money had received.*

In this case the declaration was for money had and received, and on accounts stated to which the deft. pleaded never indebted, set off; and, thirdly that the money alleged to have been received was money deposited by the plt. with the deft. under a contract or agreement by way of wagering and gaming, and illegally betting on horses running at races, and the account stated, as alleged in the declaration, was made and stated of and concerning the said money deposited as herein alleged, and not otherwise.

The action was tried before the Under-sheriff of Middlesex, on the 30th June last, when a verdict was found for the deft.

The deft. was a list keeper, or racing agent, and was in the habit of frequenting a certain spot under some trees in Hyde-park. On the 20th Oct. 1863, which was the day of the Lincoln races, he was in the park, and a crowd of persons round him; he had a betting-book in his hand, containing a list of the horses, and was betting on races, and offering odds against horses.

The plt. was also there, and took six to one from the deft. about Fly Trap winning the Witham Handicap at Lincoln, which was to be run for on that day; the plt. at the time depositing 5*l.* 10*s.* with the deft. This was at half-past twelve, and it appeared from the evidence that Fly Trap had been scratched a few hours before the bet was made, and the plt. accordingly, a day or two afterwards, demanded the return of his deposit, which the deft. refused to make, stating, at the time, that as Fly Trap had not won the race he had won the bet.

The rule at Tattersall's and the Jockey Club is, that money would be returned under such circumstances; but it was shown that there was a rule, which rule was stuck in the deft.'s book, and of which the plt. was cognisant, "that all bets stand on the day of the race, whether scratched or not."

Yeatman having obtained a rule calling on the deft. to show cause why the verdict found for him should not be set aside and entered for the plt., pursuant to leave reserved, upon the ground that there was no risk, the horse being struck out of his engagement; and, secondly, that the Betting Act (6 & 17 Vict. c. 119), ss. 1 and 5, entitled the plt. to recover back the 5*l.* 10*s.* in an action for money had and received,

Talfourd Salter now showed cause, and contended that what was contemplated by the Legislature was to prevent the opening of betting-houses or offices, and the receiving money in advance by the owners of such houses or by persons acting on their behalf; and that this case would not come within the meaning of the Act, although a booth put up in a park might, as "such person" as is mentioned in the 5th section must be connected with the management or use of a house, office, room, or other place, which was not the case here.

Yeatman, in support of the rule, was not called on.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The evidence is that the deft. was in the habit of betting, generally with those persons who chose to take the risk; and to resort to a place frequented by him for the purpose of making bets, namely, near a certain tree in Hyde-park. The deft. had seen him at that spot daily, betting on horse races, and on this occasion paid him a deposit of 5*l.* 10*s.*, which was to be returned to him sixfold, on a certain contingency, viz., if a particular horse won a certain race at Lincoln. That was a deposit on a contingency, and by 16 & 17 Vict. c. 119, s. 5, money deposited on a bet with persons coming within the meaning of this Act may be recovered back. Now the words of that statute are, I think, wide enough to extend to this place. The deft. used this spot in Hyde-park, having his betting-book with him, and received deposits from persons resorting to him, and so brought himself within the meaning of the statute. Mr. Salter has contended that the "other place" mentioned in the first section of the Act must be *ejusdem generis* with the words "house, room, office," which precede it, and that the place therefore must be something in the nature of a structure; but he at the same time admitted that a booth would come within the meaning of the Act. I think, however, that the mischief is the same whether the place resorted to is under the shelter



[Ex.]

- YOUNG v. EDWARDS.

[Ex.]

of a tree or canvas, or under a roof, and that the words in the statute are wide enough to include the present case. Then Mr. Salter says that the preamble to the Act, which points out the mischief to be remedied, narrows the construction I am putting on it. The words in the preamble are, "whereas a kind of gaming has of late sprung up, tending to the injury and demoralisation of certain improvident persons, being places called betting-houses and offices." No doubt the demoralisation caused by the betting-houses was the mischief which the Legislature sought to prevent, and I think it was intended, if places other than betting-houses were resorted to, to draw the line wide enough to include places of this description, and that this was the reason why they used the words, "no house, office, room, or other place." Mr. Salter contends that we shall check the rights of parties to lay bets, which are to a certain extent recognised by 8 & 9 Vict. c. 109, for he says, by this construction we shall bring all persons who bet within the peril of the penalty. I think, however, that the Act was meant to apply to persons using a place for betting as a habit, and to protect the young against professional persons doing so, and to prohibit the habitual gamester from carrying on his occupation, and does not affect the legality of an isolated bet made in the street or elsewhere. I am clear that the statute was made to meet this case, and that the rule must be made absolute.

KEATING, J.—I am of the same opinion, and think that the words of the statute are wide enough to meet this case. Mr. Salter admits that this was a transaction which would, if it had taken place in a house, have come within the meaning of the statute. In this case the person has resorted to the shelter of a tree in Hyde-park; is he or is he not a person contemplated by the Legislature. I think we may say that he is, and that the spot chosen by him for making his bets comes within the statute. I agree that this decision does not affect bets made in the street, or isolated transactions of that nature. If the parties had merely gone to Hyde-park and met there by chance, and then made a bet, there would be good grounds for Mr. Salter's argument; but the evidence shows that such was not the case, but that the deft. habitually resorted to this place for betting purposes. Under these circumstances the rule must be made absolute to enter the verdict for the plt.

*Rule absolute.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Monday, May 2, 1864.

YOUNG (app.) v. EDWARDS, Surveyor of the Corporation of Stockton-on-Tees (resp.)

*Local Improvement Act—Validity of bye-law—Conviction by justices for infringement of—Local Government Act 1858 (21 & 22 Vict. c. 98, s. 34).*

A local board of health, by one of its bye-laws, imposed continuing pecuniary penalties upon any person who should "construct any works, or do, or omit to do, any act, or to comply with any requirement of the board, or should make any alteration in any works after completion, or any deviation from or alteration in any plan approved by the board, whether in new or existing buildings, contrary to the provisions therein contained, or do any act, matter, or thing contrary to the bye-laws made under the authority of sect. 34 of the Local Government Act 1858 (21 & 22 Vict. c. 98), or omit, neglect, or fail to perform and execute any of the works, matters, or things required by such bye-laws, or in any manner transgress the same bye-laws or any of

them;" and the board by the same bye-law were empowered to remove, alter, pull down, or otherwise deal with such works as the case might require:

*Held, that a conviction by justices, imposing a pecuniary penalty on the app. under the above bye-law, was bad; such bye-law being ultra vires, and beyond the authority conferred on the local board by the Local Government Act 1858 (21 & 22 Vict. c. 98), s. 34.*

Special case by justices of the borough of Stockton-on-Tees (under 20 & 21 Vict. c. 43, s. 43), which stated in substance as follows:

At a petty sessions of the borough on the 27th July 1863, a complaint was made by resp., the borough surveyor, against the app., under the bye-laws made in pursuance of the Stockton Extension and Improvement Act 1852, and the various Acts incorporated therewith, for having within six months then last past unlawfully proceeded to the construction of certain works on a certain piece of ground there (describing it) without having, previously to the commencement of such works, deposited the plans or given the notices required by the bye-laws made in pursuance of the before-mentioned Acts.

The bye-laws considered to have been infringed were the 21st and 26th.

By the 21st, every person intending to erect any new building is required to give sixteen clear days' notice to the local board of such intention by writing, and at the same time to leave at the office of the local surveyor detailed plans and sections of every floor of such intended new building drawn to a scale prescribed therein, and otherwise as therein is specified.

Bye-law 26 was as follows:

The local board shall, by their order approve or disapprove of the proposed new works or buildings within the times severally specified herein for the deposit of notices thereof, but if the owner, or person intending to construct any new street, or erect any new buildings, fail to give the notices herein required, or proceed to the execution of any of the works before the expiration of such notices without the approval of the local board; or, if any such owner or person shall construct, or cause to be constructed, any works, or do any act, or omit to do any act, or to comply with any requirement of the local board, or shall make any alteration in any works after they have been completed, or make any deviation from or alteration in any works after they have been completed, or make any deviation from or alteration in any plan which has been submitted to and approved by the local board, whether in new or existing buildings, contrary to the provisions herein contained, or do any act, matter, or thing contrary to the bye-laws made under the authority of the 34th section of the Local Government Act 1858, or omit, neglect, or fail to do, perform and execute any of the works, matters, or things required by such bye-laws, or any of them, or in any manner transgress the same bye-laws, or any of them, he shall be liable for each offence to a penalty of not exceeding 5*l.*, and he shall pay a further sum not exceeding 4*l.* for each and every day during which such work shall continue to remain contrary to the said provisions, and the local board may, if they shall think fit, cause such work to be removed, altered, pulled down, or otherwise dealt with as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner as provided by the Public Health Act 1848.

On the hearing of the complaint it was proved, and the justices found as a fact, that the app., on or before March 27, 1863, deposited plans and notices, which were rejected on that day by the local board of health; that on or before April 24, 1863, he deposited amended plans and another notice, which were rejected on that day; and that on or before May 8, 1863, and more than sixteen clear days before any buildings were commenced, he again deposited the plan, to which, as he alleged, was attached the old notice dated 20th April, but the notice attached to the plan produced before the justices was a notice written the day before the hearing, and substituted by the app. for the notice of April 20, which had been destroyed.

The local board of health rejected the said plan on May 8, 1863, on the ground that the buildings as

[Ex.]

REG. v. TUBERFIELD.

[C. CAS. R.]

shown thereon would project beyond the adjoining houses, and that it was desirable that the line of houses in the street as at present laid down should be preserved; and the app. commenced building a house and other erections without depositing any other plans or notices, and without the sanction of the board. The board by their order disapproved of the proposed new works within the times severally specified in the bye-laws for the deposit of notices thereof, and the justices found, as a fact, that app. had proceeded to the construction of certain works without having previously thereto deposited the plans and given the notices required by the said bye-laws.

It was objected on app.'s part that no penalty could be inflicted on him, inasmuch as a bye-law similar to a certain extent to this 26th bye-law which contained the penalty, had been held to be bad, so far as concerned the power therein contained for removing, altering, pulling down, or otherwise dealing with works, and that bye-law 26 was equally bad, and that a bye-law bad in part was bad as to the whole; but the justices, without deciding whether the 26th bye-law was or not bad in part, decided that they had power under it to inflict a penalty, and they thereupon convicted the app. of the offence charged against him, and adjudged him to pay a fine of 10s. and 2l. 15s. for costs, accordingly.

One of the questions of law for the opinion of the court was, whether the 26th bye-law was bad, either wholly or in part, and, consequently, whether the justices were justified in inflicting any penalty by virtue thereof?

On the case coming on for hearing on 20th Jan. last, the Court of Ex. ordered it to be remitted to the justices to be amended by stating the grounds upon which the plans deposited were rejected by the local board. The justices accordingly on the 16th Feb. amended the case by stating the grounds of rejection as above mentioned.

*Manisty*, Q.C. (with him *Prideaux*) for the app.—By sect. 34 of the Local Government Act 1858 (21 & 22 Vict. c. 98), local boards are empowered to make bye-laws with respect to the four following matters, viz.: first, the level, width and construction of new streets; secondly, the structure of walls of new buildings; thirdly, the sufficiency of the space about buildings with regard to ventilation; fourthly, the drainage of buildings, &c.; and they may provide for the observance of the same by necessary provisions as to giving notice, depositing plans, &c., and as to the power of the board to remove, alter, or pull down any work begun or done in contravention of such bye-laws. The question here was, whether bye-law 26 was a valid bye-law. The app. had deposited and given the requisite plans, sections and notices three several times, in compliance with bye-law 21, and three times had they been rejected without any ground being assigned for such rejection. This was an attempt on the part of a local board, similar to that made in *Brown v. The Local Board of Health of Holyhead*, 7 L. T. Rep. N. S. 332; 32 L. J. 25, Ex.; 1 H. & C. 601, to take a person's land from him without paying for it; but this court decided there that land taken must be paid for. Bye-law 33 in that case, which was very similar to the 26th bye-law here, was held to be *ultra vires* and bad, and it is submitted that this bye-law is also bad. But if it be good, app. has not contravened it.

*Mellish*, Q.C. (with him *Davison*), contra, for resp.—The local board proceeded and now rely on sect. 28 of the Local Government Act Amendment Act (24 & 25 Vict. c. 61), which prohibits any house or building forming part of any street within the district of any local board being brought forward beyond the front wall of the house or building on

either side thereof, without the previous sanction of such local board. It was because the app.'s plans contravened that section, and projected beyond the street line, that they were rejected, and not because they did not comply with the bye-law. App. then proceeded to build, and the board say he was wrong because no plans were deposited. App. is liable to a penalty under the bye-laws by virtue of sect. 34 of 21 & 22 Vict. c. 98, although none is inflicted by sect. 28 of the subsequent Amendment Act. The real question is, whether this last-mentioned section has been infringed by app.'s building beyond the street line. [BRAMWELL, B.—What we have to decide in truth is, whether the 26th bye-law is good.] The real decision in the *Holyhead* case, which has been cited contra, was that the bye-law did not refer to an old building. Moreover, a bye-law may be good in part, and bad in part; and this bye-law is good so far as relates to new buildings. [BRAMWELL, B.—Is this bye-law which gives the board a general power of disapproval without assigning any reason, a good bye-law under an Act of Parliament which says the board may make bye-laws, with power to enforce the observance of them in respect to four particular matters? Under this bye-law the board may enforce anything. MARTIN, B.—The substantial question is, have the justices any jurisdiction?] These are not the bye-laws of this particular board only, but the general bye-laws issued by authority by all local boards. The bye-law may be good and the conviction bad.

*Manisty* in reply.—The case contains no mention of the 24 & 25 Vict. c. 61, and the conviction was not under that Act, but under this bye-law.

POLLOCK, C. B.—We are all of opinion that the conviction is bad, the bye-law being *ultra vires*, and beyond the authority conferred on the board by the Local Government Act 1858.

MARTIN, BRAMWELL and PIGOTT, BB. concurred.

*Judgment for the app.; conviction quashed with costs.*

Attorneys for app., *Hollings, Sharp and Ullithorne*, 1, Field-court, Gray's-inn, agents for *Dodds and Trotter*, Stockton-on-Tees.

Attorney for resps., *Perkins*, 13, Great James-street, Bedford-row, agents for *H. G. Faber*, Stockton-on-Tees.

The case of *Webster* (app.) v. *Edwards* (resp.) was a similar case, and followed the above decision.

### CROWN CASES RESERVED.

Reported by J. THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 12, 1864:

(Before POLLOCK, C. B., WILLES, J., CHANNELL, B., BYLES, and SHEE, JJ.)

REG. v. TUBERFIELD.

*Constable—Assault—Execution of duty—Evidence as to character of party being arrested.*

Upon an indictment for assaulting a constable in the execution of his duty, it appeared that the assault was committed whilst the constable was attempting to arrest the accused upon suspicion of having stolen some larch trees (under the value of 1l.) which the accused was carrying. To show that the constable was justified in suspecting the accused, the counsel for the prosecution asked the constable, in his examination in chief, "What did you know had been the prisoner's previous character?" The constable replied, "I knew him to be a very bad character," and was proceeding to mention previous convictions, when he was stopped on the

*ground that parol evidence of such convictions was inadmissible, but in answer to a question from the counsel for the prosecution, he said he had seen the accused in the Court of Quarter Sessions, and before the magistrates on one occasion :*

*Held, that, although the constable might be examined in chief as to the general character of the accused, he could not be asked in chief as to the grounds of his suspicion, and therefore that the question and answer as to the grounds of the constable's suspicion were improperly admitted.*

Case stated for the opinion of this court at the General Quarter Sessions of the peace for the county of Gloucester holden on the 28th June 1864.

Thomas Tuberfield was tried before me on an indictment which in the first count charged him with unlawfully and maliciously wounding Nehemiah Philpott: in the second count with inflicting on Nehemiah Philpott grievous bodily harm: in the third count with assaulting and beating, wounding and ill-treating Nehemiah Philpott and occasioning bodily harm to him: in the fourth count with assaulting and beating Nehemiah Philpott, a peace officer, to wit, a constable, in the due execution of his office: a fifth count charged a common assault.

In opening the case the counsel for the prosecution stated that the prisoner assaulted the constable Philpott in resisting an attempt to arrest him on a reasonable suspicion that a felony had been committed by the prisoner. From the evidence it appeared that on the 5th May the constable Philpott being on duty and standing at a public-house saw the prisoner and another man go up to the house, the prisoner carrying a bundle of larch trees which appeared to have been just pulled up; the constable looked at the bundle and asked where the trees came from. The prisoner replied in very coarse words and did not answer the question. The constable told the prisoner he thought he had stolen them. To this the prisoner made no reply, but took up the bundle and went along the road. The constable followed and overtook him and told him he should detain him until he made some inquiries about the trees. The prisoner refused to go with the constable to the police-station. The constable then took hold of the prisoner by the collar and told him he should detain him and take him to the station. Resisting this and another attempt to arrest him, the prisoner assaulted and beat the constable, inflicting a very severe wound on his head.

Evidence was given showing that the larch trees had been stolen from a plantation in the neighbourhood and were worth fourpence apiece. The number of trees was eight.

In the examination in chief of the constable Philpott, the counsel for the prosecution asked this question, "What did you know had been the prisoner's previous character?" To this question the prisoner's counsel objected and urged that, except in a few cases specially provided for by statute, the law does not permit a prisoner's previous character to be given in evidence against him. The counsel for the prosecution argued that the prisoner's previous character applied so directly to the issue whether the constable had reasonable ground to suspect that a felony had been committed by the prisoner as to make evidence of it admissible. I permitted the question to be put. The answer was, "I knew the prisoner to be a very bad character." The constable was proceeding to mention previous convictions, when he was stopped on the ground that parol evidence of previous convictions could not be received. In answer to questions from the counsel for the prosecution the constable said: "Before the 5th May I had seen him (the prisoner) in this court and before the magistrates on one occasion." Cross-examined on this point he said, "I saw him in the other court at

the last quarter sessions; I gave evidence against him; he was acquitted."

At the close of the case for the prosecution the prisoner's counsel submitted that, as there was nothing to justify the constable's suspicions but his knowledge of the prisoner's character and the possession of the larches freshly uprooted, and as the larches were of less value than one pound, the constable could not have had reasonable ground to suspect that a felony had been committed, by the prisoner, and that there was no case to go to the jury. Anticipating this objection the counsel for the prosecution had in opening the case suggested that the larches might have been severed by some person and afterwards stolen by the prisoner. He had also drawn my attention to the 32nd, 33rd, and 36th sections of the Larceny Act of 1861, 24 & 25 Vict. c. 96; and the 20th and 21st sections of the Act relating to malicious injuries to property, 24 & 25 Vict. c. 97, and suggested that, for aught that appeared to the constable at the time of the attempt to arrest the prisoner, the eight larches might have been property, or part of property, in respect of which some one or more of the felonies described in those sections had been committed by the prisoner. It did not appear at the trial whether, at the time of the arrest, the constable knew the value of the trees. The counsel for the prosecution also argued, that even if the constable was not justified in arresting the prisoner, greater violence was used than was necessary to resist the attempt to arrest him. I thought there was a case for the consideration of the jury, and in summing up I submitted to them in writing two questions:

The first question was, "Do you think that the constable had reasonable ground for suspecting that a felony had been committed by the prisoner?" The answer of the jury to this question was "Yes."

The second question was, "Do you think that the prisoner used more violence than necessary to resist an unlawful attempt to arrest him?" To this question the answer of the jury was "No."

The jury then, under my direction, returned a verdict of "guilty," and I respited the judgment and remanded the prisoner to the gaol, in order that the opinion of the Justices of either Bench and the Barons of the Exchequer might be taken on two questions:

1. Was evidence of the constable's knowledge, at the time of the attempt to arrest the prisoner, of the prisoner's character properly admitted?

2. Was there evidence sufficient to be left to the jury that the constable had reasonable ground for suspecting that a felony had been committed by the prisoner?

JAMES FRANCILLON,  
Chairman.

*Sawyer for the prisoner.*—The conviction cannot be sustained. It was contended for the prosecution that the police-constable had reasonable grounds for believing that a felony had been committed, because he knew the prisoner to bear a bad character; and further it was said that the trees might have been severed from the soil by somebody else, and that the prisoner might have obtained possession afterwards, and so been guilty of a larceny. Neither of these positions is tenable. To constitute a stealing within the 24 & 25 Vict. c. 96, s. 32, the trees must exceed the value of 1*l*, but here they are much below that value. Neither does the case fall within sects. 83 or 86. Again, to make the case a felony under sect. 20 of the 24 & 25 Vict. c. 97 (Malicious Injury to Property Act), the injury done must exceed the value of 1*l*. No felony was committed, and the jury have found that the prisoner did not use more violence than necessary to resist an unlawful attempt to arrest him. Assuming the policeman to have been in the execution of his duty

in arresting the prisoner, the conviction cannot be supported, because the evidence of the prisoner's character given by the constable was inadmissible. The effect of it was to damage and prejudice the defence of the prisoner. The 24 & 25 Vict. c. 96, s. 116, carefully guards against the charge of a previous conviction being stated to the jury until the prisoner has been found guilty of the offence charged in the indictment. This is the general course of proceeding, not to allow a prisoner's defence to be prejudiced by any evidence of the prisoner's previous character: (Best on Presumptions, 211; 1 Phil. on Evid. 499.) The prisoner's bad character formed no ingredient in this case. If a policeman is allowed to say generally, "I know the man to be a bad character," that so prejudices the defence that the prisoner's counsel is forced to call on him to state the grounds. No definite meaning can attach to the general imputation of bad character. It may mean a man is a drunkard, or that he has deserted his wife, or anything else that is morally wrong.

*Gilmore Evans* for the prosecution.—The evidence objected to was admissible. The question was not as to the innocence or guilt of the prisoner, but whether the constable had reasonable or probable cause to suspect the prisoner of having stolen the larch trees. The case of an action for malicious prosecution is analogous, and in such a case the deft. may lay before the jury all the circumstances which actuated him, that the jury may judge whether he was acting maliciously or not. Here the policeman had a right to say what he knew of the case and of the man. Every circumstance was material, and the grounds of his suspicion were necessarily stated. The cases of

*Williams v. Cross*, 2 Car. & K. 422;

*Hogg v. Ward*, 27 L. J. 443, Ex.;

*Hailes v. Marks*, 80 L. J. 889, Ex.; 4 L. T. Rep. N. S. 805.

*Allen v. Wright*, 8 Car. & P. 522;

show the degree of particularity admissible. The value of the evidence is not the question: (Haw. P. C. bk. 2, cap. 12, s. 8.) If a policeman is not allowed to consider the previous character of a person whom he arrests in the execution of his duty, the consequences will be very serious; and, if he is, why may he not state them?

*POLLOCK, C.B.*—We are all of opinion that this question ought not to have been put to the policeman. The question is, "What did you know had been the prisoner's previous character?" The answer of the constable is, "I knew the prisoner to be a very bad character." The question is not limited to what the witness knew of the prisoner, but what he knew of the prisoner's character. The witness was entitled to say that he entertained reasonable grounds for suspecting him of having stolen the trees, but that did not justify him in going into those grounds. It was open to the other side to go into them. In the first instance we think that the question ought not to have been put, and certainly the answer of the policeman as to the grounds of suspicion ought not to have been given. The object of the law in precluding such evidence is to prevent any evidence coming out so as to prejudice the prisoner in his defence. We think, therefore, this conviction cannot be sustained.

*Conviction quashed.*

#### REG. v. MUTTERS.

##### Nuisance—Working quarries—Evidence.

*An indictment charged the deft. with working quarries of stone near to public streets and dwelling-houses, and unlawfully and injuriously throwing and discharging pieces of rock and stones into and upon the streets and dwelling-houses, whereby the streets were rendered unsafe for passengers and the dwelling-houses, and the inhabitants were injured, &c. Other counts of the indictment charged the deft. with negligence in the working of quarries. On the 6th May the deft. caused a number of stones and pieces of rock to be thrown from a quarry by blasting it; and it was proved by one witness that a piece was thereby cast into her bedroom in a house in a street near the quarry; by another, that a piece, ten inches by seven or eight inches, was thrown into his garden; by another, that a piece struck his horse in the street; and by two witnesses, that many stones fell into the adjacent streets.*

*On a case reserved as to whether, upon these facts, the deft. could properly be convicted upon the indictment:*

*Held, that he was rightly convicted.*

Case reserved at the Devon Quarter Sessions, for the opinion of this court.

Henry Muttons was indicted and tried, for that, First count:

That at Torquay on the 6th May last, he did near to divers public streets, being the Queen's common highways, and also near certain dwelling-houses, work, manage and use certain quarries of stone, and did unlawfully and injuriously send, throw and discharge divers large pieces of rock, and divers other large stones in, into, through and upon the said dwelling-houses, and in and upon the said highways, and did unlawfully and injuriously suffer and permit the said stones and rocks to remain on the said highways for several hours, whereby the said dwelling-houses were greatly injured, and the inhabitants put into great fear and danger, and whereby the said highways were rendered unsafe for passengers, and were, by the continuance and remaining of the said pieces of rock and stones, obstructed.

##### Second count:

That he did so negligently, carelessly, &c., manage, work, and use certain quarries of stone, as to cause divers large pieces of stone to be thrown and discharged upon, into and through certain dwelling-houses, whereby the said dwelling-houses were injured, and the lives and properties of Her Majesty's subjects put in peril and endangered.

##### Third count:

That he did, near certain streets and highways, so negligently manage, work and use certain quarries of stone as to cause divers large pieces of stone to be thrown and discharged in and upon the said streets and highways, and did suffer the said pieces of stone to remain upon the said highways for several hours, whereby, by the throwing and discharging of the said pieces of stone on the said highways, the passage of Her Majesty's subjects was rendered unsafe and dangerous, and the said highways were by the said pieces of stone lying thereon, obstructed.

The deft. was convicted, and the judgment on the conviction postponed in order to obtain the opinion of the Criminal Court of Appeal on the following facts. He was discharged on recognisances to appear and receive judgment when called upon.

The prosecutors were the Local Board of Health in Torquay. The following witnesses were examined.

George Hayes said:—I am a tailor living at No. 1, Alma-terrace, on the Warren-hill, in Torquay. I awoke about a quarter to eight o'clock on the morning of the 6th May; I saw something falling down, it was a stone about twenty pounds weight.

Jemima Book said:—I was in my bedroom in Alma-terrace, on the morning of the 6th May. One stone came into my bedroom; I was in bed. The stone came three or four inches from the bed.

Walter Myers said:—I live at No. 1, Alma-terrace. On the morning of the 6th May I had a horse and cart in the Rock-road. I heard some stones fall; there were more stones than one; some pitched against the wall. There is a good bit of traffic. There are schools there to which children go. One stone struck my horse's foot.

George Douch said:—I live in Swan-street on the Warren-

C. CAS. R.]

REG. v. JAMES ROBERTSON.

[C. CAS. R.]

hill in Torquay. On the morning of the 6th May, a large stone, part of the rock, some ten inches by six or eight, fell on Mrs. Staff's wall and pitched in my garden. There was a shower of stones, small ones. I heard a report of blasting just at that time.

Edward Appleton said:—I am surveyor to the local board of health at Torquay. The plan produced (and which is the plan annexed to this case) is a correct plan. Swan-street, shown on the plan, is an old street. The house where Mr. Douch, the last witness lives, is an old house. The Rock-road shown on the plan is in part dedicated to the public. St. Luke's schools have been built more than ten years. Mr. Cary is the owner of the road. On the 6th May, I received information which led me to go to a quarry on the Warren-hill, shown on the plan, about nine o'clock in the morning. I saw the prisoner there; I told him that mischief had been done in the roads below, by stones from the quarry by the blasting. He said he had fired the hole. He pointed out where the hole was; it was about fifteen feet above the Warren-road, and about ninety or one hundred feet above Swan-street. I did not see any faggots or planking. He told me that the hole was three feet four inches in depth, and that he had put in eleven inches of powder. The depth was not an improper depth. The proper charge would have been five inches to throw the rock without scattering it. I find that five inches is quite enough; eleven inches is a great deal too much. I think if powder had been used at all, it should have been used in very small quantities. Some of the houses in the Rock-road, which are in that part of the road shown in the plan, under the position of the hole which was fired, were built before that part of the hill was quarried, and the road was used for public traffic before that.

The deft., who was undefended, called no witnesses.

The jury were directed that, if they were of opinion that in working the quarry, stones were thrown out upon the houses and the roads, and that the use of the houses or the traffic of the roads was rendered unsafe to such a degree that persons inhabiting the houses or using the roads of ordinary courage might reasonably apprehend injury or danger, that was a nuisance, and that if the deft. had committed the act by which the stones were thrown out upon the houses and roads, they might find him guilty; and they were directed to find whether in the manner of working the quarry the deft. had been guilty of negligence. The jury found the deft. guilty, and said they were of opinion that he had worked the quarry negligently.

The question for the opinion of the Court is, whether, upon the facts proved, the deft. could be properly convicted upon this indictment.

B. ANDREWS, Chairman.

M. Bere, for the prosecution, was not called on.

No counsel appeared for the prisoner.

By the COURT.—There was abundant evidence for the jury.

Conviction affirmed.

#### REG. v. JAMES ROBERTSON.

*Demanding money with menaces—Threat of policeman wrongfully to lock a man up—24 & 25 Vict. c. 96, s. 45.*

A policeman, late at night, met the prosecutor, who had just parted from a female in a street, to whom he had been talking, and told him that he had been talking to a prostitute, and that he must go with him to the Bridewell, and that the prosecutor was under a penalty of 1l. for talking to a prostitute in the street, and that if prosecutor would give him 5s. he might go about his business. The prosecutor eventually gave the policeman 4s. 6d.; but while the policeman was demanding the other sixpence, an inspector came by, when he desisted, and prosecutor complained to the inspector:

*Held, sufficient evidence to sustain a conviction against the policeman for demanding money with menaces under 24 & 25 Vict. c. 96, s. 45. It is no answer to an indictment under this statute that all the money demanded has been obtained, and so a larceny committed.*

Case reserved for the opinion of this court by

the Assistant Barrister at the Liverpool Quarter Sessions.

At the Court of Quarter Sessions of the peace, holden in and for the borough of Liverpool, on the 18th July 1864, James Robertson was tried before me upon an indictment preferred and found against him under the 45th section of 24 & 25 Vict. c. 96, which indictment charged that the said "James Robertson with menaces did feloniously demand of one Joseph Speck certain money, to wit, the sum of 5s. of him the said Joseph Speck, with intent the said money from the said Joseph Speck feloniously to steal."

It was proved, at the trial before me, that at the time of the committing of the offence the prisoner was a policeman in the police force of the borough of Liverpool, and was on duty in the said borough, and was wearing his uniform and armlet. The evidence of the prosecutor Joseph Speck was as follows:

I am a groom in the service of Dr. Vose. I had been spending Saturday evening with a friend, and at a quarter to one o'clock on Sunday morning, 19th June, was going home along Hope-street alone. A female came up and asked me the way to Oxford-street. I directed her, and talked to her for two or three seconds. I took no liberty with her, and she left me and passed on. The prisoner came round the corner, and shook hands with me before he spoke. I mistook him for another officer whom I knew. I said it was getting very late, and I wanted to go home, and turned to leave him, when he said, "You have been talking to a prostitute." I said, "I do not know who she is, or what she is." He said, "You must go with me to Hotham-street Bridewell." I said I had the care of three horses, and if he would go with me to my master's and leave the keys, I would go anywhere with him. He said I was under a penalty of 1l. and costs for talking to a prostitute in the streets, and that if I would give him 5s. I might go about my business. He pulled out a book to take my name. He asked my name, and said he would write it down. He did not write it down. He took the book out before he mentioned the 5s. I pulled out a half-crown and two-shilling piece, and he placed it in his right hand pocket. I then saw a man coming, and I went across the street and prisoner followed. The man was drunk. The prisoner asked him where was his hat, and what officer had been after him, and said he would take us both; but he let the man go, saying, "You may go about your business;" and, to me, "I'll stick to you." When the man went, I heard an inspector's signal-stick. Prisoner then pulled out the money and said, "This is only a two-shilling piece; I must have the other sixpence." I said I had no other change, only two-shilling pieces. He then pulled out two halfpennies to give me change. I would not take it, and I did not give him the sixpence. The inspector then came up and passed, the prisoner saying, "All right, sir." I followed the inspector and made a complaint. I and the inspector went to find Superintendent Sibbald, and found him at Steel-street Bridewell, and when there the prisoner was brought in. Sibbald told him that he was in charge for extorting 4s. 6d. He said, "If I have the money, it is about me." Sibbald said, "You will have to be searched." He put his hand in each trouser's pocket and pulled out two halfpennies, a two-shilling piece and key. I gave him the money because he put it as a charge. I expected he was going to take me to Bridewell.

Upon cross-examination by the prisoner's counsel, the prosecutor said:

I believed I could have been fined 1l. for speaking to a woman, and was quite sober. I only answered the girl's questions. He did not charge me with more. I did not throw down the money, and tell him to take it. I did not say, "You must have it, and shall have it." I did not refuse to give my name and address.

It was further proved by the evidence of an inspector of the Liverpool borough police force, that a complaint was made to him of the conduct of the prisoner by the witness Joseph Speck, at the place where, and immediately after the time when the said offence was alleged to have been committed, and that a two shilling piece and a half-a-crown were found upon the prisoner, and that at the time the half-crown was found upon him, and before it was so found the prisoner denied having any such coin or money in his possession.

1. It was submitted by the counsel for the prisoner, that the case proved was not within the statute and indictment, because the money was obtained and the offence completed.

2. That this was not a menace within the mean-

ing of the statute, because the money was obtained by a threat to accuse of a non-existing offence.

I overruled these objections and the jury convicted the prisoner.

I postponed passing sentence, and remanded the prisoner back to the Liverpool borough gaol, and reserved the above points for the decision and opinion of the Court of Criminal Appeal.

LEOFRIC TEMPLE, Assistant-Barrister.

*Little for the prisoner.*—It is submitted that there was no proof of any "menace" within the meaning of sect. 45 of 24 & 25 Vict. c. 96. A menace to accuse of a crime is not within the section. [WILLES, J.—Here the prosecutor was menaced with imprisonment unless he gave the policeman 5s.] This is similar to *Rex v. Knerland and Wood*, 2 Leech C. C. 721, where a young woman was invited into a mock-auction room and against her will compelled to bid for articles which were immediately knocked down to her, and on not paying for them she was threatened to be taken to Bow-street, and from thence to Newgate and be imprisoned till she paid for them, and after these threats a sham constable was introduced, who said that unless she gave him a shilling she must go with him, upon which she did give him a shilling as a means of obtaining her liberty, to avoid being taken to prison, and not from fear of any other personal violence. In that case the woman paid the sum demanded, because she was afraid of being taken to prison. [CHANNELL, B.—This is a statutory offence. The decision in that case was, that the facts did not support an indictment for robbery at common law.] There must be an intent to steal to bring the case within sect. 45, but here according to the decisions there could be no intent to steal. The threat to amount to a menace within the Act must be such that if the money had been obtained the offence would amount to larceny. The menace must be such as would alarm a reasonable person:

*Rex v. Southerton*, 6 East, 126;

*Reg. v. Walton*, 9 Cox C. C. 268; 1 L. & C. 288.

Wilde, B., in delivering the judgment of the court, *Reg. v. Walton*, says: "There are many demands for money or property, accompanied by menaces or threats, which are obviously not criminal, nor intended to be made so. Thus, in a case of disputed title to personal property, a man may threaten his opponent with personal violence if he does not relinquish the subject of dispute, and he would not be within the intention of this statute. Where, then, is the proper limit to the operation of this section? It is to be found in the words 'with intent to steal.'" In this case there could be no intent to steal, because the facts do not amount to stealing. Secondly, if any offence was committed, it was an actual stealing. [CHANNELL, B.—There is an express decision on that point, *Reg. v. Norton*, 8 C. & P. 671, which decides that any indictment for obtaining money by menaces under such circumstances is good.]

A. Peel, for the prosecution, was not called upon to argue.

POLLOCK, C.B.—We are all of opinion that this conviction was quite right. The points taken by the prisoner's counsel are, first, that this is not a case within sect. 45 of 24 & 25 Vict. c. 96, because the money was obtained, and the offence of stealing complete. That is not correct, because part only of the 5s. demanded was obtained; and even if the whole had been obtained, the case cited by my brother Channell shows that would have made no difference. Secondly, it was said that this was at a menace within the meaning of the statute. We think there is no ground for that objection. If no policeman states that he is acting under authority, and that it is his intention to exercise

the authority which he professes to have unless money is given to him, that is a menace within the statute. An action at law would give no redress for the injury to which the prosecutor was exposed. The threat is within the plain words of the Act.

*Conviction affirmed.*

REG. v. JOHNSON AND ANDERSON.

*Indictment—Pleading—Description of property.*

*In an indictment for attempting to steal goods and chattels in a dwelling-house, it is not necessary to specify the goods.*

Case reserved for the opinion of this court by the Recorder of Brighton, Sussex.

At the General Quarter Sessions of the peace for the borough of Brighton, holden on the 18th July 1864, Ephraim Johnson and Walter Anderson were arraigned before me upon the following indictment:

Borough of Brighton to wit.—The jurors for our lady the Queen, upon their oath present that Ephraim Johnson and Walter Anderson, on the twenty-seventh day of April, in the year of our Lord one thousand eight hundred and sixty-four, the goods and chattels of Thomas Roe, in the dwelling-house of the said Thomas Roe, situate in the borough of Brighton, in the county of Sussex, did attempt feloniously to steal, take, and carry away against the peace of our Lady the Queen, her crown and dignity.

The prisoners severally pleaded not guilty.

Before the case for the prosecution was commenced, the prisoners' counsel applied to me to quash the indictment, upon the ground that, upon the face of it it was bad for uncertainty, in not charging the defendants with attempting to steal some particular article or articles, the property of the prosecutor.

I declined to stop the case upon this objection, but consented to reserve the point for the consideration of this court.

The trial proceeded, and both the prisoners were convicted.

The question upon which the opinion of your Lordships is respectfully requested is, whether the indictment before verdict is good? If this court be of opinion that it is not, the conviction is to be quashed.

The prisoners are in custody awaiting sentence.

JOHN LOCKE.

Lumley Smith, for the prosecution, was not called on. No counsel appeared for the prisoner.

POLLOCK, C.B.—We are all of opinion that the conviction is right. Where an indictment charges an actual stealing in a dwelling-house the goods must be specified; but where an attempt to steal only is charged, it is not necessary to specify the goods in the house.

*Conviction affirmed.*

## ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Friday, Nov. 11, 1864.

SPILLER v. MAUDE.

*Friendly society—Sole surviving member.*

*Where the rules of a friendly society made no provision for its dissolution or extinction, or for the application of the funds of the society in either of those events, the sole surviving member of the society, and the only party who could claim any interest in its property, was held entitled to the income of the funds only for her life, with liberty to any party who might then be interested to apply to the court, when, also, notice was to be given to the Attorney-General.*

The plt. in this suit was the sole surviving member of the York Theatrical Fund Society, which was

ROLLS.]

REG. V. JUSTICES OF SALOP.

[Q. B.]

instituted in 1815 for the benefit of old and infirm actors, by twenty-eight members of the York company of actors and actresses. The defts. were the legal personal representatives of the last surviving trustee of the society. The bill prayed a declaration that the plt. was absolutely entitled to all the funds of the society.

The facts of the case were shortly these:

The society was not originally registered under the Friendly Societies Act, but in 1832 the rules of it were amended at a general meeting, certified by the Registrar of Friendly Societies, and duly confirmed by the justices under the provisions of the 10 Geo. 4. c. 56. By the amended rules the funds of the society were vested in three trustees, but were to be under the management of a committee of five persons appointed at the annual general meeting of the society, and of a treasurer and secretary. Members were elected by the committee, those alone being qualified for election who had been for one year actually performing on the stage in the York company. The funds of the society were to be raised, in the first instance, by fixed contributions from members, and from annual benefits. The treasurer was also to collect moneys from the voluntary contribution of strangers to the society. Members who were in arrear with their subscriptions were to be excluded from all the property of the society, and all benefit in the fund. The committee had a discretionary power of providing medicines and advice for sick members in indigent circumstances, of relieving orphan children of members, and of contributing towards the funeral expenses of poor members. The capital of the fund was not to be broken into, and if the interest was deficient to meet the annuities payable out of it, they were to be proportionately reduced.

The only rules that it is material to this report particularly to state were the following:

Rule 14. The interest only of the principal moneys for the time being held by the trustees, shall be applied towards the current expenses and general purposes of the society.

Rule 19. Every member becoming incapacitated by age, sickness, or accident from exercising his or her profession as an actor or actress, and who shall not possess an independent income of more than 50*l.* per annum, shall be entitled to the annual sum of 50*l.*; and if any such member shall possess an independent income of less annual amount than 50*l.*, they shall be entitled to such annual sum as together with their own income will make up the sum of 50*l.* per annum.

Rule 32. That all money arising from contributions and fines, &c., shall be applied to the purposes in these rules stated; and in defraying the necessary expenses attending the management of the affairs of the society.

The rules contained no provision for the dissolution or extinction of the society, or for the application of the funds in either of those events. In 1825 the three trustees had made a declaration of trust in favour of the society. In 1835 one of the trustees died, and a new trustee was appointed in his place, who was the surviving trustee.

In 1835 there were only six members of the society, and they then proposed to divide the funds, which at that time consisted of 1800*l.* New Three-and-a-Half per Cent. Annuities, equally between them. That proposal, however, was not carried out. Since 1835 there had been no new subscription to the fund, and no new members had been enrolled. Five of those six members had died, and the plt. was the survivor. She had been duly receiving an annuity from the fund till 1862, when she was paid the whole income of it. In 1864 a claim was made by a child of a deceased member; but the child was proved not to be in indigent circumstances, and it was in evidence that there were no orphan children who could claim any interest in the property of the society; in fact, the plt. was the only person who could make any demand with respect to it. There were no accounts; but on the back of an old play-bill was a list of donations, amounting to about 800*l.*, contributed by strangers to the society. It also

appeared from the play-bill that an appeal was then made for charitable aid for the society, on the ground that, by the rules of it, the capital of its funds was never to be broken into, and the income was then insufficient for the purposes of the society. It was also notified that the society was to be managed in the same way as such societies in London.

The plt. by her bill claimed to be entitled to the whole of the fund absolutely, and prayed payment of it to her accordingly. The defts. declined to transfer it without the direction of the court, and by their answer submitted, whether the Attorney-General ought not to be a party to the suit?

A. G. Marten appeared for the plt., and contended that this was an ordinary friendly society; that, on the death of any member, his interest in it ceased; and that, all the members being joint tenants, the survivor took the whole of its property. He cited

10 Geo. 4. c. 56, s. 26;  
13 & 14 Vict. c. 115, s. 34;  
18 & 19 Vict. c. 63, s. 13;  
*Anon.*, 3 Atk. 276.

C. Hall for the defts.

The MASTER of the ROLLS.—I cannot order the payment of this fund to the plt. in this suit. It seems clear to my mind that about 800*l.* of it arose from the contributions of persons who were strangers to it. Those contributions must have been made with a charitable object, and to augment the fund as a charity. If it can be ascertained how much of the fund now in existence arises from these sources, I think that so much should be applied *cy près*. I am inclined to think that, if any one is absolutely entitled to the fund, the representatives of deceased members may claim a share in it. For the present, however, the fund should be brought into court. I will direct the income of it to be paid to the plt. for her life, with liberty to any parties who may then be entitled, to apply to the court. Notice should then be given to the Attorney-General. If the plt. is entitled to any share in the capital of the fund, she may dispose of it by will. The costs of all parties must be paid out of the fund.

Solicitors for plt., Bell, Brodrick and Bell.  
Solicitor for defts., T. W. Nelson.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Saturday, Nov. 5, 1864.

REG. V. JUSTICES OF SALOP.

Assistant-overseer—Notice of vestry to appoint —  
Salary—Duties.

In the notice of a vestry meeting to appoint an assistant overseer in pursuance of 59 Geo. 3, c. 12, s. 7, it is not necessary to state that he is to be a salaried officer.

Where a resolution of vestry merely states that E. R. was elected to be assistant-overseer of the parish at 15*l.* per year, and the warrant of justices recited that the vestry appointed him to perform all the duties of overseer of the poor, and then authorised and empowered him to perform the said duties:

Held, that this was a sufficient appointment, and that the resolution, by implication, meant him to be overseer in all respects, and to perform all the duties of an overseer.

Rule nisi for a certiorari to remove a warrant under the hands of justices of Salop, appointing Edwin Roberts to be assistant-overseer of the poor of the



Q. B.]

SHEPHERD AND ANOTHER v. THE POSTMASTER GENERAL.

[Q. B.]

parish of Cainham, in the county of Salop. The affidavits in support of the rule stated that notice was given by the overseer of Cainham as follows:

Notice.—The parishioners of the parish of Cainham are requested to meet at the church on Thursday next, at eleven o'clock in the forenoon, to appoint an assistant-overseer for the parish of Cainham, and sundry other business.  
Cainham, April 9, 1864. SAMUEL SMALL, Overseer.

There are two chapels in the parish, and the notice was fixed on the door of the parish church of Cainham, and upon the door of one only of the chapels. In pursuance of the notice, a meeting was held at the parish church on the 14th April, at which certain parishioners, but not a majority of them, attended, and at which meeting Edwin Roberts was nominated and elected to be assistant-overseer of the poor of the parish. The following resolutions were then passed in relation thereto:

Cainham Church, 14th April 1864.

At a meeting held this day it was resolved, that an assistant-overseer be employed, by a majority of two persons. Nominated by Mr. Giles and seconded by Mr. Bolton, that Edwin Roberts be appointed, at a salary of 18s. per year, and carried by a majority of two. (Signed by eight persons.)

Subsequently to the meeting an application was made to two justices of the county of Salop to appoint the said Edwin Roberts assistant-overseer of the parish. And at a petty sessions assembled on the 25th April, the Rev. Charles Adams, vicar of the parish, appeared and objected that the appointment was unnecessary, and also that the notice concerning the meeting to appoint the assistant-overseer was not affixed or placed on the door of both the chapels. And further, that the notice did not specify the amount of salary to be paid to the person to be so appointed; and also because it was not stated in the resolution of the meeting what were the duties to be executed and performed by him.

A warrant was afterwards made under the hands of two justices as follows:

County of Salop, to wit.—Whereas the inhabitants of the parish of Cainham, in the county of Salop, in vestry assembled in the said parish on the 14th April last, did nominate and elect Edwin Roberts to be assistant-overseer of the poor of the said parish, and did determine and specify that he should execute and perform all the duties of the office of an overseer of the poor of the said parish, and did fix the yearly sum of 18s. as and for the yearly salary of the said Edwin Roberts for the execution of the said office: Now we, two of Her Majesty's justices for the said county, in pursuance of the statute in such case made and provided, do hereby appoint the said Edwin Roberts to be an assistant-overseer of the poor of the parish. And we do hereby authorise and empower him to execute and perform the said duties, and to receive the said salary, so as aforesaid fixed by the said inhabitants in their said vestry.  
Given, &c.,  
THOMAS L. ROBERTS (L.S.)  
CHARLES POWELL (L.S.)

The affidavits, in answer, stated that there were only two dissenting chapels in the parish, and that at the meeting of the vestry the duties of the assistant-overseer were well understood by all parties to be the usual duties.

Abbott showed cause.—It was unnecessary to post the notice of the meeting on the doors of the dissenting chapels. All that was required in this case was to post a notice on the door of the parish church, which was done.

Dowdswell said, that he should abandon that objection.

Abbott.—The next objection is, that the notice of the meeting was bad, because it did not state that the assistant-overseer was to be a paid officer; and, further, that the resolution of the vestry was bad because it did not define what the duties of the assistant-overseer were to be. It was not necessary to state these things. The 59 Geo. 3, c. 12, s. 7, empowers the inhabitants in vestry to nominate and elect an assistant-overseer, and to determine and specify the duties to be by him executed and performed, and to fix such salary as the vestry may determine, and

two justices are empowered by warrant to appoint any person so nominated, &c., and every person so appointed is empowered to execute "all such of the duties of the office of overseer as shall in the warrant be expressed as fully as the same may be executed by an ordinary overseer." The notice was sufficient; "to appoint an assistant-overseer" raises the question of salary, which is incidental: (*Blunt v. Harwood*, 8 A. & E. 610.) As to the specification of the duties in the notice. [MELLOR, J.—The parishioners should attend the vestry if they want to know what the duties of the assistant-overseer are to be.] It must be taken from the notice and resolution that the assistant-overseer was to be appointed to perform all the duties of an ordinary overseer, there being no limitation expressed: (*Skingley v. Surridge*, 11 M. & W. 508; 11 L. J. 122, M. C., which is in point.)

Dowdswell in support of the rule.—The notice of meeting, and the resolution of the vestry, are defective for not specifying the salary and the duties. The 59 Geo. 3, c. 12, is imperative, and requires the vestry to determine and specify the duties and to fix the yearly salary, which was not done.

CROMPTON, J.—As to the only objection now relied on, I think that when the parishioners were summoned to appoint an assistant-overseer, they must have understood that the salary and duties would form part of the consideration of the meeting. And as to the other part of the case, the case of *Skingley v. Surridge* is quite in point, and is entitled to great weight, for it might have been carried to a court of error. That Court decided that, though a resolution like this one does not in express terms, yet it does by necessary implication, determine and specify the duties to be performed, and that it means that he was to be assistant-overseer in all respects, and perform all the duties of an overseer. The rule must therefore be discharged.

MELLOR and SHEP, JJ. concurred.

Rule discharged.

Wednesday, Nov. 16, 1864.

SHEPHERD AND ANOTHER (apps.) v. THE POSTMASTER GENERAL (resp.)

*Criminal law—Jurisdiction—Arrest for felony—Abandonment of charge of felony and preferring one of misdemeanor—Malicious injury to property.*

The apps. were apprehended and charged at petty sessions with a felony under 24 & 25 Vict. c. 97, s. 10, for setting fire to letters in a pillar-box. They were remanded and admitted to bail to appear at a subsequent sessions. At the subsequent sessions the charge of felony was abandoned, and one for a misdemeanor, under sect. 52, for wilful damage to personal property with intent, &c., substituted. No objection to this was made on the part of the apps., but the hearing of the misdemeanor was proceeded with, and the witnesses cross-examined by the apps. advocate, who, at the close of the evidence, objected that, as no information on oath had been taken on the misdemeanor, as required by sect. 62, and the apps. were not found committing the offence, the magistrates had no jurisdiction to convict. The objection was overruled and the apps. summarily convicted.

Held, that the conviction was right.

Case stated under the 20 & 21 Vict. c. 43, in obedience to an order of this court.

On the 9th Jan. 1864, it was discovered that the letter-bag of and in the pillar letter-box, situate at Dresden, in the parish of Trentham, in the county of Stafford, together with several letters which had

Q. B.]

SHEPHERD AND ANOTHER V. THE POSTMASTER GENERAL.

[Q. B.]

been posted and deposited therein, had been burned, and certain pieces of phosphorus matches were found therein, and thereupon information was given to the police authorities by one Austin Becke, the postmaster of Longton, in the said county, and the app. Henry Shepherd was afterwards, and on the same day, apprehended and brought before me, the undersigned William Kenwright Harvey, charged with setting fire to the letters in the pillar-box at Dresden, and upon the evidence then given the said app. Henry Shepherd was remanded in custody to answer the said offence until the 18th Jan. Subsequently, on the 9th Jan., the app. John Turner was apprehended, and charged with setting fire to the letters in the pillar-box at Dresden, and bailed to appear at a petty sessions to be held at Longton, on the 18th Jan., to answer for the said offence.

At the said petty session holden at Longton on the said 13th Jan. 1864, the said app. Henry Shepherd was brought in custody, and the said app., John Turner, being surrendered by his bail, appeared to answer the charge so made against them, and thereupon one John Adams Stevenson appearing as attorney in support of the said charge, and George Hulme Hawley, as attorney on behalf of the said Henry Shepherd, and certain witnesses having been examined by the said respective attorneys, application was made by the said J. A. Stevenson, on behalf of the said A. Becke, to remand the said apps. for one week that the said A. Becke might obtain the directions of the Postmaster-General as to the precise charge to be preferred against the apps. upon the evidence as aforesaid, and the apps. were accordingly remanded upon bail to appear on the 20th Jan. to further answer the said charge. And at the petty sessions holden at Longton, on the said 20th Jan. 1864, the said apps. surrendered and appeared to further answer the said charge, and the said respective attorneys also appeared, and thereupon the said J. A. Stevenson stated that he should proceed against the said apps. under the 52nd section of the stat. 24 & 25 Vict. c. 97, for having wilfully and maliciously committed damage, injury, and spoil to and upon the said pillar letter-box, and upon the letters and property being therein; and the said respective attorneys, on behalf of the said apps., were asked by the said J. A. Stevenson whether they would plead guilty to such charge, or whether further evidence should be offered in support of the same; and the said respective attorneys for the said apps. having retired from the court to consult together thereupon, after a lengthened absence returned into court and informed the said J. A. Stevenson that he must go on and prove his case, but this was in the nature of a private communication between the said attorneys; and certain other witnesses were then called and examined in support of the said charge, and were cross-examined by the respective attorneys on behalf of the said apps.; and after the examination and cross-examination of the said witnesses were finished, and the case on behalf of the said prosecutor was closed, the said respective attorneys, on behalf of the said apps., objected that, inasmuch as no information on oath had been taken, as required by the 62nd section of the said Act, 24 & 25 Vict. c. 97, and the apps. were not found committing the offence, they were not legally in custody, and therefore the said justices had no jurisdiction to convict the apps. of the said offence then charged against them; but it appearing to the justices that the said apps. were lawfully apprehended and taken into custody upon a charge, made on oath, of having committed an offence upon and with respect to the said pillar letter-box, and the letters and property therein, within the meaning of the 10th section of the said Act, 24 & 25 Vict. c. 97, the justices overruled the objection, and the said

respective attorneys, without waiving their objections, and without prejudice thereto, proceeded to address them on the merits of the said case, on behalf of the said apps.; and having called no witnesses in denial of or in answer to the said charge, the justices convicted the said apps. under the 52nd section of the said Act, and committed each of them, the said apps., to the house of correction at Stafford, to be imprisoned and kept to hard labour for the space of one calendar month for the said offence. It was found as a fact that the apps. were, upon the merits, guilty of the charge and offence of which they were so convicted as aforesaid.

The question of law for the opinion of this court is, whether the apps. were, under the before-mentioned circumstances, legally and properly convicted of the said offence.

The following sections of 24 & 25 Vict. c. 97 were referred to in the course of the argument:

Sect. 10:

Whosoever shall unlawfully and maliciously place or throw into any building any gunpowder or other explosive substance, with intent to destroy or damage any building, or goods, or chattels, shall be guilty of felony and be liable to be kept in penal servitude for any term not exceeding fourteen and not less than three years, or to be imprisoned for any term not exceeding two years.

Sect. 52:

Whosoever shall wilfully or maliciously commit any damage upon any real or personal property whatsoever, for which no punishment is hereinbefore provided, shall on conviction thereof before a justice of the peace at the discretion of the justice be imprisoned in the common gaol for any term not exceeding two months, or else shall pay a fine not exceeding 5 and a reasonable compensation for the damage done.

Sect. 61

Enacts that any person found committing any offence against the statute, whether the same be punishable on indictment or summary conviction, may be apprehended without a warrant

Sect. 62

Provides that where any person shall be "charged on the oath of a credible witness before any justice of the peace," with any offence under the Act punishable by summary conviction, the justice may summon the person charged to appear at a time and place to be named in such summons, and in default of appearance may either hear the case or issue his warrant, or the justice before whom the charge is made may issue such warrant if he thinks fit without any previous summons.

The *Solicitor-General* (*Poulden* with him) for the resps.—The charge of felony under sect. 10 could not be sustained, as it was difficult to establish that a pillar letter-box was a building within the meaning of that section. But the offence came clearly within sect. 52, and accordingly that was the charge proceeded with before the magistrates, who determined it and sentenced the apps. to one month's imprisonment. The apps. did not object until the case for the complainant had been closed, and it was then too late. It was not material then that there had been no information and summons under sect. 52, for the parties were present and allowed the case to be proved before they raised any objection to its being proceeded with. But, in point of fact, there was an information on oath as to the facts of the case, although at first the nature of the offence was mistaken. The conviction was therefore valid:

*Paley on Convictions*, 80;

*Wilkinson v. Dutton*, 32 L. J. 152, M.C.; 8 L. T. Rep. N. S. 276.

*Harington* for the apps.—The apps. were apprehended for an indictable offence, and the jurisdiction of the magistrates was only preliminary, to commit for trial, and they had no power to alter the charge so as to give themselves jurisdiction to convict summarily. [Cockburn, C.J. referred to *Ex parte Thompson*, 3 L. T. Rep. N. S. 294, where the evidence amounted to a rape and the justices convicted for an assault, and this court refused to interfere.] The apps. were before the court on a

Q. B.]

REG. v. THE MAYOR, &amp;C. OF ABERAVON.

[Q. B.]

charge of felony, but they were convicted of another offence. This was wrong:

*Martin v. Pidgeon*, 28 L. J. 179, M. C.;

*Reg. v. Brickall*, 33 L. J. 156, M. C.; 10 L. T. Rep. N. S. 385.

There should have been an information to ground the conviction: (*Sanders' case*, 1 Wms. Saun. 262.) [MELLOR, J.—Here there was an information; the statute does not require an information in writing.] The procedure is different in cases of felony and on summary convictions. If an information is not essential, then the 11 & 12 Vict. c. 42, s. 17, was unnecessary.

COCKBURN, C. J.—I am of opinion that the conviction was right. The case was fairly heard. All that the apps. could have asked for was, that an information should be issued upon the alteration of the charge, and even if they had demanded that, it would only have amounted to this, that on the new charge the same evidence would have been taken over again. This was substantially done. At first it was supposed the apps. had committed a felony under sect. 10, but upon investigation before the justices it turned out to be only a misdemeanor under sect. 52. The facts alleged in proof of the latter charge were the same as those alleged in support of the other charge. No doubt, in strictness, the apps. might have demanded to be called on to answer to the charge that was proceeded with, and that the evidence should be gone through again on the charge of misdemeanor. But they waive all right to have that done by their conduct in allowing the charge of misdemeanor to be proceeded with. I therefore think the apps. were legally convicted.

CROMPTON, J.—I am of the same opinion. The objection to the conviction is really that there was no information and no summons as required by sect. 62 of 24 & 25 Vict. c. 97. An information and summons are not necessary in all cases, for, under sect. 61, if a man is found in the act of committing an offence against the statute he may be apprehended at once. Here the defs. were in custody upon a charge of felony, and being so, a new charge for the misdemeanor was preferred against them. If they had applied, it may be that the magistrates would have adjourned the case. But no such request was made; on the contrary, their advisers chose to go on with the new charge and cross-examine the witnesses. Then they object that their clients were not properly in custody, there not having been any information or summons to ground the charge of misdemeanor. I think that we may assume that a proper minute was made of the charge at the time, and that would be a sufficient information or complaint; and the want of a summons would be cured by the defs. being present. I therefore think that the conviction ought to stand.

MELLOR, J.—I am of the same opinion. Although the apps. may have been irregularly taken into custody as for a felony, that did not prevent the magistrates proceeding with the case of misdemeanor if the apps. did not object.

SHEE, J. concurred.

*Conviction affirmed.*

Attorney for the resps., the Solicitor to the Post-office.

Attorney for the apps., Litchfield.

Nov. 16 and 19, 1864.

REG. v. THE MAYOR, &C., OF ABERAVON.

*Municipal corporation—Grant of charter on petition—Inhabitant householders—1 Vict. c. 78, s. 49.*

*A petition was presented to the Crown for the grant of a charter of incorporation by a majority of the inhabitant householders of a borough, but subsequently a second petition was presented against such grant, signed by many who signed the first petition, such persons having apparently changed their opinions; and whether the majority was in favour of the grant or not at the time of the presenting of the second petition, was a matter of doubt. The Crown sent down a commissioner to the borough to ascertain the facts relative to the petitioners. He made his report, and the Crown granted the charter:*

*Held, that the right of the Crown to grant the charter attached on the presentation of the first petition, signed by a majority; and that the Crown having granted the charter, it was no ground for repealing it, that before the grant the subsequent petition was presented, also signed by a majority, some who signed the first petition having changed their minds and signed the second also.*

*Scire facias to repeal a charter of incorporation granted by Her Majesty to the borough of Aberavon, in the county of Glamorgan, pursuant to the 7 Will. 4 & 1 Vict. c. 78, s. 49, on the ground that the inhabitant householders of the borough did not petition for the charter.*

*Plea, that the inhabitant householders did so petition. Issue was joined thereon.*

At the trial before Cockburn, C. J., at the sittings at Westminster after last Hilary Term, a verdict was taken for the Crown subject to a special case.

The borough of Aberavon is a borough by prescription under the name of the Portreeve, Aldermen and Burgesses of the borough of Avon, otherwise Aberavon, and is not included in either of the schedules (A and B) of the Municipal Corporations Act, 5 & 6 Will. 4, c. 76.

The Crown, upon a petition of the inhabitants, granted a charter of incorporation to the borough under 1 Vict. c. 78, s. 49, which enacts,

That if the inhabitant householders of any town or borough in England or Wales shall petition His Majesty to grant to them a charter of incorporation, it shall be lawful for His Majesty by any such charter, if he shall think fit, by the advice of his Privy Council, to grant the same to extend to the inhabitants of any such town or borough within the district to be set forth in such charter, all the powers and provisions of the said Act for regulating corporations (5 & 6 Will. 4, c. 76), whether such town or borough be or be not a corporate town or borough, or be or be not a separate named in either of the schedules to the said Act.

The mode in which the petition originated was this:—In June 1859, at a public meeting held in Aberavon, summoned by handbills and by the town crier, in Welsh and English, a resolution was unanimously adopted in favour of the presentation of a petition for incorporation, but the chairman and the persons who proposed and seconded the resolution were not inhabitant householders, and the majority of persons present were only owners and occupiers.

On the 20th Sept. 1859, a petition for incorporation was presented as from the inhabitants of the borough, and on the 19th Oct. 1859, a counter petition was presented also by inhabitants of the borough. The Lords of the Privy Council appointed a commissioner to hold an inquiry at Aberavon as to the number of inhabitant householders who had signed the respective petitions for and against incorporation, and as to their several assessments, and the circumstances under which the charter was prayed for and opposed. It was contended before him that "compound householders," i. e., such as occupied

[Q. B.]

REG. V. THE MAYOR, &amp;C. OF ABERAVON.

[Q. B.]

houses in respect of which the owners only are assessed under the Small Tenements Act, 18 & 14 Vict. c. 99, were not inhabitant householders within 1 Vict. c. 78, s. 49, and with reference to this contention, he analysed the numbers with these results:

The first petition (after striking off 123 names which appeared in both petitions) was signed by seventy-five ratepaying householders and ninety-three compound householders, in all 168.

The second petition (after a similar deduction) was signed by sixty-two ratepayers and 150 compound householders, in all 212.

The whole number of inhabitant householders including compound householders was 501. Adding to the 168 the 123 struck off, there was on the first petition an absolute majority (viz., 291 out of 501) in favour of the charter, supposing compound householders were to be included.

If only ratepayers were to be included, then there was on the petitions as revised a majority of thirteen in favour of the charter. It did not appear how many of the 123 struck off were ratepayers, but whatever their number, if they were to be added to both sides they would not alter the majority; and further, since the numbers left on the petitions as revised, together with the 123 struck off, made up the whole number of inhabitant householders of both kinds, it was also plain that there was on the first petition, whether adding to the seventy-five left so many of the 123 (if any) as were ratepayers, or, taking the 75 alone (if none of the 123 were ratepayers), an absolute majority in favour of the charter.

The report found various other facts with respect to the causes of the opposition, the relative assessment of the opposed parties, and the state and circumstances of the town and its neighbourhood, and after considering the report and obtaining the opinion of the then Attorney and Solicitor-General to the effect that "compound householders" were not inhabitant householders within the meaning of 1 Vict. c. 78, s. 49, the Lords of the Privy Council advised Her Majesty to grant a charter of incorporation. The charter was accordingly granted bearing date the 2nd July 1861, and the town has since been governed by a mayor, aldermen, councillors and other officers duly elected, according to 5 & 6 Will. 4, c. 76.

The court was to be at liberty to draw inferences of fact, and the question for their opinion was, whether the verdict on the issue joined is to be entered for the Crown or for the defts.

*Lush, Q.C.* (*Prentice* with him) for the prosecutors.

—The term "inhabitant householders" in sect. 49 is not to be restricted to householders paying rates. A compound householder is within the term, and entitled to vote, although the owner pays the rates. Where it was intended that the word inhabitant householder was to be so restricted, express words are inserted to that effect, as in 5 & 6 Will. 4, c. 76, s. 9, to which the 1 Vict. c. 78 is supplemental. If compound householders may vote, then there was on the second petition a majority against the charter, and the petition was one on which the Crown had no power to grant a charter.

*Bovill, Q.C.* (*Giffard* with him) for the defts.—Whether the petition was a petition of the inhabitant householders was a question of fact for the jury:

*Rutter v. Chapman*, 8 M. & W. 1;

*Reg. v. Boucher*, 3 Q. B. 641.

On the petition for the charter as it stands without striking off the 123, and without reckoning compound householders, there was a majority, and on the presentation of that petition the power to grant

a charter attached at once. The subsequent proceedings did not affect the power to grant the charter, but were taken merely to satisfy the advisers of the Crown as to the propriety of granting a charter.

*Nov. 19.*—*Bovill, Q.C.* was further heard herein.

*Lush, Q.C.* in reply.

*COCKBURN, C. J.*—If it is a fact that the first petition was signed by a sufficient number of inhabitants, the Crown could act upon it, although it may, for its own satisfaction, have sought further information. The fact that there was a sufficient petition cannot be altered. If afterwards the inhabitants chose to change their minds, that fact may have influenced the advisers of the Crown not to act upon the petition, but it could not affect the right of the Crown to act upon it. The charter then having been granted, proceedings by *sci. fa.* are instituted for the purpose of calling its validity into question, and the only issue raised is, whether there was a petition of a majority of the inhabitant householders, and the only question therefore is, whether there was such a petition of the majority. Now, it appears that there was in fact such a petition, but that a month afterwards a certain number of the petitioners change their minds, and petition against the grant of a charter. But the question is, whether at first there was a majority? What the Crown subsequently does is only for the purpose of its own satisfaction. It need not have taken any subsequent steps whatever; the fact that there was a petition of a majority of the inhabitant householders was all that was requisite to empower the Crown to grant the charter.

*CROMPTON, J.*—In this case we are in the position of a jury to ascertain a fact. This is a proceeding by *sci. fa.* to repeal a charter which is said to have been granted upon no sufficient petition, and issue is taken upon that allegation. The question, therefore, is, whether there was a sufficient petition or not. We must see whether or not, when the first petition was presented, it fairly represented the opinion of the majority? Now I do not think that the discretion of the Crown can in any way be questioned, if it had the right to grant the charter. The facts seem to be, that there was a meeting of the inhabitants relative to the application for the charter, at which there was no opposition; then a petition went up, signed by the requisite number; but it appears that afterwards a number of persons changed their minds, and it may be that, deducting them, it might be a question whether or not there was a majority in favour of the charter; but there was a clear majority in the first instance. I am quite satisfied that the first petition was a sufficient one, and therefore all that was afterwards done was immaterial. Taking all the circumstances into consideration, it seems to me that the commission that was afterwards sent to the town was merely to satisfy the discretion of the Crown. The only real question is, did the power to grant the charter once attach to the Crown? I take it that it did.

*MELLOR, J.*—I am of the same opinion. The question is, what was the state of things which existed at the time the petition was presented? since all that afterwards took place was merely in the discretion of the Crown. I take it that the first petition did really represent the wishes of the town, and that the charter was properly granted.

*Judgment for the defts.*

Q. B.]

BAILIE v. THE GREAT WESTERN RAILWAY COMPANY.

[Q. B.]

Monday, Nov. 28, 1864.

BAILIE (resp.) v. THE GREAT WESTERN RAILWAY COMPANY (apps.)

Weights and measures—Unjust weighing machine—5 &amp; 6 Will. 4, c. 63, s. 28.

*A weighing machine that has an index hand which gives an inaccurate result is unjust within the meaning of the 5 & 6 Will. 4, c. 63, s. 28, although the machine may in fact weigh correctly.*

*A weighing machine was used at a railway-station for weighing passengers' luggage; it worked by a spring, and had a dial plate and index finger from zero to 560, by which the weight was ascertained; the machine had been injured and out of order for a fortnight before the day of the complaint, and the index finger stood at 4lbs. instead of "zero," whereby, unless the 4lbs. were allowed for, there would be a loss of that weight to the customer; the porter, however, whose duty it was to weigh, made that allowance, whereby the customers were charged for the correct weight:*

*Held, that the said machine was unjust within the meaning of the above section.*

This was a case stated under the 20 & 21 Vict. c. 43 upon a conviction of the apps. under the 5 & 6 Will. 4, c. 63, s. 28, for having, on the 5th Oct. 1863, at Aynhoe, in the county of Northampton, unlawfully in their possession at their station there situate, and where goods are weighed for conveyance or carriage, a certain weighing machine which was then found to be incorrect and unjust. The apps. were convicted and fined. The case stated as follows:

Upon the hearing of the complaint it appeared that the machine in question was that in use on the platform at Aynhoe station, for weighing parcels and passengers' excess luggage, all of which were weighed thereby; that 6d. was the lowest price charged, and that, for example, from Aynhoe to London for 14lbs. was 10d. with an increase of 3d. for weights above 14lbs. and under 21lbs.; that the machine worked by a spring and had a dial-plate and index-finger with figures from zero to 560lbs. by which the weight was ascertained; that the machine had been injured and out of order for a fortnight before the day of complaint, and that the index-finger stood at 4lbs. instead of "zero," whereby, unless the 4lbs. were allowed for, there would be a loss of that weight to the customer or passenger in every case, but it was asserted by the station-master that this allowance had been directed to be made by the porter who was in the habit of weighing goods; if, however, a porter who was not aware of such orders and did not notice the defect were to weigh the goods the result would be wrong. The station-master proved that he did not rectify or adjust the machine to remedy the defect, and said that it could not be so rectified at the station, and that he had no means of doing it, but that the machines were inspected by the manufacturer every three months; that the manufacturer, who contracted with the company, was to inspect the machines and keep them in order, and to attend at any time when he had notice that a machine was out of order, was called and admitted the machine was out of order, and said it could be adjusted by means of a pin, which method he explained. It was also proved that no notice to the manufacturer to adjust the machine had been given until after the complaint had been made by the resp. The apps. contended that it was the duty of the resp., before proceeding to examine the machine, to have taken steps to adjust in the method spoken of, or, at any rate, to start from the weight of 4lbs., indicated by the finger, and deduct such amount from the apparent weight, and that the machine, with such precautions, was not

incorrect or otherwise unjust within the meaning of the statute. The resp. contended that the facts above stated justified a conviction, the machine being admittedly in fact incorrect and, without the allowance being made in the case, unjust, and that the argument of the apps. might be used in support of an ordinary scale ascertained to be faulty, and the same allowance made, or in case of a weight proved to be light, and which the weigher corrected by allowing the deficiency. Also, that upon the facts no rectification could be effected by the persons who were using the machine for the purpose of weighing, or by the resp. at his visit, and that for all purposes the machine was in gear and fit to be used but for the four pounds shown against the customer as before mentioned, which required mental correction. The question for the opinion of the court is, whether upon the above facts the apps. were liable to be convicted under the terms of the section named? If the court should be of opinion that they were so liable, the conviction to stand; if otherwise, to be quashed.

By sect. 28 of the 5 & 6 Will. 4, c. 63 (the Weights and Measures Act), it is enacted,

That it shall be lawful . . . for any inspector . . . to enter any shop, store, warehouse, stall, yard, or place whatsoever within his jurisdiction wherein goods shall be exposed for sale, or shall be weighed for conveyance or carriage, and there to examine all weights, measures, steelyards, or other weighing machines, and to compare and try the same with the copies of the Imperial standard weights and measures required or authorised to be provided under this Act; and if, upon such examination, it shall appear that the said weights or measures are light, or otherwise unjust, the same shall be liable to be seized and forfeited, and the person or persons in whose possession the same shall be found shall, on conviction, forfeit a sum not exceeding 5*l*.; and any person who shall have in his or her possession a steelyard or other weighing machine which shall on such examination be found incorrect or otherwise unjust, or who shall neglect or refuse to produce for such examination when thereto required all weights, measures, steelyards or other weighing machines, steelyards, or other weighing machines which shall be in his or her possession, or shall otherwise obstruct or hinder such examination, shall be liable to a like penalty.

Care now appeared in support of the conviction, and argued that the conviction was right, for that whatever may have been the intent of the company, or however accidental may have been the condition of the weighing machine, it was in fact unjust in the results to which it pointed.

Hayes, Serjt. (Digby with him) argued that the penalty under the statute had not been incurred, inasmuch as the machine weighed correctly, though the index hand was out of order, the public not being in any way prejudiced, since the full allowance was always made in the calculation of the weight; that, in fact, the hand of the machine merely required adjusting, which could easily have been effected by any person who knew the method of using the apparatus. [CROMPTON, J.—It is like the case of false scales or weights, in which the party might say, "Oh, never mind, I can make an allowance"—such a state of things might lead to great frauds.] It must be the incorrectness which defrauds. [SHRE, J.—The company should see continually that the machine is correct.] It may get out of order by an accident at any moment. [MELLOR, J.—If the inaccuracy were merely accidental it might be another question, but here the error was well known, and yet the machine was permitted to be used.] It is not like a false scale; the machine weighs correctly, and is not unjust. [MELLOR, J.—It is not meant that the machine has been used fraudulently, but only that it indicates a false quantity. The public have a right to be served by a correct machine.] The penalty is for having in possession. The porter did allow in weighing for the 4lbs. incorrectly indicated:

*The London and North-Western Railway Company v. Richards*, 2 B. & Sm. 826.

Q. B.]

REEVE v. WOOD.

[Q. B.]

CROMPTON, J.—I think that this conviction must be confirmed. My brother Hayes seems to think that there must be an intention to do wrong, but I am not of that opinion. I should say that such a machine as this is like a watch, which is incorrect if it does not show the right time. Now, here the machine registers 4lbs. against the customer—that is a wrong result; there may be no fraud in it, but these provisions are intended for the security of the public, and it is the having of unjust weights in possession, not the using of them, that is the offence. It is true that this machine might be made correct, but that may be applied to every case of false weights, since it may be set right. It would however never do, when the inspector came, to say, "I told my man to make it correct." The Act means, you shall not have it in your power to do an injustice, and it is no answer to say that "I set it right by calculation." This case differs from the one cited of the *London and North-Western Railway Company v. Richards*. In that case the machine was one which from its very nature required adjusting before it was used, and it was held that it ought to have been adjusted before it was examined. It was a case of a machine so variable in its nature that it was necessary to adjust it each time it was used, and so far was like an astronomical instrument which has to be adjusted each time it is used. That is not the case here. The injury which had put the machine out of order had happened some time before (a fortnight), and yet it was continued in use. It was not a machine requiring adjusting before use, but it was one which had become incorrect by means of an injury which had happened to it, which was well known to the officers of the company, who still went on using it, making, as they said, an allowance for the inaccuracy.

MELLOR, J.—I am of the same opinion. My brother Crompton has properly distinguished between this case and the case of *The London and North-Western Railway Company v. Richards*. The intention of the statute is, that without regard to the intentions of the parties they shall not use incorrect machines. This was a case where they had to make an allowance of four pounds in order to arrive at a correct weight. That is a state of things which the statute intended to prevent. No one supposes that the company intended to make any improper use of the inaccuracy, but still they allowed the incorrect machine to be used.

SHEE, J.—I am of the same opinion. The case cited, for the reasons already pointed out, is in point. There the machine was really not out of order, it merely required adjusting before being used. *Conviction affirmed.*

Monday, Nov. 28. 1864.

REEVE (app.) v. WOOD (resp.)

*Husband and wife—Evidence—Competency of wife against husband—Desertion.*

*A wife is not an admissible witness against her husband in support of a charge of desertion of wife and children preferred by the parish under the Vagrant Act, 5 Geo. c. 83.*

Case stated by justices at the instance of the informant pursuant to the 20 & 21 Vict. c. 43.

At a petty sessions of the peace for the city of Worcester on the 18th July 1864, before us the undersigned, two of Her Majesty's justices of the peace acting in and for the said city, Charles Wood appeared charged in and by an information laid by Thomas Sutton Reeve in pursuance of an order of the board of guardians of the Worcester Union in the said city, for that he the said C. Wood, at the

parish of St. Helen in the said city of Worcester, on the 23rd June last past, being then and there a person able wholly or in part by work or other means so to do, did wilfully neglect and refuse to maintain his lawful wife Mary Ann Wood and their three children, viz., Agnes, Emily and Walter, by reason of which neglect and refusal she the said M. A. Wood and her said three children did on the year and day aforesaid become chargeable to the common fund of the said Worcester Union, contrary to the statute in such cases made and provided, and the said charge having been duly heard by us, we dismissed the said information on the grounds hereinafter stated.

At the hearing of the said information, in order to prove the offence, and more particularly the marriage and the neglect and ability to maintain, as alleged, it was sought to examine the wife of the deft. upon oath, and she was tendered as a witness for that purpose by the attorney for the informant. The deft. thereupon objected that the evidence of his wife was not admissible against him on the ground that the offence with which he was charged was of a criminal nature. It was argued on the part of the informant that, although the deft. was charged under the Vagrant Act (5 Geo. 4, c. 83), with an offence punishable with imprisonment, still it was strictly a proceeding in its nature civil, and also that the case should be treated as a personal wrong to the wife; and the almost certain impossibility to prove in detail all the facts necessary to constitute the offence, without such evidence, was forcibly dwelt upon as a further reason why it should be admitted. The case of *Sweeney v. Spooner*, 6 L. T. Rep. N. S. 388, was referred to; it did not appear to contain any express decision upon the point in question.

We, the said justices, were of opinion that the offence commenced and consisted in the chargeability to the union; that the punishment is provided for that offence, and not for an alleged wrong to the wife, and therefore that the evidence of the wife could not be received against her husband, and that the said objections made by the husband must prevail; and we allowed the same accordingly and did discharge the said deft.

Therefore it is submitted for the judgment of us the said Court of Q. B. as to whether we the said justices were correct in point of law in our said decision, or as to what further should be done in the premises.

JNO. W. LEA, (L. S.)  
EDWARD EVANS. (L. S.)

*H. Matthews* for the app.—The wife's evidence was admissible. It is conceded that this is a criminal proceeding, and that the 14 & 15 Vict. c. 99, does not apply. In this case an injury is done to the wife by the desertion, and she falls within the principle by which she is made competent in cases of personal injury to her by her husband. In the case of abduction, the woman is competent to prove the offence against the man, though he afterwards become her husband. In 1 Phil. on Evid. 82 (10th edit.), it is said that it is the practice to admit the evidence of the wife in cases of desertion, and so it is in the metropolitan police-courts. [*West, unicuique curia*, stated that in the West Riding of Yorkshire the wife's evidence was excluded.]

*R. v. Wakefield*, 2 Lew. C. C. 279;  
*R. v. Locker*, 5 B. & P. 107;  
*R. v. Serjeant*, 1 Ry. & Moo. 352;  
*R. v. Fere*, 1 Jebb & Symes (Irish Rep.), 563;  
*R. v. Pierson*, 1 Andrews, 310.

No counsel appeared for the resp.

CROMPTON, J.—I think in this case that the magistrates decided rightly. In very early times an exception was made to the general rule that a

C. P.]

STEELE v. BOSWORTH.

[C. P.]

At a court held by adjournment in Bury on the 13th Oct. 1864, before me, appointed to revise the lists of voters in the election of Members of Parliament for the southern division of Lancashire, the Rev. Thomas Corser, incumbent of Stand, in the township of Pilkington, applied to have his name restored on the list for that township.

The name had been removed from the Pilkington register in due course of proceeding by my colleague, one of the other revising barristers for the same division of the county, at a previous sitting of the court in Bury, in consequence of its having been duly objected to, and of the absence of the applicant or any one on his behalf when the name in its order was called. At the time in question the applicant had been in attendance on his bishop in performance of his duties as rural dean of Bury, but with due precaution he had provided a fit and proper person to attend the revising barrister's court on his behalf and support his right to remain on the register.

Upon this application being made objection was taken that I had no power to entertain it.

But I was of opinion, First, that although the list in question had been gone through and duly initialled and signed by my colleague, yet, as it was still in my hands, my power to do in open court all things proper for perfecting the list in accordance with the intention and purpose of the statutes in that case provided still remained. Secondly, that the marks of erasure upon the name and qualification of the applicant in the list, accompanied by the initials of my colleague in the margin, were to me sufficient evidence that a valid notice of objection in this particular instance had been duly proved in open court, and that it was competent for me without further proof of such notice to investigate the right of the applicant to be upon the register. Thirdly, that such investigation, after being initialled by proof of such notice, is a proceeding in the hands of the revising barrister solely, and is not invalidated by the absence of the object or his agent, or if present, by any refusal on their part to assist.

Being further of opinion that the applicant through no default of himself had been removed from the register, I did, in the exercise of my discretion, entertain the application, and upon investigation of his right, being satisfied that he was entitled to be on the register, I restored his name.

If the court should be of opinion that I had power to do so, the name is to remain on the register; but if otherwise, it is to be erased.

Keane, Q. C. appeared for the app.

The resp. was not represented by counsel.

ERLE, C. J.—I think that the revising barrister was wrong. The trial of the question raised between the objector and the voter is the trial of a matter *in foro contentioso*, and on this occasion the objector was there at the time, but the party objected to was not; the judge, having proper authority, proceeded with the case and disposed of it in favour of the objector. Then, as I understand the case, on the following day the party objected to came before the barrister and satisfied him that his absence was a justifiable absence as between man and man, and prayed what in effect would be a new trial as between him and the objector, and the barrister accordingly held a new trial. I give judgment against the resp. on the ground, that what was done was in favour of the party objected to, and therefore against the objector, who does not appear to have been present. I give this judgment upon that ground. I should, however, wish to say that I am desirous to the last degree to sanction in all tribunals power to correct clerical errors in matters of form where there is anything to amend, but yet I cannot but see a material distinction between amending a clerical

error and rehearing a case which has been finally heard and determined on another day. Here the barrister says, "I will have in effect a new trial." That may be; but I still have greater doubts whether, where there were two concurrent barristers appointed for one district, with power to act jointly and severally, if one takes a case and hears it, and finally determines it, it is open for the other barrister to consider the case again and come to a contrary conclusion. I am clearly of opinion, as it does not appear that the objector was present with his proofs or had an opportunity of being heard, that it was not a trial that can be supported. And in my opinion, therefore, our judgment must be for the app.

BYLES, J.—I am of the same opinion.

KEATING, J.—I am of the same opinion.

Judgment for app.

#### STEELE v. BOSWORTH.

*Election law—Inmates of hospital—Equitable estate—Right to vote—2 Will. 4, c. 45, s. 18.*

*In 1762 certain lands were conveyed to trustees in trust to suffer and permit the rector or rectors of certain parishes to take the rents and profits of the same, and with them to keep a hospital, which had been founded in 1692, in repair and to provide its inmates with beds and bedding, household goods, and all necessary utensils and medicines and medical attendance, and to pay them a sum of money weekly, and various other sums at specified times.*

*The inmates of the hospital were to be nominated by the founder or his heirs, and were liable to be removed by them for immorality or other misbehaviour. The inmates have each a separate room and a key to the same, and there is a dining-hall common to all, and at the present time they each receive 9s. 2d. per week. Nothing was said as to the appropriation of the surplus rents or profits. No instance has been known of an inmate having been removed for misconduct:*

*Held, that the claimant (an inmate), although he had the right to demand money from the trustees who collected the rents and profits, had no such equitable estate in the lands which the trustees held as to entitle him to a vote for the county.*

This was an appeal from the decision of the revising barrister for the northern division of the county of Leicester.

At a court held at Bottesford, J. A. Bosworth duly objected to the name of George Steele being retained on the list of voters for the parish of Bottesford.

The name stood on the register as follows:

Steele, George	Bottesford	Freehold interest in land	Hospital Land
----------------	------------	---------------------------	---------------

It was proved in evidence that George Steele was an inmate of Bottesford hospital for men in the same parish, founded by the Earl of Rutland in or about the year 1692, which from time to time was augmented until the year 1762, when certain lands and tenements in Bottesford, Muston, Abkettleby, Hotwell and Long Clowson were reconveyed to certain trustees therein named, and which conveyance, after reciting that the rents of premises comprised in certain indentures therein recited had for some time been found sufficient for the support of fourteen poor people, and the said duke being desirous to extend the said charity to the maintenance of two other poor persons, had directed two more to be added to the twelve poor people already provided for out of the revenues of the said hospital, and declared that the said trustees should stand



C. P.]

STEELE v. BOSWORTH.

[C. P.]

possessed of the said lands and tenements upon the following trusts, that is to say :

In trust that they the said trustees and survivors or survivor of them should permit and suffer the rectors of the rectories of Bottesford and Harley respectively for ever to receive and take the rents and profits of all and singular the said messuages, lands and premises thereby respectively granted, bargained and sold, as often as the same should become due and payable, to the intent and purpose that they the said rectors and their successors, or the rector for the time being of Bottesford and Harley aforesaid respectively for ever, should and would, by and out of the said rents and profits, pay and distribute to the fourteen poor men who then were, or thereafter should be legally and rightly admitted into and placed in the said hospital (that is to say), to each and every of them, once in every month, the sum of 10s. 8d. of current British money, and also the sum of 6d. to each and every of the said poor men, four several times in the year, namely, Easter, Whitsuntide, Bottesford feast, and Christmas, for pie-money, and also the sum of 10d. to each and every of the said poor men in December every year, in lieu of capon-money, and also in February and August, yearly, to every of the said poor men, 6d. a time for buying them salt; and also to every of them the said poor men the sum of 10d. in September, yearly, for the finding them with candles; and also the sum of 1s. 6d. every month for the fire-maker of the said poor men's fires; and also the sum of 30s. for each and every of the said poor men in April, yearly, for the providing every of them a suit of clothes, and to each and every of them a good cloth gown and making at Easter, every other second year; and also the sum of 6s. 8d. a man, to the landress, for washing each poor man's clothes, at Lady-day and Michaelmas yearly, by even and equal portions; and also out of the said rents to find and provide for each of the said poor men 20 cwt. of hard coals, to be laid in yearly, in the month of May; and also then, and from time to time, and at all times thereafter, to find and provide all necessary and reasonable beds and bedding, household goods and other necessary utensils for the use and benefit of the said poor men, but at the discretion of the said trustees, parties to these presents, and should maintain, repair and keep the said hospital or almshouse, with all necessary amendments and reparations, and also provide physic and attendance for the sick; and in case the said trustees, or their successors, or the rector for the time being of Bottesford and Harley aforesaid should neglect or refuse to act or concern themselves in the said trust, pursuant to, and to be guided by, the directions aforesaid, then and in such case it was thereby declared and agreed by and between all the said parties to these presents, and the said John Duke of Rutland (party thereto) did authorise and empower the said trustees, or any three of them, by any writing under their hands respectively, and also any subsequent grantees of the said premises, to nominate and appoint three or more honest and discreet persons to act and be concerned in the said trust, in such manner as the rectors aforesaid, or any of them, might or were to do, by virtue of these presents and of the powers aforesaid. And it was thereby declared and agreed by and between all the said parties to these presents, and the said John Duke of Rutland (party thereto) did declare that the said sole power of nominating or appointing for any person or persons whatsoever to be placed and admitted in the said hospital should be and remain in the said duke and his heirs male for ever; and in case of failure of such heirs male then the lord or lords of the manor of Bottesford at the time of such failure, and their successors, lord or lords for the time being, shall have the right of nomination and placing of poor persons in such manner as the said duke then had, and his heirs might have; and it was further declared that in case any of the said poor men, after such their nomination or admission into the said hospital, should in any way abuse the said charity by their immoralities, profaneness, or lewdness, or other misbehaviour, then it should and might be lawful for, and be in the power of the said then present duke (party thereto), or his heirs, or for failure of such, for the Lords of Bottesford and their successors for the time being, to remove and displace such person or persons, so as he or they should not have the benefit or advantage of the said charity, and to nominate and appoint any other person or persons in the place and stead of such person or persons so to be removed. And in the said conveyance is contained a declaration that the said trustees should demise or lease all or any part of the said premises for a term not exceeding twenty-one years, so as upon every such lease there be reserved the full and improved rent without any fine to be paid.

It was further proved that the said George Steele was paid by the trustees of the said hospital the sum of 9s. 2d. per week; that the appointment of the hospital men by the Duke of Rutland for the time being was by word of mouth or by letter to his agent, who reduced such appointment to writing, and forwarded it to the parties so appointed; that there was in the said hospital a common hall where the hospital men had their meals; that each man had a separate room with a pantry, and that all the apartments were numbered; that the entrance to the said hospital is by one outer door into a passage,

at the end of which is a second door, and all the inner doors of the said apartments open into the said passage; that a matron is appointed by the said trustees, who has apartments allotted to her, and who receives a salary of 20l. per annum, and whose duties consist in the general superintendence, in cleaning the apartments, and in cooking and working for the said hospital men; that the said hospital men pay no rates or taxes, and never repair the apartments; that they enjoy the use of an orchard and garden adjoining the hospital, and are supplied from the funds of the trust with coal, medicine, medical attendance, and all necessities (except meat and provisions), they also receive a cloak apiece once in two years; that they have uninterrupted enjoyment of their apartments, together with a key, and with a power of ingress and egress at any time; but that after nine o'clock at night the matron, by arrangement among the hospital men, locks the outer door and hangs up the key in the passage; that no instance has ever been known of a hospital man being removed, although a power to remove is contained in the deed for immorality, &c., nor has any instance been known of any of the poor men having sublet their apartments; that, as the rents of the said lands and tenements mentioned in the said deed of conveyance increased, such increased rents were distributed among the hospital men from time to time, and so far back as the year 1778 each man has been in receipt of upwards of 10l. per annum, and each man is now in actual receipt of 9s. 2d. per week, exclusive of coals and gown.

Upon proof of the above facts the revising barrister held :

First, that although the weekly payments to each of the hospital men amounted to more than 10l. per annum, as the power of appointment and removal expressed on the deed appeared to him to be discretionary with the Duke of Rutland for the time being, that the said George Steele had not such an equitable freehold interest in the land as to entitle him, under the provisions of 2 Will. 4, c. 45, s. 18, to have his name retained upon the register of voters for the said parish of Bottesford, in the said division of the said county.

Secondly, that even if that were not so, the said George Steele was simply a member of an eleemosynary institution, and as such was not entitled to have his name retained upon the said register.

There were thirteen other names upon the existing register for the said parish, and two on the list of new claimants, whose right to be retained or otherwise depends upon the decision of the court in the case of the said George Steele.

The revising barrister expunged the names of the said thirteen persons on the old register, and disallowed the two new claims.

If the court should be of opinion that the revising barrister was wrong, then the name of the said George Steele, together with the names of the said other persons, are to be restored to the register, and the two new claims are to be allowed.

Mellish, Q.C. appeared for the app., and Hayes, Serjt. for the resp. They cited,

*Davis v. Waddington*, 7 M. & Gr. 37;

*Simpson v. Wilkinson*, 7 M. & Gr. 50;

*Heartley v. Banks*, 5 C. B., N. S., 40;

*Freeman v. Gainsford*, 11 C. B., N. S., 68; 5 L. T.

Rep. N. S. 611;

*Ashmore v. Lees*, 2 C. B. 81;

*Attorney-General v. Drapers' Company*, 2 Beav. 508.

Nov. 18.—ERLE, C. J.—I am of opinion that the revising barrister was right. The claimant claimed as for a freehold interest in land in the parish of Bottesford, and it appears that there was a hospital, that had been founded in 1692, but that in 1762 the lands in respect of which the

C. P.]

BENESH v. BOOTH.

[C. P.]

claim was made were reconveyed to certain trustees therein named, and those trustees were to hold it in trust to allow the rectors of two parishes to receive the rents and profits and appropriate out of those rents and profits divers payments in the different channels specified in the deed. It is altogether a legal trust, vested in trustees, to allow the rectors of these two parishes to appropriate the profits in certain charitable ways, and the deed is entirely silent as to the appropriation of the surplus. I am perfectly clear it is not appropriated to the inmates of this hospital. It may be that it should be appropriated in some manner that the trustees might consider it their duty to adopt. This claim is for a freehold interest; and I am of opinion that the claimants have no equitable estate in the land. They have a right to receive certain payments out of the land, which payments they have to get from the trustees. When a person files a bill in equity, it means a bill in equity to enforce a legal estate, not a bill to appropriate to himself certain payments which he may consider himself to be entitled to. I cannot see, on looking at the deed, the least sign of an equitable estate. The claim in *Freeman v. Gainsford* was a claim of a freehold interest in respect of a hospital; the judgment of the court was, that he did not take any equitable freehold in the chamber in which he lived, though he may have had some right to receive profits out of the hospital. In a part of my judgment I said: "It seems to me that he is elected as a mere object of charity, and that when the founder assigns him rooms for his residence he does not confer on him any estate which he could enforce by bill in equity. It is an estate the party must have to qualify him to vote." And my brother Williams says: "The occupier of a residence as part of the benefits of a charitable institution is not entitled to an estate of freehold therein unless the founder has expressly assigned it to him, directly or indirectly, during his life." They are to take these profits during their lives, and says Williams, J.: "It does not follow that the particular room is to be assigned to each of them as owner for his life. It seems to me to be clear that he has not the right to be owner at all. If he had, although the purposes of the charity might require him to be removed to another set of rooms, he might set the governor at defiance. It is quite manifest that no such state of things as that could have been intended." I take it to be perfectly clear that these persons having the right to ask for money from the trustees who collect the rents and profits cannot be said to have an equitable estate in the lands which the trustees hold.

ByLES, J.—I am of the same opinion. In order to entitle the claimant here to vote, he must be seised of an estate of freehold; it is not necessary it should be a legal estate; it is quite sufficient that it is an equitable estate. Now, in the first place, this is not the case of a trust, that is, to receive the money in trust for a *cestui que trust*; nor is it to allow him to take the money. The trustees are first of all to receive the rents and profits, and to distribute them in a particular manner among these inmates. It is conceded by Mr. Mellish that the claimant must avail himself of the surplus in order to make out an equitable estate of sufficient value. Now, without giving any opinion as to whether the trustees take the surplus in trust or not, let us assume that they do; how are they to dispose of it? There is no provision for that being done. I conceive that they are not to dispose of it in any prescribed manner, but with such a discretion as the Court of Ch. would sanction. For these reasons, though I had some doubt at one period of the discussion, I now entertain no doubt. I think the claimant has not an equitable estate; and I think the authority of the

last case, and particularly the judgments of my Lord and my brother Williams in *Freeman v. Gainsford*, support our determination of this case.

KEATINGE, J.—I am of the same opinion. I think it is clear from this case that the claimant is entitled to a payment to be made to him, no doubt by the trustees who take the rents of the land: the equitable right is to the money payment; but on the facts stated he takes no equitable estate in the land.

*Judgment for the resp.*

Attorneys for resp., *Hollings, Sharpe, and Ullithorne.*

Wednesday, Nov. 23, 1864.

BENESH v. BOOTH.

Notice of objection sent by post—Duplicates—6 Vict. c. 18, s. 100.

*By sect. 100 of 6 Vict. c. 18, a person desirous of sending a notice of objection by post must deliver the same duly directed, open and in duplicate, to the postmaster of any post-office where money-orders are received or paid, and the postmaster must compare the notice and the duplicate, and, on being satisfied that they are alike in their address and their contents, must forward one of them to its address by post, and return the other to the party bringing the same, duly stamped with the stamp of the said office.*

*The objector delivered his duplicate notices of objection to the app.'s vote to the postmaster, who, having compared them, put his stamp on. The duplicate notice returned to the objector had the word "copy" at the head of it, but the one left in the hands of the postmaster to be posted had not. The app. contended before the revising barrister that the notice sent to him was invalid, inasmuch that, as it had not the word "copy" on it, it was not a duplicate of the one returned to the objector, and therefore was not such a notice as was required by the Act. The barrister decided that the notice was good, and the Court*

*Held, that his decision was correct.*

This was an appeal against the decision of the revising barrister appointed to revise the lists of voters for the city of London. Thomas Woodzell Booth, on the list of voters of the livery of the Company of Distillers, objected to the name of Maurice Benesh being retained on the list of voters for the parish of St. Botolph Without, Aldersgate. The objector being called upon to prove that he had given the notices of objection respectively required by the Registration Act, he duly proved the requisite notice given to the overseers, as to which therefore no question arises in this case; and the party who posted the notice directed by the Act to be served on the party objected to, produced the notice duly stamped with the stamp of the London post-office, of which the following is an exact transcript:

(Cont.)

To Maurice Benesh.

I hereby give you notice that I object to your name being retained on the list of persons entitled to vote in the election of members for the city of London.—Dated this sixteenth day of August one thousand eight hundred and sixty-four.

THOMAS WOODZELL BOOTH,  
12A, Manor-place, Walworth, S.

(On the list of voters of the Livery of the Company of Distillers.)

It was admitted that the word "copy" on the notice produced before the barrister was on the said notice before it was taken to and stamped at the post-office; and that the words "Thomas Woodzell Booth," subscribed thereto, were in the proper handwriting of the objector. An objection was thereupon made before the barrister to the reception of any parol evidence to explain the state of the notice retained by the postmaster to be forwarded, and the address thereon; but he admitted the party posting

C. P.]

HEELIS v. BLAIN.

[C P.]

the said notice to supply such explanation, and he proved satisfactorily that the word "copy" was not on the notice retained by the post-office to be forwarded to its address.

The barrister held that it had been duly proved that the objector had given the notices of objection as required by the Registration Act, and called upon the party objected to, to prove that he was entitled to have his name inserted in the list of voters in respect of the qualification described in the list, and on his failure to do so he was expunged from the list.

The app. contended before the barrister: First, that parol testimony was inadmissible to prove the contents of the notice retained to be forwarded by the postmaster, the same being a judicial instrument required by the statute to be in writing, and which in this case, by the express words of the 100th section of the Registration Act, must explain and prove and be complete in itself. Secondly, that while the Registration Act allows a certain latitude in the forms of notices for claims in counties, and also of notices of objection to overseers in cities and boroughs, provided the words employed be "to the like effect" of the statutory form, it admits of no such deviation in the case of borough notices to be served on parties objected to; and, therefore, the notice now in question was not according to the forms numbered (11) in the schedule B., in which the word copy does not appear. Thirdly, that a statutory judicial written instrument must be held in law to be what on the face of it it purports to be, and that, inasmuch as the notice produced purported to be a "copy," it could not be adduced by its author as the original notice required by the Act. That the word "copy" was not surplusage, because it was a term which assigns a distinctive and specific negative character to the document to which it is affixed, amounting in fact to a protest on the part of its utterer that, as against him, such document is not to be allowed to have the effect and authority of an original—not to have the effect, in short, in the present instance, of proving that the objector gave the notice required by the Act without evidence of which the party objected to would not be *in foro*, or entitled to the costs of a groundless objection. That the notice was not the less a "copy" because the words "Thomas Woodzell Booth" were in the actual handwriting of the objector, inasmuch as it was competent for himself or an amanuensis to make copies of his own notices. Fourthly, that, if the notice left with the postmaster to be forwarded to its address did not bear the word "copy," it was not a duplicate of the notice produced before the barrister, and would not therefore be the notice required by the Act.

The app. raised several other objections to the like effect.

If the court should be of opinion that due notice of objection was not given to the parties objected to, their names are to be re-inserted on the lists.

Hannen (with him Underdown) for the app.—The question is, whether the objector gave such notice as the statute requires. If the evidence to show that the word "copy" was not upon the notice actually sent ought not to have been received, then the notice that was sent must be taken to have purported to be a copy, and not an original, and would not be a good notice. Or, if the evidence was rightly received, then these two documents did not correspond *verbatim et literatim* as the Legislature intended they should:

*Toms v. Cumming*, 1 Lush. 200;

*Birch v. Edwards*, 5 C. B. 45; 2 Lush. 37.

Fawcett, for the resp., was not called upon.

ERLE, C.J.—The statute requires the notice to

be sent to the party objected to, and makes a provision for sending it by the post where the objector chooses to avail himself of that means, and then there must be a duplicate original kept by the objector and a duplicate original sent to the party objected to, and I think, if he headed one of them "duplicate" and not the other, the rest of the notice being the same in all essentials, and the address being alike, that would be a compliance with the statute. In common parlance the large majority of mankind, where there are two duplicate originals that require to be dealt with, call one of them a copy of the other. I am sure I have witnessed innumerable cases where the party who has to serve a notice and keep a duplicate of it does that. It is a rule of law that all notices are originals, and therefore the notice that is kept by the party serving is the duplicate original. I believe I never remember a notice server who did not say, "I served a copy of this notice on the other party," and the lawyer says, "Do not call it a copy, call it a duplicate." This party calling the duplicate original in the heading a "copy" has not in the smallest degree affected the validity of the instrument.

KEATING, J.—I am also of opinion that this is a good notice, and the word "copy" has not at all vitiated it. The case Mr. Hannen has referred to of *Birch v. Edwards* is one in which the court held that the variance was very material, because what the court really decided there was, that the external address was part of the notice; the moment you decided on that, the one having the external address and the other not having it, then immediately an essential variance was established. It seems to me here the word "copy" has not in the slightest degree effected any essential variance. The external address might be very essential, and Wilde, C. J. says, in terms, the postmaster could only act upon the information given to him by the external address. It may be, no doubt, not only material but very material. It seems to me this case does not come at all within that case, and that the revising barrister was quite right.

HEELIS v. BLAIN.

*Right to vote—Actual form of rentcharge—Statute of Uses—27 Hen. 8, c. 10.*

*A rentcharge was originally created by deeds of lease and release, dated the 9th and 10th June 1839.*

*By indenture of the 3rd Nov. 1862, it was conveyed to S. H., his heirs and assigns for ever. By indenture of the 29th Jan. 1864, between S. H., J. H. and the five sons of S. H., the rentcharge was granted to J. H. and his heirs, to the use of the five sons of S. H., their heirs and assigns for ever as tenants in common.*

*The first payment under this indenture became due in June 1864, and the app., who was one of the five sons of S. H., received his share in July:*

*Held, that the app., under the Statute of Uses, had been in actual possession of a share in a rentcharge for six calendar months prior to the 31st July, and therefore that he was entitled to vote.*

This was a consolidated appeal from the decision of the revising barrister for the southern division of the county of Lancaster, on the following case.

Frederick Clayton objected to the name of Arthur Heelis being retained on the list of voters for the township of Pendleton, in respect of the following qualification:

Township of Pendleton, 1864.

Southern division of Lancaster, to wit.—The list of persons claiming to be entitled to vote in the election of knights of the

C. P.]

HEELIS v. BLAIN.

[C. P.]

shire for the southern division of the county of Lancaster, in respect of property situate in whole or in part within the township of Pendleton :

Heelis, Arthur	Walton-bank, Eccleston-road, Pendleton	An undivided sixth part or share of a perpetual chief or fee farm rent of 50 <i>l.</i> per annum.
----------------	--	---

The said rentcharge of 50*l.* was created by indentures of lease and release, dated respectively the 9th and 10th June 1839, whereby certain land in Pendleton was granted, bargained, sold and released by John Robinson and Stephen Heelis to John Spencer and his heirs, to the use, intent and purpose that the said John Robinson and his assigns during his life, and after the determination of that estate by any means in his lifetime, then that the said Stephen Heelis and his heirs during the natural life of and in trust for the said John Robinson, and subject to the aforesaid limitations, then that John Robinson, his heirs and assigns, should and might yearly and every year for ever thereafter have, receive and take from and out of the land thereby released, and the buildings to be erected thereon, one clear yearly rent or sum of 50*l.* by half-yearly payments, on the 24th June and 25th Dec. ; and to further uses limiting to John Robinson, his heirs and assigns, or to Stephen Heelis and his heirs, as the case might be, powers of distress and of entry and perception of profits for securing the said yearly rent, and subject to the said yearly rent of 50*l.*, and powers and remedies for the recovery thereof, to uses to bar dower, remainder to the use of John Spencer, his heirs and assigns for ever.

All the estate and interest in the said land so vested in John Spencer became, prior to the year 1862, and still is, vested in William Thomas Blacklock and his heirs in fee.

By an indenture, and dated the 3rd Nov. 1862, the said John Robinson granted and released the said rentcharge of 50*l.* and all his estate therein, with the said powers and remedies for securing the same, unto and to the use of the said Stephen Heelis, his heirs and assigns for ever.

By indenture duly executed, and dated the 27th Jan. 1864, and made between the said Stephen Heelis of the first part; John Heelis, a son of the said Stephen Heelis, of the second part; and the said Stephen Heelis and John Heelis, and Thomas Heelis, Arthur Heelis, James Heelis and Edward Heelis, four other sons of the said Stephen Heelis, of the third part; the said Stephen Heelis, in consideration of the natural love and affection which he had and bore for his sons, the other parties to the deed, and for a nominal pecuniary consideration, granted and assured unto the said John Heelis and his heirs the said rent of 50*l.*, with the powers and remedies for the recovery thereof, and all his estate and interest therein, to hold unto the said John Heelis and his heirs to the use of the said Stephen Heelis, John Heelis, Thomas Heelis, Arthur Heelis, James Heelis and Edward Heelis respectively, and their respective heirs and assigns, equally in undivided sixth shares, as tenants in common and not as joint tenants.

The said rentcharge has always been duly paid to the parties entitled.

The half-year's rent which became due on the 24th June 1864, being the first which became due after the execution of the said indenture of the 27th Jan. 1864, was, on the 8th July following, paid by the said William Thomas Blacklock to the said John Heelis, for and on behalf of himself and the five other parties entitled thereto under the last-mentioned deed, to whom he paid over their respective shares at various times between the 8th and the 30th July. No portion of the said rentcharge was paid after the execution of the said

indenture of the 27th Jan. 1864 until the 24th June 1864, when the half-year's payment was made as aforesaid.

The land so conveyed in 1839, together with a house and other buildings subsequently erected thereon, are the premises described in the fourth column of the said list of persons claiming to be entitled to vote.

The said Arthur Heelis named in the said indenture of the 27th Jan. 1864 is the claimant Arthur Heelis named in the said list.

When the claim of Arthur Heelis came before me it was objected that he had not been in actual possession or in receipt of the rent for his own use for six calendar months next previous to the last day of July 1864. On the other hand the claimant contended that the said rentcharge having been originally created, not by grant but by a conveyance to uses, he (the claimant) having on the 27th Jan. 1864 become by virtue of the indenture of that date an assign of the said John Robinson, he was by the 4th and 5th sections of the Statute of Uses to be adjudged and deemed to be in possession and seisin of the share of the said rentcharge in such like estate as he had in use of the same, and that so being in such possession and seisin he was in the actual possession and receipt thereof for six calendar months next previous to the last day of July 1864 within the meaning of the 2 Will. 4, c. 45, s. 26. I considered that the seisin and possession mentioned in the sections of the Statute of Uses is explained and qualified by the subsequent words in the latter section, viz., as if a grant or other lawful conveyance had been made and executed to them by such as were or shall be seised to the use or intent of any such rent, and that only as if a grant of the said share of the said rent had on the said 27th Jan. 1864 been made by William Thomas Blacklock to the claimant; and that if such grant had then been made, nevertheless, until the actual receipt of part of his said share of the said rent, the claimant would not have been in the actual possession or receipt thereof within the meaning of the 2 Will. 4, c. 45, s. 26. I therefore disallowed the claim of the said Arthur Heelis, and erased his name from the list of voters.

If the Court of C. P. shall be of opinion that upon the facts stated the claimant was, by virtue of the said seisin to uses of the said William Thomas Blacklock, or otherwise, to be deemed in point of law to have been in the actual possession or receipt of the said share of the said rent for six calendar months next previous to the last day of July 1864, then his name is to be restored to the list of voters; but if the said court shall, upon the said facts, be of opinion that claimant was not in point of law to be so deemed in the actual possession or receipt of the said share of the said rent, then his name is not to be restored to the said list. The like claims were made by James Heelis, John Heelis and Thomas Heelis, whose names appear in the same list of claimants.

*Joshua Williams* (of the Chancery Bar) for the apps.—A rentcharge was created in 1839. By indenture of 27th Jan. 1864, this rentcharge was granted to John Heelis, to the use of the five sons of Stephen Heelis. The app. was one of these five sons. The revising barrister decided that no rent having been paid till July 1864, the app. had not been in "actual possession" of the rentcharge for six months previous to the last day of July 1864, and was therefore not entitled to be registered for that year. At the hearing the argument turned on the meaning of sects. 4 and 6 of the Statute of Uses, 27 H. 8, c. 10. All parties seem to have gone astray as to the application of that statute to the present

[C. P.]

HEELIS v. BLAIN.

[C. P.]

case. I do not rely on ss. 4 and 5, but on sect. 1. (a) The 26th section of the Reform Act enacts that, "no person shall be registered in any year in respect of his estate or interest in any lands or tenements, as freeholder, &c., unless he shall have been in actual possession thereof, or in the receipt of the rents and profits thereof, for his own use for six calendar months at least next previous to the last day of July in such year. The words "in the receipt of the rents and profits thereof" are inapplicable to a rentcharge, which cannot be let. There can be no receipt of the rent and profits of the rent. The only words that have any bearing are "unless in actual possession," and your Lordships have to decide on the meaning of these words. We have to show that we have been in actual possession. I say that by the deed of the 29th Jan. 1864 the app. is placed in actual possession. There are only two kinds of possession, seisin by law and seisin in deed by actual possession. My argument is, that we have an actual seisin in deed by virtue of the 1st section of the Statute of Uses. A rentcharge may be created either by conveyance at common law or under the Statute of Uses, but when once created it becomes an incorporeal hereditament, and may be dealt with as such. If grant had been made at common law we should not have been in actual possession until the receipt of rent or a sum paid to give actual possession:

*Murray v. Thorniley*, 2 C. B. 217;

*Hayden v. Overseers of Tiverton*, 1 Lut. 510.

He also quoted as authorities the following:

Lord Bacon's Reading on the Statute of Uses, vol.

13, p. 342 (Basil Montague's edit.);

Comyn's Digest, "Uses," 1;

3 Cruise Digest, 274;

Coke on Littleton, 815 a, n. 1 (Butler's note);

Burton's Real Property, 1116.

*Keane*, Q.C. for the resp.—The result of the argument of the other side is, that if you have never received rent you might have a vote. There has been no authority for this position cited: I mean no decision of the judges. [ERLE, C.J.—In a case of, I think, *Smith v. Jersey*, 2 B. & B. 599, in the H. of L., Lord Eldon says that the practice of conveyancers is entitled to very great authority.] The Reform Act requires "actual possession;" the Statute of Uses employs the words "lawful possession." The former words were as well known to the Legislature in Henry the Eighth's time as now. *Berill's* case, 4 Coke Rep. 10 b; Sugden Gilbert on Uses, p. 193 (86), shows that sects. 4 and 5 are the only sections applicable to the creation of a rentcharge, when a person is to stand seised of any lands to the use that some other person may receive a rent thereout. The object of the statute was, that the person to whose use the estate was granted should be in the same position as a grantee at common law. The words of sect. 5 are, "deemed to be in possession and seisin of the same rent as if a sufficient grant or other lawful conveyance had been made and executed to them." Now, *Murray v. Thorniley* and *Hayden v. Overseers of Tiverton* show that if this had been a conveyance at common law there would have been no actual possession until the payment of rent.

*Williams* in reply.—Sects. 4 and 5 of the statute have no application. They had discharged their duty when the rentcharge was created by the deed of 1839.

(a) Sect. 1 enacts that the person that has the use of lands, tenements, rents, &c., shall from thenceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession. Sects. 4 and 5 enact that where certain persons stand seised of land, &c., to the use that some other person shall have a yearly rent out of them, then that the same person that has such use "shall be deemed to be in possession and seisin of the same rent as if a sufficient grant or other lawful conveyance had been made and executed to them."

ERLE, C.J.—I am of opinion that the revising barrister was wrong, and that the claimant is entitled to vote. The claimant claimed to have been in the actual possession of a share in a rentcharge for six calendar months before the 31st July, and it appears that, more than six months before that time, the rentcharge was granted to John Heelis and his heirs, to the use of the claimant and others as tenants in common. A rentcharge had been created by the owners of the fee-simple of land in 1839, that rentcharge coming by divers mesne conveyances to the party who in 1864 conveyed it to the claimant. No payment was made, and nothing received under the rentcharge; and if the conveyance had been at common law, without the aid of the Statute of Uses, it is clear, from the cases cited by Mr. Williams, that there would have been no actual possession. This conveyance is a conveyance operating by the Statute of Uses, and that statute, in sect. 1, says that, where there is a conveyance to one party to the use of another person, "all and every such person and persons that have or hereafter shall have any such use, confidence, or trust in fee-simple, or fee-tail, either for a term of life, or for years, or otherwise, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in the same." The statute of Will. 4 requires that the party shall be in actual possession, and the Statute of Uses enacts that when a person is seised to the use of another the *cestui que use* shall be deemed to be in possession. I am of opinion that the word "possession" is a technical word, and that the Legislature in the times of Hen. VIII. and Will. IV. attached the same meaning to the words possession and actual possession, and that the Statute of Uses has given him the actual possession which the statute of Will. 4 required. It is said that the interposing of one name would appear as an evasion of the statute, which requires actual possession; but I attach no importance to that, as there are two cases to show that it must be actual possession; but at the same time, anything like actual seisin of the rent would, to my mind, afford less facility of proof than the production of a conveyance operating by virtue of the Statute of Uses, which, ever since the reign of Hen. VIII., has received great attention, coupled with actual practice every day down to the present hour. So much upon the statute. Then upon the authorities which Mr. Williams has brought forward—authorities, I should say, entitled to very great respect; in which the most important propositions very often occupy only four or five lines, but are of not the less force because they are concise. Then Bacon's reading upon the Statute of Uses is entitled to very considerable weight. Lord Chief Baron Comyn has been held in high opinion in the profession. He says, "By 27 Hen. 8, c. 10, the *cestui que use* is immediately seised and in actual possession." Then we turn to Coke upon Littleton, and Butler's note (815 a, note 1), where the whole of the learning of Tindal, C.J., in *Murray v. Thorniley*, is to be found, for it appears to me to be involved in the passage from Coke upon Littleton and Butler's note, pointing out the distinction between a conveyance of rent at common law and a conveyance by virtue of the Statute of Uses; where the latter is the case there is actual possession from the time of the conveyance. Then, I take notice of Cruise's Digest and Burton on Real Property, and I think I have authority for so doing. I speak without reference, but I am sure that in the case of *Smith v. Jersey*, Lord Eldon says that the practice of conveyancers must be taken notice of by those who have to administer the law, and to give effect to the intentions of the parties to an instrument. I think that Lord

Eldon laid down a very salutary principle. Those who have been entrusted with that branch of the law have been remarkable for ability and learning, and also for the logical way of contending for these principles when in court, and I am happy to think that the mantle of some of the old conveyancers has come down to the present day, and that we have had the benefit of it in the argument of this case.

KEATING, J.—I am of the same opinion. I think that the revising barrister was wrong, but I am bound to add, that if I had to decide the point as he had, without the benefit of the argument that we have listened to, I think the great probability is that I should have decided in the same way. But that argument has distinguished a conveyance of a rentcharge at common law and a conveyance under the statute. The statute now in question requires actual possession for six months; and the courts have decided that a grant of a rentcharge at common law would not give that actual possession which the Reform Act requires. The judgment of the court in the case before Tindal, C. J. was founded upon many authorities which might not be supposed to amount to actual decisions, but which are entitled to great weight. Tindal, C. J. quotes the extract from Lyttleton (par. 235): "And so it is, if a man grant by his deed a yearly rent issuing out of his land to another, &c., if the grantor thereafter pay to the grantee a penny or a halfpenny, in name of seisin of the rent, then if after the next day of payment the rent be denied the grantee may have an assize, or else not," &c. And then Lord Coke, carrying out his own statement that there might be great virtue in an *et cetera*, explains what it means, "that," he says, "by this *et cetera* is implied that the grant and delivery of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintain an assize or any other real action, but there must be an actual seisin." Mr. Williams admits that actual possession, as required by the Reform Act, must be such as would have enabled him to maintain assize. From Cro. Eliz. 46, deriving some authority, at all events, from its being adopted by Comyn, we find that by the 27 Hen. 8 a *cestui que use* is immediately seised and in actual possession, and therefore that he shall have an assize or trespass before entry against a stranger. That, therefore, brings this case precisely within the grounds on which the case of *Murray v. Thorniley* was decided in this court, and establishes completely the distinction between the conveyance of a rentcharge at common law and the conveyance by the statute. Upon these grounds I also, agreeing entirely with the observations made by my Lord, am of opinion that the revising barrister took an erroneous view of this case; but, I think, a view which he might be well excused for taking when he had not the advantage of hearing the argument we have heard.

*Judgment for app.*

Nov. 23 and 24, 1864.

TEPPER v. NICHOLLS.

*Freeholders—Right of shareholders in Putney-bridge.*

Where land is vested in commissioners for public purposes they have not power to convey away any part of such land; therefore, where the Commissioners of Putney conveyed the lands, which had been conveyed to them for the purposes of building the bridge, to trustees to divide the profits of the said lands and the tolls of the bridge among the shareholders:

*Held, that, as the Commissioners had no power to give, and the shareholders no power to take, the lands, the*

*latter had not acquired such an equitable freehold estate in them as would entitle them to vote.*

This was a consolidated appeal against the decision of the revising barrister appointed to revise the list of voters for the eastern division of Surrey. David Nicholls duly objected to the names of Jabez Tepper and twenty-four other persons being retained on the Putney list of voters for the eastern division. In support of the right of the parties to have their names retained the following documents were put in:

In or about the year 1724 the Act 12 Geo. 1, c. 36, was passed, entitled "An Act for building a bridge across the river Thames from the town of Fulham, in the county of Middlesex, to the town of Putney, in the county of Surrey."

By sect. 1 of that Act certain persons were constituted and appointed commissioners and trustees for designing, directing, ordering and building such bridge, and for maintaining, preserving and supporting the same when built; and they were empowered, at any time after the 24th June 1726, to design, assign and lay out how and in what manner the said bridge should be made and built from the town of Fulham to the town of Putney aforesaid, and the ways and passages to and from the same, and to preserve and keep in repair such ways and passages from time to time, and to make contracts and do all matters and things for carrying on and effecting the purposes aforesaid, and to cause the same to be done and perfected accordingly.

And to the intent that the navigation of the said river Thames might receive no prejudice, by sect. 2 it was enacted,

That, when the said bridge was built across the said river, there should remain free and open passage for the water to pass and re-pass through the arches or passages under the said bridge of 700 feet at the least within the then present banks of the said river.

By sect. 5, bodies corporate and others who were seised of ground in Putney or Fulham which might be required for the purpose of making convenient approaches to the said bridge, were enabled to convey to the said commissioners and trustees, or to any nine or more of them, or their successors as they should appoint, any such ground for the purposes of that Act.

By sect. 7 it is enacted,

That it shall be lawful to and for His Majesty, his heirs and successors, by letters patent under the great seal of Great Britain, to incorporate all and every the commissioners and trustees appointed by this Act, or who shall be appointed, pursuant thereto, to be commissioners and trustees for putting this Act in execution, or such of them as shall be then living, and such others as His Majesty, his heirs or executors, shall think fit, to be one body politic and corporate in deed and in name, and they and their successors to have perpetual succession and a common seal, and such seal from time to time to break, change, make new, or alter, as shall be found most expedient; and that they and their successors shall be able and capable in law to have, purchase, receive, enjoy, possess and retain to them and their successors messuages, lands, rents, tenements and hereditaments, of what kind, nature, or quality soever, and also to sell, grant, demise, alien, or dispose of the same or any part thereof, at their free wills and pleasures, to sue and implead, be sued or impleaded, answer and be answered in courts of record or elsewhere, and to choose their successors and officers from time to time, and to do and execute all and singular other matters and things that to them shall or may appertain to do, with such powers and clauses as shall be necessary or requisite for erecting, building, or preserving and supporting the said bridge and the ways and passages thereto, from time to time.

The said commissioners and trustees were never incorporated in pursuance of this Act.

By sect. 8, it is enacted,

That it shall not be lawful to or for this corporation or company, which shall or may be established by virtue of, or pursuant to this Act, as such corporation or company, to borrow, or take up, or give security for any sum or sums of money payable in less than six months, or to discount any bills of exchange or other bills, or notes whatsoever, or to keep any books or cash of or for any person or persons, bodies politic or corporate whatsoever, other than and except only the proper books, moneys and cash of the said company or corporation.

C. P.]

TEPPER v. NICHOLLS.

[C. P.]

By sect. 10 it is enacted,

That a certain pontage or toll shall be paid before any passage over the said bridge shall be permitted, and that the said pontage or toll shall be vested in the said commissioners, to be by them applied, in accordance with the provisions of the said Act, towards the expenses of making and maintaining the said bridge, ways and passages, and purchasing the necessary ground for the same.

By sect. 13,

The commissioners, or any eleven or more of them, are empowered, when incorporated, by indenture or writing under their common seal to convey and assure the toll by that Act granted, or any part thereof, as a security for any sum or sums of money by them to be borrowed for the purposes of the Act, to grant any annuities for one, two, or three lives, or for twenty-one years, or a less term, such annuities to be charged upon and payable out of the tolls, estates and revenues belonging to such corporation.

And by sect. 14 it is enacted that such annuities shall be personal estate.

By sect. 16,

It is enacted that it shall be lawful for the said commissioners and their successors, and for such intended company or corporation or their agents or officers, from time to time to remove any shelve in the said river of Thames, and make the same river deeper.

By sect. 17,

That all stones, bricks, plants, piles and other materials which shall be made use of for or towards building or making the said bridge, or in or about the same, or for maintaining, repairing, or supporting the same, or for making the said river deeper as aforesaid, shall always be deemed to belong and appertain to the commissioners and corporation aforesaid.

And by sect. 18,

That if the said bridge should at any time become damaged, it shall be lawful for the said commissioners or corporation to set up ferries across the said river near to the said bridge, and to take certain rates and duties for passages by such ferries over the same.

By sect. 19,

It shall not be lawful to erect or build the said bridge, or any part thereof, before or until full and ample satisfaction be made for all such loss or damage as shall or may be sustained or suffered by any of the owners, proprietors, lessees, or others having any property or interest in the present horse or foot ferries between Putney and Fulham aforesaid.

By sect. 22,

That nothing in this Act contained shall extend or be construed to extend to prejudice or take away any right, property, or jurisdiction of the Mayor, commonalty, or citizens of the city of London, to, in and upon the river of Thames aforesaid, other than and except to remove any shelf or shelve, or to deepen or widen the said river, where the said bridge shall be built, and to do every other matter or thing, as shall or may be necessary for the erecting and maintaining the said bridge.

By 1 Geo. 2, c. 18, for explaining and amending the Act referred to, it is by sect. 1 enacted as follows:

The commissioners and trustees appointed by the said recited Act, and those appointed by this Act, or any nine or more of them, and the commissioners and trustees when incorporated in pursuance of the said former Act, shall have and they have hereby full power and authority to contract and agree with any person or persons whatsoever, as well commissioners and trustees as others, to erect and build a bridge across the said river of Thames from the said town of Fulham to the said town of Putney, and to repair, maintain and support the same when built in such manner as by the said commissioners and trustees or corporation aforesaid shall be judged proper; and the said commissioners and trustees or corporation aforesaid, or any nine of them, said commissioners or trustees, before such incorporation, have hereby power and authority to grant any annuity or annuities in fee out of the profits, incomes, revenues, or tolls of the said bridge in such manner as they may by the said former Act grant any other annuity or annuities, all which annuities in fee simple to be granted pursuant to this Act shall be registered, and shall be divisible and assignable as the other annuities are by the said former Act, and such annuities in fee shall be deemed personal estates and shall go as such.

And for the more effectually enabling the said commissioners and trustees and corporation aforesaid, as speedily as may be, to complete and perfect the said works, by sect. 3 it is enacted,

That it shall and may be lawful to and for the said commissioners and trustees, or any nine or more of them, before incorporated, and also lawful for such corporation, when created, at any time or times to convey and assign over in perpetuity or otherwise all or any tolls, revenues, profits, or incomes of or

belonging to the said bridge or ferries, or which shall in anywise arise, accrue, or belong to the same, unto such person or persons as will undertake, contract and agree to erect and build the said bridge, and to preserve and keep up the same in good and sufficient repair, and shall give sufficient security to do so to the satisfaction of the said commissioners and trustees and corporation aforesaid, anything herein or in the said former Act to the contrary notwithstanding.

By sect. 5,

It shall not be lawful for the said commissioners and trustees and corporation to erect or build the said bridge, or any part thereof, before or until ample satisfaction be made for all prejudice, loss, or damage as shall or might be sustained or suffered by any of the proprietors of the horse ferries between the said towns of Putney and Fulham, unless the said proprietors of the said ferries, by writing under their respective hands and seals, should consent and agree with the said commissioners and trustees, or any nine or more of them, or the said corporation, to permit the said commissioners, trustees, or corporation to build the same before such satisfaction should be made, and in case such consent of the said proprietors should be had and obtained in manner aforesaid, that then the said bridge, when built, and all tolls, revenues, profits and incomes belonging or to belong to the same, should be and were thereby made chargeable, and charged in the first place with all such sums of money as were by the said former Act to be paid to the respective owners, proprietors and persons interested in the present ferries between Fulham and Putney aforesaid, and that upon payment thereof respectively, or tender and refusal, all ownership, properties and interests of, in, or to the horse and foot ferries between Putney and Fulham shall be, and are hereby appointed, extinguished and determined, and the said ferries and passage over the river shall be and are hereby appointed, extinguished and determined, and the said ferries and passage over the river of Thames there, and the ground and soil adjacent and belonging to the said respective ferries, shall be and are, by the authority of this Act, transferred to and absolutely vested in the said commissioners and trustees and corporation aforesaid, and their successors and assigns for ever.

All such moneys and payments for the said horse ferries have long since been duly paid and made.

The ferries referred to in the said Acts on the Putney side of the river were held and were parcel of the manor of Wimbledon, and on the Fulham side were held and were parcel of the manor of Fulham, and previously to the 21st March 1728 Daniel Pettward and William Skelton had been respectively admitted to, and each of them then held in fee, by copy of the court-rolls of the respective manors, one undivided moiety of the ferries on both the Putney and Fulham sides of the river; and on that day the commissioners paid to them the sum of 8000*l.* in full satisfaction for all damage which they, or either of them, should sustain by occasion of building the bridge; the rights and interests of all other parties in the said ferries having been previously satisfied by the commissioners.

On the 19th Nov. 1828 a contract was duly entered into by the commissioners with thirty persons, who had subscribed 1000*l.* each for building the bridge, and making the purchases and payments required by the said Acts, by which those thirty persons contracted to build and maintain the bridge, and the ways and passages thereto, and make the said purchases and payments; and in pursuance thereof the said thirty persons did build the said bridge, and make the said payments and purchases.

By indenture of bargain and sale, bearing date the 11th Nov. 1729, duly enrolled in Chancery, made between the commissioners of the first part, the said thirty persons therein named and described as being all the contractors and subscribers for building the said bridge of the second part, and certain other persons as trustees of the third part, after reciting the various sections of the above-mentioned Acts, and further reciting the said contract of the 19th Nov. 1728, and that the said thirty persons had paid all moneys they had agreed to pay, and built the said bridge, the commissioners granted, bargained, sold, assigned and set over unto the said persons, parties thereto of the third part, their heirs and assigns for ever, the said bridge and all the materials wherewith the same was erected and built and all tolls, revenues, profits and incomes of o*r*.



belonging to the said bridge so built, from the town of Fulham to the town of Putney, or the ferries thereafter to be set up and erected as occasion might be, according to the provision in that behalf made by the said recited Acts, or either of them, or which should in any wise arise and accrue or belong to the same, with all such ground and soil adjoining and belonging to the then late or then present horse-ferries and passage over the said river between Fulham and Putney as had been, was, or should be vested in the said commissioners, and all benefits and advantages, powers, privileges and authorities, and every other matter or thing whatsoever vested in or granted to the said commissioners which they were empowered or capable to assign and convey over, by virtue of the said Acts or either of them, to hold the same unto and to the use of the said trustees, parties hereto of the third part, their heirs and assigns for ever, upon trust to permit and suffer the said thirty persons therein named of the second part, their heirs and assigns, to receive and take the said tolls, revenues, profits and income, and to have the sole management and direction thereof, upon condition that they should thereout pay certain sums of money and expenses specified in the said deed, which condition has been performed, and after payment of such sums of money should every year thereafter divide all the then rest and residue of the moneys to be raised by the said tolls, revenues, profits and income of the said bridge, ferries and other the premises (if any) unto and amongst the said thirty subscribers and proprietors for the time being and their respective heirs and assigns, rateably and proportionably according to the several sums of money by them subscribed for the purposes aforesaid, and to their several and respective rights, shares and interests of, in and to the same, to have, take and enjoy the same as tenants in common, and not as joint tenants. And by the said deed it was provided that in case the tolls, revenues, profits and incomes of the said bridge or ferries should at any time or times thereafter fall short, and not be sufficient to answer and make good all such sums of money as should be requisite for putting and keeping the said bridge, together with all the ways and passages to and from the same, in good repair within a reasonable time to be allowed for making such repairs, or should not be sufficient for the payment of all the matters and things thereinbefore particularly mentioned, and the charges of the trustees in the execution of the trusts, then all such sums of money as should so fall short or be wanting for the said purposes should from time to time be paid and borne by the said thirty subscribers, the parties thereto of the second part, their heirs and assigns, rateably and proportionably, and according to the several sums of money subscribed by them respectively towards the purposes aforesaid, and to their several rights, shares and interests therein.

On the 16th June 1730, by grant of that date, the Archbishop of Canterbury granted to the proprietors of Putney-bridge 200 superficial feet of land, part of the churchyard of Putney, for the purpose of making the passage to and from the said bridge more commodious, and the same was used for that purpose, and now forms part of the approach to the bridge. There is no other land in the county of Surrey vested in, belonging to, or claimed by the said proprietors, except what is comprised in the before-stated deed of the 11th Nov. 1729, and the last-mentioned grant, and no evidence was adduced before the barrister as to the annual value of the said land.

On the 26th Aug. 1736, by deed of that date, the persons therein equitably entitled to the tolls, revenues, profits and income of the bridge under the

indenture of the 11th Nov. 1729, covenanted with each other that certain orders and directions given for the arrangement of the affairs of the bridge should stand good until altered at some quarterly general meeting of persons from time to time becoming so equitably entitled, by a majority of such persons present at such meeting.

The interest of the present shareholders in the bridge is identical with the interest vested in the said thirty persons or proprietors under the said deed of the 11th Nov. 1729, and under the grant of the 16th June 1730, and has always been conveyed and transmitted as and dealt with as freehold estate, and the shareholders in the said bridge are about eighty in number. The proprietors meet once a year, and elect a committee of six out of their own body to manage the affairs.

The said persons objected to are respectively the holders of a share or part of a share of such interest as aforesaid, and the sufficiency of the annual money value of such share or part of a share is not now in dispute. The bridge is built partly on piles driven into the bed of the river, and at either end upon brick foundations, which stand respectively upon that part of the banks between high and low water-mark whence formerly the ferries used to ply from side to side, and in part upon land which formerly was ground and soil adjacent and belonging to the said ferries.

There are toll-houses at each end of the bridge at which tolls are collected, and each of them is a structure of brick and stands upon the brick foundations of the bridge referred to in the preceding paragraph thereof.

For the said persons objected to it was contended that they had respectively under or by virtue of the said Acts of Parliament and deeds of the 11th Nov. 1729 and 16th June 1730, hereinbefore stated, such equitable freehold estates in the said bridge tolls and other property comprised in the said Acts and deeds as entitled them respectively to be on the list of voters for the said eastern division of the said county; and for the said David Nicholls, the objector, it was contended that they had not respectively such equitable freehold estates as would entitle them to vote for the said division of the said county; and also that the shareholders were a company; and that the individual shareholders being only entitled to a share of the receipts and profits were not entitled to be on the said list of voters.

The barrister decided in favour of the objector, that the said several persons objected to had not respectively such equitable freehold estates as entitled them respectively to be on the said list of voters.

If that decision was wrong the names are to be restored.

*Karslake* (with him *Deresford*) for the app.—Each shareholder in the bridge has such an equitable freehold estate as entitles him to a vote, for, First, the original commissioners, when they had carried out the undertaking in accordance with their Acts, acquired such an interest in the soil as would have given them a right to vote. They had a right to purchase the ferry, and to hold land, and in 1725 they did purchase the ferries and the soil adjacent. Secondly, having such an interest, they had a power to assign it. Thirdly, they did actually assign it to trustees for the benefit of the shareholders:

*Rogers Election*, 23;

*Baxter v. Brown*, 7 M. & G. 198;

*Bennett v. Blain*, 15 C. B., N. S., 518; 9 L. T. Rep.

N. S. 506.

*Raymond* for the resp.—The real question is, are these shareholders entitled to vote for their share in the aggregate of this property, whatever it is? I submit, first, the commissioners had no interest in land. The bed and soil of the river are *prima facie*

C. P.]

GAYDON v. BANKROFT.

[C. P.]

in the Crown. The 17th section of the Act is conclusive, that no interest in bed or soil of the river should pass. The courts have held that they will not suppose that more is conveyed than is actually necessary for the purpose of the Act: (*Badger v. South Yorkshire*, Ell. & Ell. 347.) [ERLE, C. J.—I never remember a permanent structure having been held an easement.] This is not the common case of a building or land. It was a navigable river:

*Lancaster v. Eves*, 5 C. B., N. S., 517;

*Wood v. Hewitt*, 8 Q. B. 918.

It is not necessary that the ferries should have any land. Secondly, supposing there was an interest in land in the commissioners, they had no power of conveying it. The 3rd section of the second Act gives them their power of conveying; anything done beyond their power is invalid. Thirdly, there is no equitable interest in land in each shareholder. The interest is vested in the company:

*Bennett v. Blain*, 15 C. B., N. S., 518; 9 L. T. Rep. N. S. 506.

Nov. 24.—ERLE, C. J.—In this case, which was a claim on behalf of a shareholder in Putney-bridge, the question was whether he had an equitable freehold interest. The statute has conveyed the bridge and the land to the commissioners, and the commissioners in 1729 conveyed the bridge to trustees on behalf of the shareholders, and if the commissioners had power to part with the property, I have no doubt the shareholders have become entitled to the bridge, and to the land that belongs to the bridge. But I take it to be perfectly clear law that the land is vested in the commissioners by the Act of Parliament for public purposes, and the commissioners have not, unless there be something in the statute to that effect, the power to convey away part of the land vested in them for public purposes, and the statute appears to me to confirm that view, because the second of these statutes enables, specifically, the commissioners to convey the tolls to the shareholders, and if the statute instead of that had intended they should have power to convey the fee-simple of the land to the shareholders, it would have used an expression enabling them to convey the tolls as distinguished from the fee-simple of the land. But it appears to me to be a negation of that right. I think the commissioners have no power to convey the freehold to the shareholders, or to the trustees in trust for the shareholders. Then, if they had conveyed it in 1729 or purported to convey it by means of a deed of conveyance, if the law prohibited that conveyance, the shareholders, taking it with a knowledge of the title under the Act of Parliament, acquired nothing more than could lawfully be conveyed, and the commissioners parted with nothing more than could be lawfully parted with. We think that the commissioners having no power to give, and the shareholders having no power to take, the fee-simple, the latter have not acquired a title, but there has been a holding under the Act of Parliament. The commissioners are entitled to have the right over the land, and the shareholders are entitled to the tolls; therefore there is no qualification. That is all we affirm.

*Judgment for resp.*

Saturday, Nov. 26, 1864.

GAYDON v. BANKROFT.

Borough—Right of freemen to vote—2 Will. 4, c. 45, s. 32.

By sect. 32 of 2 Will. 4, c. 45, it is enacted that no person shall be entitled to vote as a freeman in respect of birth, unless his right be originally derived from or through some person who was a freeman, or entitled to

be a freeman, previously to the 1st March 1831, or from or through some person who since that time should have become, or should hereafter become, a freeman in respect of servitude.

S. was admitted a freeman, by right of birth of his father, on the 31st July 1856; his father was admitted on the 2nd May 1831, having only come of age on the 4th April of that year; and the grandfather was admitted on the 14th Oct. 1810:

Held, that the proviso was intended to give a continuous lineal right to persons claiming freedom by birth, where they claimed the right originally from or through a person who was a freeman before the date of the same; and as the app. claimed through his father, who was a freeman before the date of the claim, he was entitled to have his name on the register.

This was a consolidated appeal from the decision of the revising barrister appointed to revise the list of voters for the borough of Barnstaple. On the 19th Sept. 1864, William Saunders was inserted in the list of freemen entitled to vote for the said borough, thus:

William Saunders	Holland-street, Barnstaple.
------------------	--------------------------------

His name was duly objected to by T. J. P. Tucker, and the facts were as follows:

In the borough of Barnstaple there is a body of freemen; the sons of these freemen are entitled, on proving their father's marriage, that they were born of that marriage, and that they have attained the age of twenty-one years, to be admitted as freemen of this borough, but they can claim from or through no other relative than their father, and in no other way than that described. The said William Saunders was duly admitted as a freeman (by right of his father) to the borough on the 31st July 1856. His father was admitted also by right of birth on the 2nd May 1831, having only come of age on the 4th April in that year. The grandfather was admitted by right of birth on the 14th Oct. 1810. On this state of facts it was contended on the part of the objector that as the said William Saunders derived his right to be admitted as a freeman of the said borough through his father, from and through whom alone he could claim, and as it was necessary by the 32nd section of the Reform Act that the father, to give him the right claimed (viz., to be on the list of freemen voting for the borough), should have been admitted a freeman, or have been entitled to be admitted as a freeman, previously to the 1st March 1831, and that as he (the father) was not admitted till the 1st May 1831, nor entitled to be admitted till he came of age on the 4th April in that year, his right to be placed on the list of freemen voting for that borough could not be sustained.

On the other side it was contended, in support of the vote, that, although the father could not have been admitted as a freeman till he came of age, yet he had an inchoate right to be so admitted previously to the 1st of March 1831, which was perfected on his coming of age, and that this was sufficient to satisfy the provisos of the 32nd section of the Reform Act, and to sustain the vote.

The barrister held that the said William Saunders originally derived his right from or through his father, and that there was no one from or through whom he thus derived his right who was a freeman or entitled to be a freeman previously to the 1st March 1831, and that the vote could not be sustained, and I struck his name out of the list.

Cooke, Q.C. (*Bourke* with him) appeared for the app., and contended that, although the father could not be admitted until he came of age, he nevertheless had a right to be so admitted previously to

C. P.]

GAYDON v. BANKROFT.

[C. P.]

the 1st of March 1861, and therefore that the son could claim through him.

*Dowdeswell*, for the resp., contended, that as the app. claimed through his father, his father must have been admitted or have had a right to have been admitted prior to the 31st March 1831, and as he was not admitted until April 1831, his son could not claim through him.

The following cases were referred to in the course of the argument:

*Gale v. Chubb*, 4 C. B. 41;

*Croucher v. Brown*, 1 Lut. 388;

*Elliott* on Registration, 2nd edit., 214, note a;

Municipal Corporation Act, 5 & 6 Will. 4, c. 76, ss. 4, 5.

ERLE, C. J.—In this case I think the revising barrister was wrong. The question is whether the right of voting as a freeman reserved by sect. 32 of the Reform Act was preserved for one descent only, or preserved continuously to lineal descendants of freemen before a certain day? I think the Legislature intended to preserve it continuously. The beginning of sect. 32 is a general enactment; it says, "Every person who would have been entitled to vote either as a Burgess or as a liveryman, shall have his right continued, provided he be duly registered." Then comes the proviso that no person who shall have been elected, made or admitted a Burgess or freeman since the 1st March 1831, otherwise than in respect of birth or servitude; and no person who shall be hereafter elected, made or admitted by birth or freedom, otherwise than in respect of birth or servitude, shall be entitled to vote in any such election. The result is, it reserves for the future freedom by birth or servitude. Then comes the proviso on which the question turns: "No person shall be entitled as a freeman in respect of birth, unless the right be originally derived from or through some person who was a freeman or entitled to be admitted a freeman previously to the 1st of March 1831." Now, I stop there; as to freedom by birth, it is a limitation upon the general enactment of the previous part of the section under which the claimant would be entitled. I think the present claimant derives his right originally from or through some person who was a freeman or entitled to be admitted a freeman before the 1st March 1831—namely, from his grandfather: his grandfather was a freeman admitted before the 1st March 1831, and his father became entitled in April 1831, but was not entitled before. I think this proviso was intended to give a continuous lineal right to persons claiming freedom by birth, where they claimed the right originally from or through a person who was a freeman before the date of the claim. I do not think the Legislature intended it should be continued for one generation only, and I am confirmed in that view because the Legislature has preserved freedom by servitude, and it has enacted that in respect of a person claiming by descent from a freeman in respect of servitude, "that that right is to be continued to so and so in perpetuity." The statute enacts that "no person shall be entitled as a Burgess or freeman in respect of birth, unless his right be originally derived from or through some person who was a Burgess or freeman previously to the 1st March 1831, or from or through some person who, since that time, shall have become, or shall hereafter become, a Burgess or freeman in respect of servitude." Therefore a right may be acquired by servitude in all future time till the Legislature shall again interfere. I think it was very improbable the Legislature intended merely to give it to one descent. The words contemplate, to my mind, lineal succession. The revising barrister has found that, in the borough of Barnstaple, the freemen are entitled, on proving their father's right; and that

they can claim from or through no other relative than their father. I take that, construed with reference to this statute, which says "continued," to mean freemen claiming by birth; and then there is no doubt that a freeman claiming by birth, but of lineal descent from a former freeman, must always intend lineally claiming through his father, and the parties in Barnstaple have never yet had the right. The father, however, was in truth a freeman before 1831. In my opinion the statute contemplated the lineal succession in perpetuity, and is not to be read that no freeman can claim by birth unless the father was admitted before 1831. I do not think that is the meaning of the Legislature. I think the practice in Barnstaple to trace to the father is to be reconciled with this interpretation in the way I mention. He claims as a freeman by birth, because lineally descended. He must trace through the father in all cases.

BYLES, J.—I am of the same opinion, and although I have paid every attention and respect to Mr. Dowdeswell's argument, I am unable to entertain any doubt at all that the revising barrister was wrong here. The facts, when put in order, are very simple. In this borough, freemen by birth, leaving all other qualifications out of the question, have voted; in 1810, the grandfather of the claimant was admitted, and he claimed to be, and was admitted as a freeman by birth; he dies, and leaves a son, who is of age in April 1831; the son is admitted, and then the son dies, and the grandson, the present claimant, claims to be admitted. It is not only proved, but it is admitted by Mr. Dowdeswell, that the father must have been admitted, and he is within the preserving or creating words of the 32nd section; the right is preserved unless the proviso takes it away. It seems to me he does satisfy the proviso, for he does claim through and from some person who was a Burgess or freeman of the borough before the passing of the Act of Parliament. I entirely assent to all that my Lord has said, that the words "from or through," and the word "continually," are strong to support that construction. On the other hand, we are without any reason, that I can see, asked to say that the words "some person" mean father. I can see no reason for that construction, and no instance has been pointed out in which the Legislature do not either preserve the franchise for life, or preserve it in perpetuity, or abolish it altogether; no instance in which they have preserved it for one generation after the existing persons who enjoy it.

KEATING, J.—I am of the same opinion. The question raised by this case for our consideration, by the revising barrister, is, whether a freeman by birth is entitled to vote whose grandfather was actually a freeman previously to the 31st March 1831, but, his father being under age at the time, was not entitled to be admitted until after that date. Now, it seems to me, on looking at the whole scope of the Act, and those sections with reference to the franchise to be exercised by freemen by birth, that the intention of the Legislature in passing the 32nd section and the proviso, was not to exclude a person who could claim originally through his grandfather, such grandfather being a freeman before the 31st March 1831.

*Judgment for app.*

[Ex.]

SAUNDERS v. SLACK.

[Ex.]

## COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs. Barristers-at-Law.

Tuesday, June 7, 1864.

SAUNDERS (Executor, &amp;c.) v. SLACK.

*Local Improvement Act—Action against clerk to commissioners under—Exemption of clerk from personal liability—Judgment against the clerk—Execution against goods of commissioners—Mandamus.*

By a local and personal Act (2 & 3 Vict. c. 63) the commissioners thereby appointed for improving the town of Bradford, Wilts, were empowered to sue and be sued in the name of their clerk, who was expressly exempted from personal liability in respect of any such action, and they were also empowered to appoint a clerk and other officers, and it was enacted that they should and might, out of the moneys to arise by virtue of the Act, pay such officers such salaries as the said commissioners should think reasonable.

An action was brought by the executors of a former clerk to the commissioners against deft., the present clerk, for arrears of salary due to the deceased, in which judgment was entered up against the deft. and a *fi. fa.* issued, under which the sheriff seized the fire-engines and other goods of the commissioners vested in them by the said Act for public purposes, and a rule *nisi* having been obtained to set aside the judgment and *fi. fa.*, on the ground that execution could not be had against different persons from the party sued, and that a *mandamus* to compel the commissioners to pay the debt out of the rates, &c. was the proper remedy:

The Court (Pollock, C.B., Martin, Bramwell and Channell, BB.) discharged the rule, on the ground that if the commissioners were right they had other means of redress, as by action of trespass, &c., but that, if the rule were made absolute, there were no means of reviewing the decision of the court.

A rule calling on plt. to show cause why the judgment signed in this cause, the writ of *fi. fa.* issued thereon, and all subsequent proceedings, should not be set aside with costs. The action was originally brought by plt. and another as executors of one John Bush, a deceased attorney, for arrears of salary due to him as clerk to the Improvement Commissioners of the town of Bradford, in Wiltshire. The action was brought against the then clerk to the commissioners, a gentleman named Martin, under sect. 16 of the local Act 1839, for paving, lighting, watching and improving the town of Bradford, in the county of Wilts (2 & 3 Vict. c. 63), empowering the commissioners to sue and be sued in their clerk's name. It was tried at the Wiltshire spring assizes 1863, before Shee, J., when a verdict was found for plt. for the amount of salary claimed and costs, which verdict was afterwards reduced by the Ex. on a rule, obtained by deft. for that purpose, to 70*l.* and costs: (see *Bush and another v. Martin*, 8 L. T. Rep. N. S. 509.) The co-plt. and Martin, the original deft., having died after verdict, and before judgment signed, and the present deft. Slack having been appointed clerk to the commissioners in Martin's place, suggestions of those circumstances were duly entered on the roll and judgment signed against the deft. on 21st Dec. 1863, for plt. to recover 70*l.* and also 129*l.* 3*s.* 4*d.* for costs of suit. Upon this judgment a *fi. fa.* was issued at plt.'s suit, and certain goods, the property of the commissioners, and vested in them by the local Act, namely, a water-cart, two fire-engines, and sundry heaps of stones or road materials, were seized thereunder by the sheriff of Wilts, but the stones were subsequently given up in compliance with the recommendation to that effect of Pigott, B., before whom the matter came at chambers on summons, but who did not decide the matter, but referred it to the court at the request of both parties.

Coleridge, Q.C. (for deft.) accordingly, in Easter Term, moved for a rule *nisi* to the effect above mentioned, and contended that a *mandamus* to the commissioners, to raise the money out of the rates, was the proper remedy of plt. Pollock, C.B. thought the rule ought not to be granted, inasmuch as it was one which, his Lordship said, he should decline to make absolute, thinking the court ought not to decide a matter on motion when there was a course for obtaining the more satisfactory decision even of a court of error, if necessary. The rule *nisi* was, however, granted by the other members of the court, Martin, Bramwell and Pigott, BB., although their Lordships intimated their strong opinion that it would be discharged on cause being shown.

The following are the material sections of the local Act referred to in the argument:

By sect. 13 the commissioners were empowered to appoint a clerk, treasurer and other officers, &c., and

Shall and may, out of the moneys to arise and be collected by virtue of this Act, allow and pay to such officers such salaries and allowances as the said commissioners shall think reasonable.

By sect. 16 it was enacted in effect that

The commissioners may sue and be sued in the name of their clerk for the time being, and no action brought, &c. by or against the said commissioners shall abate or discontinue by the death, suspension, or removal of such clerk, &c.; but such clerk shall be deemed plt. or deft. in any action or suit, provided that in all cases in which the clerk should be plt. or deft. on the record in any action in which, in effect, the commissioners should be suing or sued in his name, he might and should nevertheless (if not otherwise interested) be a competent witness for or against the commissioners, and should always be reimbursed, out of the moneys to arise by the Act, all damage he should be put to by reason of his being so made plt. or deft., and should not be personally answerable or liable for the payment of the same.

M. Smith, Q. C. and Lopes, for plt., now (June 7) showed cause, and submitted that the *fi. fa.* was regular. This was not the case of a person sued as a trustee. These commissioners were sued in the name of their clerk, who was like fictitious parties in an old ejectment. In substance and effect they, and not their clerk, were the real defts. (sect. 16). The words of that section were, "by or against the commissioners." It was monstrous to say that when an action had proceeded regularly to judgment signed, execution was not to be issued, but that plt. was to resort to the Q. B. for the extraordinary powers of a *mandamus*. [MARTIN, B.—I was under the impression when the rule was moved that this had been decided.] There was a case in the Q. B. (*Reg. v. Victoria Park Company*, 1 Q. B. 288), later than the cases cited by Coleridge in moving, and those cases may be distinguished. First, *Wormwell v. Hailstone*, 6 Bing. 688, only decided that execution could not issue against the clerk to turnpike trustees personally; there, too, the goods of the trustees were expressly saved from liability, and *a fortiori* would the clerk's be. That case was the converse of the present one, and an authority in favour of plt. In *Kendall v. King*, 17 C. B. 488, better reported in 25 L. J. 182, C. B., the justices were merely a committee of visiting justices, and had no property, and the language of the judges must be taken with reference to that fact, the *ratio decidendi* being the absence of funds. In *Rex v. St. Katharine's Dock Company*, 4 B. & Ad. 360, the action, which was against the company's treasurer, whose goods were expressly exempted, by the Act of incorporation, from liability to execution, was referred, and *mandamus* was held to lie to the treasurer and directors of the company to pay the sum awarded to the plt. There, on his award, plt. was entitled to summary process or attachment on the goods, but the action was against the treasurer, who was not personally liable. The proceedings in actions against poor-

Ex.]

Re THE LOCAL BOARD OF HEALTH OF TRANMERE v. KELLETT.

[BAIL.

law unions and local boards of health were analogous and in point. This local Act was a public Act, and made part of the record, and the *fi. fa.* was to take the goods of the commissioners, the real debts, who were sued in the name of their clerk, the nominal debt. In the more recent case in the Q. B., *Reg. v. The Victoria Park Company*, 1 Q. B. 288, in which the action was against the treasurer, who by the Act was made not personally liable, judgment was entered up against the company, who had no assets, and the Court refused a *mandamus* to compel the company to pay the sum recovered, although the *St. Katharine's Dock* case was cited, as it had been here to-day, in favour of the application.

The Court here called on the other side to support their rule.

*H. Bullar* (with him *Coleridge*, Q. C.), contra, for debt.—The question was of great importance, these Acts governing every large borough in the kingdom. The debt's demand was for a stale debt, and one question was, whether a retrospective rate could be made for the purpose of paying these debts. This Act was virtually a Turnpike Act. The road materials having been given up, the question remained as to the right to seize the fire-engines. It was submitted they could not be seized. [POLLOCK, C. B.—How do you propose that the judgment-debt should be paid?] By *mandamus* to the treasurer, as in the *St. Katharine's Dock* case. The debt was for the salary of an officer under the Act, and it was clear from the words of sect. 13 of the Act, that the officers were only to be paid out of the rates. The words of that section, "and shall and may, out of such moneys, &c., allow and pay such salaries, &c." [MARTIN, B.—This is a judgment-debt, and we have nothing to do with how the debt originated. BRAMWELL, B.—I doubt extremely whether the Act means more than that it is a purpose to which you may apply the rates.] The engines seized were, by sect. 19, referred to contra, vested in the commissioners for public purposes, e.g. for extinguishing fires, and not for the purpose of liquidating debts. [BRAMWELL, B.—You would say all the property which they hold is held for the purposes of their trust, and so nothing is seizable?] That was the true construction. This debt was payable out of the rates; a view strongly supported by sect. 13 and by sect. 19, which rendered any person wrongfully taking the commissioners' goods liable to an action. [BRAMWELL, B.—The question recurs, were these goods wrongfully taken? It has been decided that a railway cannot be taken under an *elegit*, on the ground of public convenience.] Turnpike Acts were analogous to this Act, yet what would be the result if, in actions on their bonds, plts. could seize the road materials? [*M. Smith*.—The mortgages in those cases were on the tolls.] But they might have gotten judgment and so seized the road. Sect. 60 of the General Turnpike Act (3 Geo. 4, c. 126) was like sect. 19 here. There was no sound distinction between the present case and *Wormwell v. Hailstone*. What was said by Williams, J., in *Kendall v. King* (*ubi sup.*), was entitled to great respect, and had hitherto been the opinion of the profession, namely, that a judgment recovered in such a case as the present was not to be enforced otherwise than by *mandamus* or bill in equity. It was without precedent to issue execution against a different person from the party sued. As a legitimate consequence of plts.' argument, if the commissioners were the real debts, and *fi. fa.* could be executed, why might not even a *ca. sa.* issue against their bodies? [BRAMWELL, B. referred to *Pallister v. Mayor of Gravesend*, 19 L. J., N. S., 358, C. P.; 9 C. B. 774.]

POLLOCK, C. B.—It is impossible not to feel the

force of a great deal of that which Mr. Bullar has urged before us in his argument on behalf of the commissioners; but this point still recurs—namely, that if the debts. (the commissioners) are right they have other means of redress, as by an action of trespass, &c.; but on the other hand, if we stay the proceedings under this judgment and *fi. fa.*, there are no means of reviewing our decision at all. We think, therefore, that this rule should be discharged.

MARTIN, BRAMWELL, and CHANNELL, BB., concurred.

Rule discharged.

Attorneys for plt., *Kingsford and Dorman*, 23, Essex-street, Strand, W.C., agents for *Spackman*, Bradford, Wilts.

Attorneys for debt., *Whittakers and Woolbert*, 12, Lincoln's-inn-fields, W.C., agents for *Slack and Simmons*, Bath.

### BAIL COURT.

Reported by T. H. JAMES, Esq., Barrister-at-Law.

Tuesday, Nov. 22, 1864.

(Before SHEE, J.)

Re THE LOCAL BOARD OF HEALTH OF TRANMERE v. KELLETT.

Arbitration—Time for making award—Umpire—Public Health Act 1848—Enlargement of time—C. L. P. A. 1854 (17 § 18 Vict. c. 125).

An award under the Public Health Act 1848 must be made within three months after the appointment of the arbitrators; therefore, where an umpire published his award after the expiration of this period, without enlarging the time:

Held, that the award was bad:

Held, also, that the court had no power afterwards to enlarge the time.

This was a rule to set aside an award, upon the ground that it had not been made within the time prescribed by law. The award was made under the provisions of the Public Health Act 1848 (11 & 12 Vict. c. 63), sects. 125 and 126 of which enact that if the arbitrator fails to make his award within twenty-one days after his appointment, or if he enlarges the time or does not make the award within three months, the matter is to be referred to another arbitrator. If there be more than one arbitrator they must appoint an umpire, and if they neglect to do so for seven days, the Court of Quarter Sessions are to appoint an umpire, and if the arbitrators fail to make their award within twenty-one days, or within three months in case of enlargement, the matters are to be referred to the umpire; but the time is not to be extended beyond three months.

The arbitrators in this case were appointed on the 15th Jan. 1864, and before they proceeded with the reference on the 3rd Feb., appointed an umpire. They enlarged their time to the 18th April. Having failed to make their award on that day, the duty then devolved on the umpire, who made his award on the 2nd May, and did not enlarge the time.

*Field*, Q.C. showed cause.—The application is too late. The local board had notice of the award in May, and no formal publication is necessary. The application should have been made before the last day of the term following the publication. Terms in this statute are to be construed like those in the Lands Clauses Consolidation Act: (*Sherratt v. North Staffordshire Railway Company*, 2 Phil. 475.) If the period is to be three months from the date of the

[BAIL.]

REG. v. JUSTICES OF ESSEX.

[BAIL.]

instrument, arbitrators might exclude the umpire altogether:

11 & 12 Vict. c. 63, s. 128;

*Re Bradshaw*, 12 Q. B. 562.

The deft. has waived the objection, by having agreed to pay the money as soon as the costs were ascertained.

*F. Russell* in support of the rule.—The time must be calculated from the appointment. The limitation of the time for making the award was to prevent delay in making awards. The umpire should have left his power alive:

*Daddington v. Baythorpe*, 7 Dowl. 640.

*Field, Q. C.* having obtained a cross-rule to show cause why the time for making the award by the arbitrators should not be enlarged,

*Russell* showed cause.—The application is unprejudiced: (*Ward v. Secretary of War for India*, 11 W. R. 88.) Sect. 15 of the C. L. P. A. 1854 (17 & 18 Vict. c. 126) refers only to arbitration by consent and compulsory references. There are two classes of arbitration, viz.: first, those entered into in the course of a suit or cause; secondly, where the submission contains a clause to make the award a rule of court. Sects. 5, 6 and 7 of the C. L. P. A. 1854 do not apply:

*Morris v. Morris*, 25 L. J. 261, Q. B.

*Field, Q. C.* in support of the rule.—The right to an enlargement of the time depends upon the C. L. P. A. 1854. The words of that statute are "any case of arbitration."

*SHEE, J.*—As to the first rule, I am of opinion that it must be made absolute. The Act of Parliament places an umpire in precisely the same position as a single arbitrator. [Read sects. 123 and 125.] Now, unless there is something in the Act plainly inconsistent with the ordinary meaning of these clauses, it is the duty of the court to give effect to the enactment, and hold that, inasmuch as a single arbitrator must make his award within twenty-one days after his appointment, or the date to which the time is enlarged, the umpire must also make his within the same period. It was contended that, as regards the umpire, the time would run from the date when his authority commenced, and at first I was under the impression that such was the construction to be put upon the Act. But in the case in the Court of C. P. I find it decided that an umpire has power to enlarge the time before the difference is notified to him. If that be the true construction, it reconciles all the sections of this Act of Parliament, because the umpire might at any time within the twenty-one days have enlarged the time. That not having been done, and it being the plain intention of the Act that the arbitrator should proceed with expedition, I am of opinion that the time for making the award had lapsed. As to the rule obtained by Mr. Field, I am of opinion that it ought to be discharged. The sections of the C. L. P. A. 1854 do not apply to a case like this. It is a strong circumstance that no such application has ever been made before. It seems to be the intention of the Public Health Act that the arbitration should proceed without delay, and express words would be required to annul that plain meaning.

*First rule absolute; second rule discharged.*

Wednesday, Nov. 28, 1864.

(Before BLACKBURN, J.)

REG. v. JUSTICES OF ESSEX.

*Diversion of pathway—Inclosure Act (8 & 9 Vict. c. 118)—Notice affixed to church door—Evidence—Presumption—Time for hearing appeal.*

An appellant, under 8 & 9 Vict. c. 118, was called upon to prove, upon objection taken at quarter sessions, the date of the notice affixed by the valuer upon the church door under sect. 62; proof was given of the date of the notices affixed at each end of the way:

*Held*, that it must be presumed that the date of the notice on the church door corresponded with this:

*Held*, also, that, provided notice of appeal be given within the four months under sect. 64, the appeal itself need not be heard within that period.

*Garth (Taylor with him)* showed cause against a rule that a *mandamus* should issue to certain justices of Essex, commanding them to enter continuances to the next sessions, and to hear an appeal.

The appeal was under the 8 & 9 Vict. c. 118, s. 62, which provides that before any public road or way shall be discontinued, diverted, stopped up, or altered by the valuer acting in the matter of any inclosure, the valuer shall cause to be affixed at each end of such road or way a notice to the effect that the same is intended to be discontinued, stopped up, diverted, or altered, as the case may be, from and after a day to be mentioned in such notice, and the valuer shall also cause the same notice to be given by advertisement for four successive weeks, and also on the church door on the four Sundays of the said four successive weeks; and after the said several notices shall have been so given, such road or way shall from and after the day in such notice mentioned be deemed to be discontinued, stopped up, diverted, or altered, as the case may be, subject, however, to such appeal as is hereinafter mentioned.

Sect. 63 enacts:

That it shall be lawful for any persons, within four months after the first Sunday on which such notice shall have been given on the church door of the intention that such road or way should be discontinued, stopped up, diverted, or altered, as the case may be, to make his complaint thereof by appeal to the justices of the peace at the quarter sessions for the county, riding, division, or other jurisdiction in which such road or way, or the greater part thereof, shall be situate, upon giving to the valuer fourteen days' notice in writing of such appeal, together with a statement in writing of the grounds thereof; but it shall not be lawful for the app. to be heard in support of such appeal unless such notice and statement shall have been given as aforesaid, nor on any hearing of appeal to go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid.

The facts were, that notice had been given by the valuer acting under the Barking Common Allotment Act of intention to stop up a pathway and bridleway across Claybury-park, and the justices had refused to hear an appeal against it under the above-recited Act.

The appeal had been lodged with the clerk of the peace, and came on for hearing on the 29th June last.

The counsel for the app. was called upon by the other side to prove the service of the notice and grounds of appeal, which was done by putting in the two notices, dated respectively March 24 and June 18.

It was then further insisted that the counsel for the app. were bound to prove that the notice of appeal was served within four months of the Sunday on which the notice had been affixed by the valuer on the church door, and that therefore he must prove the date of the last-mentioned notice. To this it was objected that it was sufficient if proof were given of service of the notice of appeal four-

teen days before the quarter sessions, and that the *onus probandi* that such notice was more than four months after the affixing of the original notice was cast upon the other side.

The Court holding otherwise, and that this fact must be proved affirmatively by the app. as a condition precedent to his having any *locus standi*, a witness was called who proved that he had seen a notice, signed by the valuer, and affixed at both ends of the way in question; he had made a copy of this, which was produced, and it proved to be identical with the notice given by the valuer, which was dated 22nd Feb. 1864. It was then contended that sufficient presumptive proof had been given of the date of the notice affixed to the church door; this, by the provisions of the Act, was to be the same as that affixed at both ends of the way, and as the date of the former had been affirmatively proved, it must be presumed that the latter was at any rate not prior to it.

The Court, however, held that no such presumption existed.

A witness was then called, who proved that he saw a notice in March last on the church door, and which related to the stoppage of the way. He afterwards read it at his own house, and now proved that it was dated the 22nd Feb. 1864, and that it related to the stoppage of the way across Claybury-park. In cross-examination, however, it transpired that although he had the notice in his house, he had left it behind him, and the Court, on objection taken, ruled that he could not, under the circumstances, give evidence of its contents.

Finally, it was held that, as the counsel for the app. could not prove affirmatively the date of the affixing the notice to the church door, the appeal must be dismissed, which was accordingly done.

Cause was now shown.—First, proof of the date of the notice affixed on the church door is necessary under sect. 63; and although the date of those affixed on both ends of the way was proved, that is not sufficient, and the evidence of the second witness was inadmissible. [BLACKBURN, J.—It must be presumed, upon the principle *omnia presumuntur rite esse acta*, that the dates of the two notices correspond, until the contrary be shown.] Secondly, the notice was posted on the wrong door. It was a district church. [BLACKBURN, J.—That objection was not taken before the justices, and therefore you can make nothing of it now.] Thirdly, by sect. 63 the appeal must be made within four months after the first Sunday on which, &c. Therefore, if the case were sent back, the appeal could not now be heard, as more than four months have elapsed since the 22nd Feb. 1864. [BLACKBURN, J.—It is not necessary that the appeal should be heard within the four months, if notice of it is given within that period.]

Lush, Q. C. (Murphy with him), who appeared on the other side, here cited, as to the time limited for appealing, the judgment of Bayley, J., in

*Reg. v. Middlesex*, 6 M. & S. 282;

For the resps. were cited,

*Reg. v. Kesteven*, 3 Q. B. 810;

*Reg. v. Freeman of Leicester*, 15 Q. B. 671.

The Court (without calling upon the counsel for the app.) held, upon the authority of *Reg. v. Middlesex*, that the magistrates were wrong, and that the rule must be made absolute.

*Rule absolute.*

Thursday, Nov. 24, 1864.

(Before BLACKBURN and SHEP, JJ.)

REG. v. THE OVERSEERS OF SUTTON, IN LANCASHIRE.

*Time for taking poll for adoption of Small Tenements Act (13 & 14 Vict. c. 99).*

*A vestry meeting was convened for the purpose of considering the question of the adoption of the Small Tenements Act (13 & 14 Vict. c. 99), and after a show of hands a poll was demanded, and the time agreed upon, viz., upon two consecutive days between twelve and four, and six and eight o'clock in the evening. The voting was slack on the first day; but on the second, so great a rush was made that, out of the whole number of 1100 ratepayers, 300 or 400 were unable to vote:*

*Held, that the time appointed was, under the circumstances, reasonable, and that there would have been time for all to vote, had they used due diligence.*

*Quere, has the chairman, under those circumstances, power to extend the time for a polling beyond the time fixed in his notice.*

This was a rule calling upon the churchwardens and overseers of the parish of Sutton in Lancashire to show cause why a *mandamus* should not issue, commanding them to convene a vestry to take into consideration the adoption of the 13 & 14 Vict. c. 99, for the better assessing and collecting the rates in respect of small tenements.

The question of the adoption of this Act had been taken into consideration at a vestry meeting held on the 17th March 1863, duly convened, when the show of hands was against the adoption of the Act, whereupon a poll was demanded, and the time for taking it determined upon by the majority of those present. The chairman on the following day gave notice that the poll would take place at the times so determined upon, viz., the 23rd and 24th March, between the hours of twelve and four in the morning and six and eight of the evening on both days. The assessments of the parish numbered 1700, but the ratepayers did not much exceed 1100, and of these 446 only voted, and there was a majority of twenty-six in favour of the adoption of the Act.

The voting was very irregular, seventeen persons only voting during the first hour in the first day, and seventy only during the same hour on the second day; but in the evening of the first day, the chairman gave notice that he would take the votes after eight o'clock, in consequence of the pressure of voters, but eventually this was not done. On the evening of the second day so great was the crowd, that 300 or 400 were unable to reach the voting-room, and their votes were not taken.

From the affidavits it appeared that the bulk of the ratepayers were working-men, though it was possible that they might have voted in the daytime.

Pickering, Q. C. (Heath with him) now showed cause.—The remedy for any owner who is rated and who objects to the rate is not by *mandamus*; he should appeal against the rate, and insist that the occupier, and not he, should be rated. [BLACKBURN, J.—It cannot be laid down as a general proposition, that a *mandamus* will never lie in parish matters, simply because every ratepayer may be harassed by appeals.] (*Reg. v. Stoke Damerel*, 5 A. & E. 584.) [BLACKBURN, J.—Judging from the analogy of parliamentary elections, six hours a day for two days is a reasonable time.]

Petersdorff, Serjt. (T. Jones with him) supported the rule.—The time for taking the poll was not sufficient, and the chairman acted improperly in first of all giving notice that he would take the votes after eight o'clock, by which many had been misled.



[BAIL.]

REG. v. CORONER OF DOVER—FRY AND GREATA v. TREASURE.

[ARCHES.]

Most of the ratepayers were workpeople who could vote only after six o'clock. Moreover there should have been more than one poll-clerk, by which much time would have been saved. [BLACKBURN, J.—The chairman who appointed the time was justified in assuming that a percentage only of those entitled would vote.] There is authority for saying that in cases of disturbances the time for election may be prolonged. [BLACKBURN, J.—Had the chairman power to adjourn?] (*Reg. v. Winchester*, 7 East, 573.) It was only probable that many voters would hold back, this therefore should have been provided for. [BLACKBURN, J.—Yet the voting on the first day had been at the rate of only seventeen per hour.]

BLACKBURN, J. then delivered judgment.—I am of opinion that this rule must be discharged. It was obtained on several grounds; but the two points insisted on are, first, that the time allowed for taking the votes was improper; and secondly, alleged misconduct on the part of the chairman. As to the first point, I take it that the time allowed must be such that all the voters may be reasonably able to give their votes. If the chairman fixes such a time he reasonably does his duty. In that case, all who come with due diligence may vote; but if some choose to hold back till it is too late, it is their own fault, and it cannot be said that an election is void because some have chosen to act in that way. The true principle is, that if the chairman has appointed a reasonable time and place, so that all using due diligence may record their votes, he has done his duty. It does not appear here how former polls have been taken; but we have this, that the number of ratepayers is about 1100, and we know that the whole number does not usually vote. It is clear, then, that the twelve hours during the two days was sufficient. It cannot be doubted that it was sufficient. It appears that the voting was slack on the first day, but when it appeared on the second day that there was a majority, there was a rush; but no reason, as it seems to me, is given to show that they might not have voted before. I do not say whether the chairman was right or wrong in saying that he would take the votes of those in the building after eight; but before we can exercise our discretion by granting this rule, we must see that he was bound to do so. I very much doubt whether the chairman had power to take the votes after the time which he had fixed. It is sufficient to say that there would be great risk of such a power being abused for party purposes. I think, therefore, that the grounds of fact upon which this rule was moved have failed.

SHEE, J. concurred.

Rule discharged.

Friday, Nov. 25, 1864.

(Before SHEE, J.)

REG. v. THE CORONER OF DOVER.

Inquisition—Adjournment of court—Signature of coroner and jury.

A coroner, holding an inquisition, adjourned the court to a certain day, but the court was not held on that day:

Held, that the proceedings could not be resumed, and the inquisition must be signed by the coroner and jury at a court which is properly constituted.

This was a rule calling upon the coroner of Dover to show cause why a *certiorari* should not issue to remove an inquisition taken before him on view of the body of one Susannah Lock, on the ground that the inquisition and verdict founded thereon were *coram non iudice*.

The inquest was held on the 2nd Aug. 1864, and upon the 5th the verdict was returned. The coroner then, in order to obtain time for preparing the inquisition, adjourned the inquest to the 8th Aug., and the jurors were bound over in their recognisances to attend on that day and sign the inquisition.

On the 6th, the coroner, finding that the inquisition could not be drawn up by the 8th, wrote a letter to the summoning officer, ordering him to inform the jury that the inquest was further adjourned for a few days.

No court was held on the 8th, but on the 12th the coroner and jury met and signed the inquisition.

Francis now showed cause.—No adjournment was necessary, for the verdict of the jury had been returned. The inquisition may be signed by the coroner and jury at any time: (*Burn's Justice*, tit. "Coroner.") No formal adjournment was necessary.

Henry James supported the rule.—When the inquiry has been once stopped it cannot be resumed:

Jarvis on Coroners, 325.

Cur. adv. vult.

Nov. 30.—SHEE, J.—It is of great importance that the duties of coroners, in the holding of inquisitions *super visum corporis*, should be conducted with the observance of those forms which have been established to ensure regularity. The forms of adjournment are requisite to secure the re-attendance of the jurors after an adjournment, at the time and place appointed, and to preserve the continuity of the proceedings from the first meeting of the inquest until its completion by the signing of the inquisition. If the coroner had taken the trouble, as it was his duty to do, of holding the court on the 8th Aug., and had then again adjourned the inquest to a day certain, all would have been right; but not having done so, the final and important proceeding of adopting and signing the inquisition did not take place under the original precept, and was *coram non iudice*.

Rule absolute.

## COURT OF ARCHES.

(CANTERBURY)

Reported by DR. SWASEY, of Doctors'-commons.

July 14 and Aug. 3, 1864.

(Before the Right Hon. Dr. LUSHINGTON, D.C.L., Dean.)

FRY AND GREATA v. TREASURE (on protest to the constitution of the suit).

Church-rate — Two churchwardens — Suit by one — Protest.

A suit for church-rate was brought before the court by letters of request purporting to be at the desire of A. and B., churchwardens. A proxy of appointment of proctors, which originally ran in the names of A. and B., was presented with A.'s name scratched through in the body of the document, and signed by B. only; the proctor alleged that A. proceeded no further. A second proxy was presented, purporting to be by B., on behalf of A. and himself, but signed by B. only. C., the party sued, appeared under protest, on the ground that both churchwardens should join in the suit, and the Court upheld the protest.

This was a question of rather a peculiar nature, arising upon a church-rate suit under the following circumstances. Fry and Greata, the churchwardens of the parish of Cheddar, in the county of Somerset and diocese of Bath, commenced proceedings against Levi Treasure for payment of a church-rate. The case came

[ARCHES.]

FRY AND GREATA v. TREASURE.

[ARCHES.]

before the Arches Court in the first instance by letters of request from the Bishop of Bath and Wells. These letters, as recited in the decree by letters of request, alleged the intended promotion of a suit by Fry and Greata, the duly appointed churchwardens, &c., and at the desire of Fry and Greata requested the Dean of the Arches to issue a decree calling on the deft. to appear and answer to the said Fry and Greata. The decree, as usual, followed the letters of request. A proxy of appointment, dated the 4th March 1864, was signed by Greata alone; as originally drawn it ran in the name of Fry as well, but his name and the corresponding terms were scratched through when given in.

On 18th April, *Pritchard* returned decree by letters of request, and exhibited proxy under the hand and seal of Robert Greata, one of the parties, and alleged that Bruges Fry, the other of the parties, proceeded no further in the suit.

*Crosse* exhibited proxy under the hand and seal of Levi Treasure, the party cited, and appeared for him nevertheless under protest. The act on petition in support of the protest recited the proceedings, and alleged that any amount assessed upon the said Levi Treasure, as a church-rate, is due, if at all, to Bruges Fry and Robt. Greata, in their corporate character of churchwardens, and that in proceeding to enforce payment of any rate alleged to be due from the said Levi Treasure, the said Bruges Fry and Robt. Greata are bound by law to proceed jointly; that the said Bruges Fry is now no party to the suit, and therefore the same is not properly constituted. The answer alleged that Fry and Greata, in their corporate capacity of churchwardens of the said parish, are in respect of the said rate trustees of the same for the use of the said parish; that this suit, as at present constituted, is a proceeding in the names of the said Fry and Greata, as the promovents thereof, and that Greata is entitled to continue the said suit in their joint names, and on behalf of himself and Fry. Wherefore, *Pritchard* craved leave to withdraw his aforesaid allegation that Fry proceeded no further in the cause.

The reply denied the validity of the suit without a sufficient proxy from Bruges Fry to be duly exhibited, or by his personal appearance therein.

A further proxy of appointment, dated the 6th June 1864, was filed, in which Greata purported to authorise the proctor on behalf of himself and Fry, and in their names to appear, &c.

The question raised by the act on petition, &c., was argued by

Dr. Deane, Q.C. (Dr. Swabey with him), on behalf of the deft.—First, as to the proceedings in the particular case, the court has not original jurisdiction in this case, and is bound by the terms of the letters of request which allege the suit to be at the instance of both the churchwardens; the proxies exhibited are inconsistent with these; there is no instance of a church-rate sued for by one churchwarden, the other refusing. Secondly, can one churchwarden maintain such a suit in any circumstances? The principle is, that all who have the legal interest must join as plts. They cited

Com. Dig. tit. "Abatement" E. 8, 9, 10.

The *Queen's Advocate* (Sir R. J. Phillimore), *Milward* and *Pritchard* with him, contra.—No *mandamus* would issue to compel the other churchwarden to join; although both must be nominally parties to the suit, one may use the name of the corporation. Neither at common law nor at equity would a suit be allowed to be defeated by one trustee refusing to join; he would be indemnified and compelled to join. They cited, among other cases,

*Starkey v. Berton*, Cro. Jac. 234.

Cur. adv. vult.

Aug. 8.—Dr. LUSHINGTON gave judgment to the following effect:—This is a question arising in a suit for church-rate brought before the court by letters of request purporting to be at the instance of both the churchwardens of the parish. It does not appear which is the minister's churchwarden and which the parishioner's churchwarden, but I must take it that both churchwardens so far took part in the suit. Two proxies are before the court, one dated the 4th March, which is a most slovenly instrument; it was originally intended to be executed by both churchwardens, but Fry's name in the body of the instrument seems to have been struck out, and it is executed by Greata only. The second, dated the 6th June, purports to be by one churchwarden on behalf of himself and his fellow-warden; it is, however, not executed by Fry, and so is void as regards him. *Pritchard* alleged that he proceeded no further for Fry; there is no evidence that he was even authorised to appear for him. *Crosse* appeared for the deft. under protest. [The learned Judge then stated the substance of the protest, answer and reply, as above given.] I am at a loss to conceive how Fry ever was a party to the suit; it does not appear that he ever executed the proxy or sanctioned the proceedings. The question therefore is, whether one churchwarden, there being two, can institute the suit for both; and, secondly, whether there be any means of compelling the co-churchwarden to join. It is admitted that there is no conclusive case either way. On the one hand no precedent of a churchwarden suing alone; on the other, none that he may not sue alone. Many cases were cited; but they seem to me to have a very remote bearing, if any, on the case now before the court. In the books it is said that the churchwardens are a *quasi* corporation. I can hardly say what that means. The case bearing most nearly on the present question is that cited from Cro. Jac. 234 (*Starkey v. Berton*), which is as follows: "Prohibition.—The case was, two churchwardens sue in the spiritual court for a levy towards the reparation of their church, and had a sentence to recover and costs assessed. The one releaseth, the other sues for the costs, and then this release was pleaded and disallowed. Whereupon he prays a prohibition, and all this matter was disclosed in the prohibition, and the deft. thereupon demurred in law, and now moved that the release by the one, being in the personality, should discharge the entire. But it was resolved by all the court to the contrary; for churchwardens have nothing but to the use of their parish, and therefore the corporation consists in the churchwardens, and the one solely cannot release nor give away the goods of the church, and the costs are of the same nature, which the one without the other cannot discharge." I have taken some pains to find other cases, but without any satisfactory result. The case cited bears some analogy to the present question; for if one churchwarden cannot release, it is difficult to understand why he should be able to institute a suit alone. I have ascertained, on the best authority, that at common law both churchwardens must join. Mr. Milward urged that means existed at common law to compel the other churchwarden to join. I am not sure of this; but at all events I do not feel that this court has any such authority. This suit, therefore, having been instituted by Mr. Greata alone, without the authority or consent of Mr. Fry, and there being no precedent for such a suit, I must pronounce for the protest, and with costs.

*Pritchard* and *Son* proctors for the plt.  
*Crosse* for the deft.

C. CAS. R.]

REG. v. JOHN MUTTERS.

[C. CAS. R.]

**CROWN CASES RESERVED.**

Reported by J. THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 21, 1865.

(Before ERLE, C. J., CHANNELL, B., KEATING, BLACKBURN and MELLOE, JJ.)

REG. v. JOHN MUTTERS.

*Larceny by adulterer—Evidence of possession—Animus furandi.*

*The prisoner, a servant of the prosecutor, eloped with the prosecutor's wife, and was found living with the wife in a room which they had occupied for two days. Some of the husband's property was found in a box belonging to the prisoner, locked, and of which the wife had the key, but a watch belonging to him was being worn by the prisoner. The prisoner, when taken, said that the watch was the wife's, and that he had got it from her:*

*Held, that upon this evidence the jury were justified in convicting the prisoner of larceny.*

Case reserved for the opinion of this Court at the General Quarter Sessions of the Peace, held at Exeter, for the county of Devon, on the 18th Oct. 1864, before the Right Hon. the Earl of Devon, the Hon. Charles Henry Rolle Trefusis, and other justices of the county aforesaid.

John Muttons was indicted for that, on the 28th July 1864, at St. Leonard, in the county of Devon, whilst he was servant to Samuel Fluellin, he did feloniously steal thirteen spoons, two pairs of sugar-tongs, one watch and two boxes, of the goods and chattels of the said Samuel Fluellin, his master.

And, in a second count, for simple larceny of the above-mentioned articles.

The following evidence was adduced:—

Samuel Fluellin.—I am a dairyman, and live at St. Leonard's. I have been married for seventeen or eighteen years. The prisoner works for me; my wife had no property of her own when she married. After our marriage my aunt gave me eight teaspoons; some other teaspoons which I had my wife bought, but it was with my money. The watch mentioned in the indictment was given to my wife by a cousin of hers before we married. Very soon after our marriage she gave it to me. I have often worn it. When I did not wear it it was hung up in the kitchen. I do not recollect my wife's ever wearing it. Before July 28th I had a large box in my house, which I missed on that day, as I also did some spoons and sugar-tongs. My wife and the prisoner were also gone.

Cross-examined.—We went to Exmouth Regatta, on the 27th, and came home in a trap, my wife, the prisoner and I. We had a quarrel on the road as we came back. It was dark. I had heard the sound of kissing. I did not threaten to throw my wife out of the trap. My wife sometimes earned money by her labour, but this was part of the common stock.

Elizabeth Dunn.—I am the wife of John Dunn, and live in St. Leonard's, near to the houses of the prosecutor and of the prisoner's mother. On July 28th I saw the prisoner outside my door carrying a box with his brother. They put it into a fly, the prisoner shut the door, then came back and spoke to his mother, he got into the fly, and it drove away.

Philippa Gage.—I live near Mr. Fluellin's house, the prisoner lives with his mother opposite. On July 28th he brought a cord out of his mother's house and went into the prosecutor's. He and his brother then brought out a box. Mrs. Fluellin was running to and fro between the house of the prisoner's mother and her home up to about nine o'clock in the morning. The prosecutor ordinarily comes home to breakfast from his morning's work about half-past nine.

Leah Slade.—I keep the Commercial Coffee-house at Bath. On July 28th the prisoner and Mrs. Fluellin came to my house; they stayed two nights and occupied one bedroom. I showed them the room.

John Pearce, police-constable.—On July 30th I went to Mrs. Slade's, at Bath. I found the prisoner and Mrs. Fluellin together in a bedroom, and charged him with stealing the spoons and the other articles mentioned from the prosecutor. He said, "I've not stolen anything, what I've taken away is with her consent" (noddling to Mrs. Fluellin). She then said, "Yes, I told him to get a fly and take the boxes." I pointed to one box and said, "That is Mr. Fluellin's" (the prosecutor). She said, "Yes, that is the only thing which I have got of him." I took this watch which I now produce from the prisoner's person; I afterwards examined a box in the room which the prisoner had admitted to be his, and which, at my

request, Mrs. Fluellin opened. In it I found on the top several articles of female wearing apparel, and under these some silver spoons and some sugar-tongs; I found also a bill and a prayer-book, both with the prisoner's name upon them; he said, "I did not know the silver was there, the watch is Mrs. Fluellin's, I got it from her."

Prosecutor (recalled) identifies the spoons, sugar-tongs and watch.

For the defence:

Mary A. Fluellin.—I am the wife of the prosecutor. As we returned from the Exmouth Regatta, my husband abused me all the way to Exeter, and threatened to throw me out of the cart; I told him that I would not live with him any longer, nor sleep with him again. I did not sleep with him that night, but sat up in the house of the mother of the prisoner. The prisoner went to bed next morning (28th). I ordered him to get a fly and take away the boxes, because I was going to leave. He was not there while I was packing. He did not know of my putting in the spoons or sugar-tongs. The watch was given to me by a cousin of mine before I married. He (the prisoner) knew nothing of it.

Cross-examined.—I took money, about 7l. or 8l., from my husband's desk to pay the fares to Bath. I paid the prisoner's fare as well as my own. I was about an hour packing up my things in his box in his mother's house. The box was afterwards locked, I had the key.

The counsel for the prisoner objected that the charge against the prisoner could not be maintained, on the ground that he was acting under the control of his mistress, and that she could not be legally charged with stealing from her husband.

The Court decided that the case must go to the jury.

The Chairman charged the jury to the effect that if the prisoner and the prosecutor's wife went away with the intention of carrying on an adulterous intercourse, and if he, when so going away, was concerned in taking away the property of the prosecutor, he was guilty.

The jury convicted the prisoner.

A case was granted upon the point raised by the prisoner's counsel.

DEVON, Chairman,  
Michaelmas Sessions, 1864.

Carter for the prisoner.—It is submitted that the conviction ought to be quashed, because there was no evidence that the prisoner ever assumed any dominion over the things taken. As to the evidence that some of the things were found in the prisoner's box, the presumption arising from that was rebutted by the key being in the possession of the prisoner's wife. The way in which the case was left to the jury was calculated to mislead them. The chairman told them that if the prisoner was concerned in taking away the property of the prosecutor he was guilty; that was too obscure, for upon the evidence it appeared that the flyman and the prisoner's brother were concerned in taking away the property. The chairman should have explained to the jury that it must be a taking away with an assumption of dominion over the property. In *Reg. v. Thurborn*, 3 Cox C. C. 453, 1 Den. C. C. 387, it was laid down that there must be an appropriation with intent to take the entire dominion over the property to constitute larceny. [BLACKBURN, J.—The sessions reserve one point only for us, whether the prisoner was acting under the control of his mistress.] Coming to that part of the case, the prisoner was a lad of eighteen years of age, and his mistress was a woman of about forty managing her husband's business of a dairy. She said she ordered him to get a fly and take away the boxes, and he was bound to obey her. There was nothing to show preconcert. [BLACKBURN, J.—The jury have found that he did take away his master's property.] In *Reg. v. Rosenberg*, 1 Car. & Kir. 283, it was held that an adulterer cannot be convicted of stealing the husband's goods brought by the wife alone to his lodgings, and placed by her in the rooms in which the adultery was afterwards committed, merely upon evidence of their being found there. And Parke, B. said, "If there had been any separate act of possession,"

C. CAS. R.]

REG. v. MARIA GILES.

[C. CAS. R.]

sion by him I should have reserved the point." [ERLE, C. J.—As I have many times remarked, there never was such a vague word as possession. BLACKBURN, J.—What is evidence of possession, if the prisoner's wearing the watch of the husband is not?] As laid down by Parke, B., to constitute larceny the taking must be *animo furandi*, and against the will of the owner. The definition of larceny given by Bracton, lib. 3, c. 82, p. 158, is this: "*Furtum est secundum leges, contractatio rei alienae fraudulenta cum animo furandi, invito illo domino, cujus res illa fuerit. Cum animo, dico, quia sine animo furandi non committitur.*" Here the watch was proved to have been handed to the prisoner by the wife. In *Reg. v. Thompson*, 1 Den. C. C. 549, the prisoner assumed dominion over the husband's property by the act of pledging some of it, while living in adultery with the wife. So in *Reg. v. Featherstone*, 6 Cox C. C. 376, 1 Dears. 869, where the prisoner was charged with stealing twenty-two sovereigns, it appeared that he knew that the wife of the prosecutor, from whom he received them, and with whom he had eloped, had taken them without the authority of the husband. [MELLOR, J.—This case was granted simply on the point raised by the prisoner's counsel. BLACKBURN, J.—The sole point is, whether the wife being concerned in the act takes it out of the category of larceny. The jury find that it does not, and there is abundant evidence to justify that finding.]

*M. Bers*, for the prosecution, was not called on.

ERLE, C. J.—Upon these facts, the taking of the box *animo adulterii* was evidence of larceny. The prisoner took his master's property, knowing it to be his master's property, and with it his master's wife, with the intention of committing adultery. The conviction must therefore be affirmed.

The other Judges concurred.

Conviction affirmed.

Saturday, Jan. 23, 1865.

(Before ERLE, C. J., CHANNELL, B., KEATINGE, BLACKBURN and MELLOR, JJ.)

REG. v. MARIA GILES.

*False pretences—Existing fact—Evidence.*

An indictment charged that the prisoner did falsely pretend to A. that she, the prisoner, had power to bring back her husband to A. over hedges and ditches, &c. per quod money and clothes were obtained from A.

The evidence was that A. met a woman, and conversed with her, and in consequence of that A. went to the prisoner, and asked her to tell her a few words by the cards, to fetch her husband back. The prisoner then asked what money the prosecutrix had, and obtained from her some money, and a dress. The prisoner said, that she could bring A.'s husband back over hedges and ditches with the stuff she had to work upon:

Hold, first, that the indictment charged a false pretence of an existing fact and was good:

Secondly, that the evidence was sufficient, connecting it altogether, to show that the money was parted with in consequence of the false pretence, and not antecedently to the making of it.

Case reserved for the opinion of this Court.

At the Quarter Sessions for the borough of Newbury, Maria Giles was tried before me, George Morley Dowdeswell, the Recorder, upon an indictment of the material parts of which the following is a copy:

That before the commission of the offence therein stated and charged, one Henry Fisher had deserted his wife Mary Ann Fisher, and that Maria Giles, in the parish of Newbury in the borough of Newbury, well knowing the premises, in

the parish aforesaid in the borough aforesaid, on the eighteenth day of April one thousand eight hundred and sixty four, unlawfully, knowingly and designedly did falsely pretend to the said Mary Ann Fisher that she the said Maria Giles then had power to bring back the said Henry Fisher to the said Mary Ann Fisher, and that she the said Maria Giles then had the power to bring back the said Henry Fisher to the said Mary Ann Fisher over hedges and ditches; and that a certain stuff, which she the said Maria Giles then had in her possession was sufficient and effectual for the purpose of bringing back the said Henry Fisher to the said Mary Ann Fisher. By means of which said false pretences the said Maria Giles did then and there unlawfully obtain from the said Mary Ann Fisher one dress of the value of one shilling and sixpence and two shillings in money of the goods and moneys of the said Mary Ann Fisher, with intent to cheat and defraud her of the same. Whereas in truth and in fact the said Maria Giles had not then the power to bring back the said Henry Fisher to the said Mary Ann Fisher, and had not then the power to bring back the said Henry Fisher to the said Mary Ann Fisher over hedges and ditches, and had not a certain stuff in her possession sufficient and effectual for the purpose of bringing back the said Henry Fisher to the said Mary Ann Fisher, as she the said Maria Giles at the time she so falsely pretended as aforesaid then and there well knew.

Mary Ann Fisher, being sworn, stated as follows:

I am the wife of Henry Fisher, and live at East Woodhay. On the eighteenth of April last I was in Bartholomew-street in Newbury, about twelve o'clock at noon. I was in trouble, my husband had run away from me; I was crying in the street. I met a woman in the street and had a conversation with her, and in consequence of that I went to the prisoner's house at the top of the town. The woman went with me, she went into the house first; she then came out and spoke to me, and then I went in; the woman then went away. I saw the prisoner in her house. I asked her to tell me a few words by the cards to fetch my husband back. She asked me how much money I had. I told her sixpence. She said that would not be of any use at all. Then I gave her another sixpence. She said her price was high, it was five shillings. After I gave her the second sixpence she asked me if I had a clock in my house. I told her I had not. She asked me if I had anything on that I could leave. I said I had a petticoat on, but that was old; and she said that would be of no use. I had two frocks on. She told me to leave the under one. I left it with her. She said her price was so high she could not do anything without the money; the stuff she had to work upon would cost her five shillings, or nearly that; she said she could bring my husband back over hedges and ditches. She said that about bringing my husband back after she got the frock. She said that she would bring my husband back before I gave her the money. Afterwards she went upstairs. She came down again, she then said I was not to be offended with what she was going to tell me, and not to take more trouble than I could help. She said my husband was gone off with another woman. I told her I did not think so. She said the woman came from the same place as I did, but that did not matter, she would bring my husband back, she could do it, and she would do it. She said she was what they called the cunning woman, and there was not another woman such as her about handy. She said she would bring my husband back with the stuff she had to work upon. She would bring him back on Wednesday if she could, and if she did not bring him back on Wednesday she would on Thursday. I told her if she brought him back on Thursday I would come and see her on Friday. She gave me three halfpence out of the sixpence and a small piece of cake. She asked me if I was going home. I said I was, and she asked me how long I should be going home. I said I should not get home till eight or nine o'clock that evening. She told me if I met with any one I was not to tell them where I had been. She said nothing about bringing any more money. She said if I brought four shillings I should have the frock again. She said she would have my husband back on the Thursday or Friday. My husband did not return. On the Monday following I went to the prisoner's house again. I saw her. I was alone. She asked me if I had heard anything of my husband. I replied I had not. She asked me where I was going. I said I was going to see if I could find him. She asked me if I had any more money. I said I had not. She said she had worked very hard for me all the time during the week. I parted with the money and the dress on the faith of what had passed between us on that first occasion.

Upon cross-examination by Mr. Griffiths the counsel for the prisoner, the witness stated—

I went again on the Monday. I then sold the prisoner a rabbit. She said she had worked very hard to get my husband back. I asked her first when I went into her house the first time whether she could tell me a few words by the cards to get my husband back. I never had my fortune told before. I have now got my husband back; he came back last Saturday. I found my husband at Winchester on the Wednesday after Whit Sunday. I went to Winchester to him. The millids were out, and when they came home I learnt from one of them where he was.

Mr. Griffiths, for the prisoner, objected that there was no evidence to go to the jury in support of the

C. CAS. R.]

REG. V. MARIA GILES.

[C. CAS. R.]

indictment, and that the false pretence alleged was not a false pretence within the meaning of the statute.

Mr. Williams, the counsel for the prosecution, argued contra, and urged me to lay the facts before the jury, reserving the questions raised by Mr. Griffiths for the opinion of the Court of Criminal Appeal. This I consented to do, and Mr. Griffiths having addressed the jury for the prisoner, I left the case to the jury subject to the opinion of the Judges on the case; telling them they ought not to find a verdict of guilty if they were not satisfied that the prisoner intended to pretend to the said Mary Ann Fisher, and to induce her to believe that she, the prisoner, at that time had the power to bring her husband back, and that she did actually so pretend, knowing at the time such representation was false, and that Mrs. Fisher was induced, by means of that pretence, and on the faith of its being true, to part with the money and the garment, or either of them.

The jury having found a verdict of guilty, I postponed judgment, and admitted the prisoner to bail to appear and receive judgment.

I request the opinion of the Court whether there was any evidence to go to the jury in support of the indictment; and,

Whether the false pretence alleged was a false pretence within the meaning of the statute.

If either of these objections is valid, the verdict of guilty will be set aside and a verdict of not guilty entered. GEORGE MORLEY DOWDESWELL,

Recorder of Newbury.

*Harington* for the prisoner.—The conviction cannot be sustained. First, this was not a false pretence of an existing fact, within the meaning of the statute 24 & 25 Vict. c. 96, s. 88. The false pretence charged, that the prisoner "had power to bring back the said H. Fisher to the said Mary Ann Fisher," amounts merely to a promise that the prisoner would do the act. It might mean by moral influence, or physical strength, or supernatural power. [MELLOR, J.—In that view, would not the pretence be an assertion of an existing fact? Does not the pretence mean that the prisoner held out to the prosecutrix that she had the efficient means of bringing her husband back to her?] It is not negated that the prisoner had not power in any of these ways to bring the husband back. [BLACKBURN, J. referred to *Reg. v. Copeland*, C. & M. 516, where Maule, J. held an indictment good in which the prisoner was charged with pretending that he was entitled to maintain an action against the prosecutrix for a breach of promise of marriage, whereby the prisoner, a married man, obtained money from the prosecutrix.] In that case the prisoner pretended that he was a single man, and the threat to bring an action was good evidence that he so held himself out. In *Reg. v. Fry*, 7 Cox C. C. 894, the promise was accompanied with the false pretence that the prisoner kept a shop, which was a pretence of an existing fact. The case of *Rex v. Douglas*, 1 Moo. C. C. 462, is more like this. In that case the prisoner was charged with falsely pretending to the prosecutor, whose horses had strayed, that he would tell him where they were if the prosecutor would give him a sovereign; and a conviction was held bad. [ERLE, C. J.—That came under the class of false promises.] The Court there stated that the indictment should have alleged that the prisoner pretended that he knew where the horses were. A similar allegation is wanting in the present indictment. [KEATING, J.—The indictment charges and negatives another false pretence, that she had in her possession a certain stuff which was sufficient and effectual for the purpose of bringing her husband back.] Secondly, there was no sufficient evidence to go to the jury in

support of the indictment. The false pretence was made after the prisoner had obtained the money and clothes, and therefore the prosecutrix could not have been induced to part with her money by the false pretence. [KEATING, J.—It looks as if she had been induced to part with her money in consequence of what the woman she met had told her.] Yes, that seems to be the effect of the evidence. The case of *Reg. v. Brooks*, 1 Fos. & Fin. 502, was then cited. There the money was obtained on a distinct promise to do a future act. A subsequent false pretence cannot convert a previous promise into a false pretence. Lastly, there was no evidence that she knew that she had not the power to do what she promised. She may have believed that she had some mesmeric or spiritual influence to bring the husband back; and unless she was acting clearly fraudulently, she ought not to be convicted.

*Montagu Williams* for the prosecution.—(The Court told him to confine his argument to the point as to whether there was any sufficient evidence to support the indictment.) The prosecutrix parted with her money in consequence of what passed between her and the prisoner; and the whole of the prisoner's conduct and conversation is to be looked at, and if that be done, it is submitted that there is evidence to sustain the conviction.

*Harington*, in reply, referred to

*Rex v. Codrington*, 1 Car. & P. 661.

ERLE, C.J.—We are all of opinion that the conviction must be affirmed. The first question is, whether the indictment was good. I take it that the pretence that the prisoner had the power to bring back her husband to the prosecutrix is the material part of the indictment. Now the pretence of power, whether moral, physical, or supernatural, made with the intent to obtain money, is within the mischief of the law, and sufficient to constitute an offence within the statute. The second point is, whether there was any evidence to support the indictment. I take the law to be, that there must be a false pretence of a present or past fact, and that a promissory pretence to do some act is not within the statute. Then the question is, was this a false pretence of an existing fact that the prisoner had the power to bring the husband back when the money was obtained? It was contended by Mr. Harington that the prosecutrix ought not to succeed, because the evidence was that the prisoner said that she would bring the prosecutrix's husband back, and that thereupon the money was parted with by the prosecutrix; and that after the prisoner had got the money and clothes, she said that she could bring the husband back, and that there was therefore a promissory pretence only. It is clear that an indictable pretence must precede the obtaining of the money, so that it can be alleged that the money was obtained by means of the pretence. The exact words of that part of the evidence favour Mr. Harington's argument; but I have come to the conclusion that we ought not to sustain the objection, because, as it was put by Mr. Williams, the whole tenor of the evidence is to be regarded, and it may be upon the evidence that the prisoner intended to convey to the mind of the prosecutrix that she had not only the will but the power to bring her husband back. The whole of the evidence was to be regarded by the jury, and, in the words of the Recorder, they were to consider whether the prisoner intended to pretend to the prosecutrix and to induce her to believe that she, at that time, had the power to bring her husband back, and that she did actually so pretend, knowing at the time such representation was false, and whether the prosecutrix was induced by means of that false pre-

Q. B.]

REG. v. DAWSON.

[Q. B.]

tance, and on the faith of its being true, to part with the money and the garment. Looking at the whole transaction, it appears to be this: that the prosecutrix had lost her husband; and in consequence of some information given to her, she called on the prisoner, and said to her, "Can you tell me a few words by the cards to fetch my husband back?" The prisoner asked her how much money she had. [His Lordship then referred to the evidence.] The question of the prosecutrix was, by implication, "Have you the power to get my husband back, and will you exercise that power for me?" The prisoner then having ascertained the uttermost value that could be extracted from the prosecutrix, said that she could do it, and that she would do it. Upon this evidence I think that there was enough for the jury from which they had a right to infer that she intended to induce the prosecutrix to believe that she had power, at the time when the money was parted with, to bring her husband back. Mr. Harington next contended that the prisoner might have believed that she did possess such power. But, upon the facts, I think that there was evidence to go to the jury that the prisoner was a fraudulent impostor. I think, therefore, that the conviction ought to be affirmed.

CHANNELL, B., BLACKBURN and MELLOR, JJ. concurred.

KEATING, J.—I have entertained very considerable doubt during the argument, and I cannot say that my mind is free from doubt at the present moment, as to how far, on the evidence before us, the money can be said to have been obtained by the false pretences. The words were promissory words up to the time of obtaining the property; but the rest of the court being of opinion, on looking at the whole of the evidence, that there was sufficient to give a colour to those words which they otherwise would not bear, the circumstances of this case are not such as to induce me to dissent from the judgment of the court.

*Conviction affirmed.*

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Tuesday, Dec. 13, 1864.

REG. on the prosecution of the PARISH OF  
WILLOUGHBY v. DAWSON.

*Highway-rate—Exemption—Hamlet repairing its own highways—Part of one parish rated in another.*

*A hamlet in parish B. had been assessed, down to the year 1841, to the highway-rate of parish C. Since 1841, by arrangement with C., it had maintained its own highways, and had not paid highway-rate to C., and it had never paid highway-rate to B. A rate having been made upon them by B.:*

*Held, that the hamlet was not exempt from the rate of B., either on the ground that, for the purposes of the highway-rate, it was a part of the parish of C., or on the ground of repairing its own highways in the way stated.*

Case stated on appeal to the Warwickshire Quarter Sessions, against a highway-rate for the parish of Willoughby.

The app. (Dawson) was an inhabitant of the hamlet of Mawthorpe, part of the parish of Willoughby. A highway-rate having been made upon him by the overseers of that parish, he appealed against it, claiming exemption on the ground that the hamlet in which he was the occupier of land was, as to the repair of the highways, united to the

adjoining parish of Well. It was admitted that, until a recent period, and as far as living memory and evidence of reputation went, Mawthorpe had in fact always been assessed to the highway-rates of Well. No consideration, however, had been given by the parish of Willoughby to that of Well in return for the latter having undertaken the repair of the highways in Mawthorpe, but the practice of treating Mawthorpe as united with Well for highway purposes seemed to have originated from a sense of mutual convenience between the two parishes. From the year 1841 down to the making of the rate appealed against, the inhabitants of Mawthorpe (having made an arrangement with the overseers of Well) had not been rated at all under the circumstances, and had maintained its own highways.

The question for the court was, whether the app. was liable to the rate made on him.

*Boden, Q.C. for the resps.*—The hamlet of Mawthorpe for all parish purposes has been treated as part of the parish of Willoughby. It never did repair its own highways. The finding is that it has formed part of the parish of Well for highway purposes. Such an arrangement must have originated in motives of convenience:

*Reg. v. St. Giles, Cambridge, 5 M. & W. 280;*

*Reg. v. Ecclesfield, 1 B. & Ald. 318.*

*Mellish, Q.C. for the app.*—One question will be, whether there can be such a thing as a hamlet which for the purpose of the poor-rate is part of one parish, but for the purpose of the highway-rate is part of another. If there can, Mawthorpe is part of the parish of Well, and not liable to this rate. Secondly, on the facts found, Mawthorpe may be considered as a hamlet repairing its own highways, and then it would not be liable:

*Freeman v. Read, 4 B. & S. 174.*

*Boden, Q.C. in reply.*—It is possible that the arrangement between the hamlet of Mawthorpe and the parish of Well originated in the circumstance that there were only three tenements in it nearer to that parish than to the parish of Willoughby. It was an irregular proceeding, done without the knowledge of the parish of Willoughby.

*Cur. ado. vult.*

COCKBURN, C. J.—In this case we are of opinion that our judgment should be for the resps., on the ground that the hamlet of Mawthorpe is properly assessable to the highway-rate for the parish of Willoughby. The hamlet of Mawthorpe forms part of the parish of Willoughby, and it follows that *prima facie* Mawthorpe must be taken to be liable to be assessed to the highway-rates of the parish. It lies upon the hamlet, in order to avoid this liability, to establish some special ground of exemption. The only ground of exemption put forward on the part of the app., the occupier of land within the hamlet, was, that the latter, though part of the parish of Willoughby, was, as to the repair of highways, and as to rates made for that purpose, united to the adjoining parish of Well. But it appears to us that, giving full effect to the statement that, as far as living memory and evidence of reputation goes, Mawthorpe has always contributed and been assessed to the highway-rates of Well, and the highways within the hamlet have always been repaired by the latter parish, yet that these facts cannot alter the liability of Mawthorpe to be assessed to the parish of which it forms a part. No such thing is known to the law as part of one parish being united to another parish for the purpose of the repair of the highways, although in some cases it happens that a parish may be bound to repair the highways in a part of another parish, if a good and continuing con-

Q. B.]

WERE v. CLERK OF THE PEACE OF THE COUNTY OF DEVON.

[Q. B.]

sideration for such an obligation can be shown. Here, however, no such consideration on the part of the parish of Willoughby appears, and it follows, on the authority of *Reg. v. St. Giles's, Cambridge*, 5 M. & S. 260, that if an indictment for the non-repair of a highway in the hamlet of Mawthorpe were preferred against the parish of Willoughby, the latter parish could not set up the liability of Well as a defence. It may well be that the long-continued practice of treating the hamlet as united with Well for highway purposes arose from general convenience, and was matter of arrangement between the two parishes and the hamlet. But such arrangement would be binding no longer than a common sense of convenience made all parties concur in continuing it. All parties would be remitted to their original rights and liabilities so soon as either of them thought proper to put an end to it. While however for these reasons we are satisfied that the ground taken by the app. is untenable, the fact that the parish of Willoughby had never sought to assess Mawthorpe to the highway-rates of the parish, and from a remote period had allowed the hamlet to be assessed to the highway-rate of Well, appeared to us so striking that it occurred to us that possibly an inference should be drawn from all the facts that Mawthorpe, though forming part of the parish of Willoughby, had originally been a hamlet repairing its own highways, and must be taken to have entered into a voluntary arrangement with Well (which under such circumstances it would of course have been competent for it to do so long as both parties were agreed) that the two should be united for the repair of the highways. In this case, although the arrangement between Mawthorpe and Well would not have been binding in law, yet Mawthorpe, having the right to repair its own highways, would not have been liable to be assessed to the highway-rate of the parish. Upon consideration, however, we think that the facts are not sufficiently cogent to warrant us in arriving at this conclusion. If indeed the hamlet of Mawthorpe had always repaired its own highways, the case of *Freeman v. Read*, 4 B. & S. 174, is an authority to show that the proper inference would be that it was a hamlet repairing its highways separate from the parish of which it forms part. But it appears that till a very recent period Mawthorpe has for highway purposes been treated as united with Well, and there is no trace (except as matter of inference), that Mawthorpe has ever, until late years, and then only by arrangement with Well, maintained its own highways, and indeed, as has been before observed, the case put forward by the app. is not that Mawthorpe is a hamlet repairing its own highways, but that it is part of Well for that purpose. We think, therefore, that the proper inference to be drawn from the facts is, that the present state of things originated in an arrangement made at some remote period between the parishes. And as such an arrangement, being founded on no consideration beyond that of convenience, would not be binding longer than it was acquiesced in by all parties, we are of opinion that the parish of Willoughby is entitled to insist upon its rights to treat the hamlet as part of the parish for the repair of the highways, and to assess it accordingly. Our judgment will, therefore, be for the resps.

*Judgment for the resps.*

Attorneys for the resps., *Gruy and Mounsey.*

Attorneys for the app., *Norris and Allen.*

Wednesday, Jan. 18, 1865.

H. B. WERE (app.) v. CLERK OF THE PEACE OF THE COUNTY OF DEVON (resp.)

*General county and police rates—Borough incorporated by Royal charter—Exemption from liability.*

*A borough was incorporated by Royal charters, and very extensive privileges were granted; but the charters did not contain any non-intromittant clauses. Up to the year 1858 no general county rates had ever been levied in the borough, but rates in the nature of county rates were made at the borough quarter sessions for the purposes of the borough. The borough justices had always tried felonies and misdemeanors at their quarter sessions. On several occasions prisoners for offences committed within the borough have been tried at the county quarter sessions. Under the Militia Act of 1854 the borough was treated as not liable to contribute to the general county rate:*

*Held, that the borough was liable to contribute to the general county and police rates, as it did not appear to be exempt from the jurisdiction of the county justices, and to have exclusive jurisdiction within the meaning of s. 51 of 15 & 16 Vict. c. 81.*

Case stated by order of Mellor, J., after notice of appeal against the basis or standard for the county rate of the county of Devon made at the Michaelmas Quarter Sessions 1860, whereby the borough of Bradninch was assessed at 19l. 4s. 6d. for the general purposes of the county, and at 28l. 16s. 3d. for the police purposes.

The borough, parish and liberty of Bradninch in the county of Devon is part of the possessions of the duchy of Cornwall. It is within and entirely surrounded by the county of Devon, and is not detached from such county by being bounded wholly or in part by another county. It is a very ancient borough, and is co-extensive with the parish, and has from time to time received charters of privileges. Charters have also been granted to the earls and dukes of Cornwall.

In 10th John (1208) a charter, of which the following is a translation, was granted by the Crown to Henry the son of the Earl Reynold:

Charter to Henry, son of the Earl—John, by the grace of God, &c.—Know ye that we have granted, by this our charter have confirmed, to Henry, son of the Earl, that he may have one fair every year at Bradenese, to continue for four days, to wit, three days next before the day of St. Dionysius, and on the day itself of St. Dionysius; and that he may have there one market in every year weekly, on Saturday, with all liberties and free customs which the city of Exeter has, unless that fair and that market be to the nuisance of neighbouring fairs and neighbouring markets. Wherefore I will and firmly command that the aforesaid Henry and his heirs shall have and hold the aforesaid fair and market, with all their appurtenances, and with the aforesaid liberties and free customs which the city of Exeter has as aforesaid. Witness, Lord Henry, Bishop of Salisbury; Thomas Bassett Peter, the son of Herbert; Matthew, his brother; John Marshall; Thomas, the son of Adam Peter de Maulay; Adam de Stewall. Given by the hand of Henry de Wells, Archdeacon of Wells, at Newton, the 26th day of Sept. in the 10th year of our reign.

Amongst the records of the late Treasury of the Exchequer in the Public Record-office, in the custody of the Right Hon. the Master of the Rolls, pursuant to the statute 1 & 2 Vict. c. 94, to wit, in the roll indorsed "Extracts of Inquisitions made by command of our Lord the King in counties of Oxford, Berks, Buckingham, Bedford, Cambridge, Huntingdon, Devon, Cornwall, concerning the rights and liberties of our Lord the King subtracted, and the excesses of sheriffs, coroners, estreators, and all other bailiffs whatsoever of our Lord the King, in the fourth year of the reign of King Edward, son of King Henry," is contained an inquisition of which the following is a translation:

Borough of Braneys.—The jurors of the said borough say that the manor of Braneys was an escheat of our Lord King Henry, father of our Lord the King that now is by the death



Q. B.]

WERE V. CLERK OF THE PEACE OF THE COUNTY OF DEVON.

[Q. B.]

of William de la Londe, because he died without heir, and the same the Lord the King gave the said manor to Richard his brother, with his wife Lenah, in free marriage, and to the heirs of the body of the said Lenah; and they say that Edmund, Earl of Cornwall, now holds the said manor, but by how many fees, and by what services, they know not; and that it is worth yearly 30*l*, and has a gallows, a pillory and tumbrell, assize of bread and ale, estreats of writs and pleas of withernam, a warren, and other royal liberties.

Amongst the records of the late Treasury of the Exchequer in the Public Record-office, in the custody of the Right Hon. the Master of the Rolls, pursuant to the statute 1 & 2 Vict. c. 94, to wit, in the bundle of inquisitions, "temp. Edward I.," indorsed "Inquisicoes com Devon," is a document, of which the following is a translation:

Verdict concerning the manor of Braneys.

The jurors Henry de Colbrok Illarius, the merchant William Hundehulle, Richard Pape, William Norman, John Illart, Andrew Haman, William de Agna, Robert Hanckeallore, Herbert Consalade, John Gby, William Leger. How many and what manors and demesnes nothing. They say upon their oath that the manor of Braneys was an escheat of the Lord King Henry, father of our Lord Edward the King, that now is by the death of William de la Londe, because he died without an heir, and afterwards our Lord the King gave to his brother Richard, Earl of Cornwall, said manor of Braneys, with the Lady Selyneche, his wife, in free marriage, and the heirs of the said Lady Selyneche issuing, and they say that Edmund, Earl of Cornwall, holds the said manor of Braneys, as heir, and ought to hold it of our Lord the King in chief, but by how many fees and by what services they know not, and they say that the manor is worth 30*l* per year, and has a gallows and pillory, and tumbrell, and assize of bread and ale, and has estreats of writs and pleas of withernam, and a warren and other royalities. Of the other heads nothing. In witness whereof to the present verdict, the seals of the aforesaid jurors are set. Indorsed "Boro of Braneys."

The following is a translation of parts of a charter granted by His Majesty King James I., in the second year of his reign, and which is dated the 18th Nov. in that year; the whole of the said charter is copied in the appendix, and is to be taken as part of the case.

We being willing, therefore, that from henceforth for ever there may be constantly one certain and undoubted means in our said borough of and for the rule and governance of the same borough and our people inhabiting therein, and others resorting thereto, and that the said borough may for ever hereafter be and remain a borough of good peace and quiet to the fear and dread of evil doers, and to the reward and support of the good, and also that our peace and other acts of justice and good order may and shall be better kept and done there, of our especial grace and of our certain knowledge and mere motions we have willed, ordained, constituted, granted and declared, and by these presents, for us, our heirs and successors, do will, ordain, constitute, grant and declare that our borough of Braneys, otherwise Bradninch aforesaid, in our said county of Devon, may and shall be and remain from henceforth for ever a free borough of itself; and that the mayor and burgesses of the borough aforesaid, or by what other name soever they have been heretofore incorporated or not, and their successors, may and shall from henceforth for ever be one body corporate and politic, in deed, fact, and name, by the name of the mayor and burgesses of the borough of Bradneys, otherwise Bradninch, in the county of Devon.

The charter then appoints the first mayor and masters, provides for future elections, gives power to make bye-laws, &c.:

And, further, we will and by these presents for us, our heirs and successors, do grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the mayor of the borough aforesaid for the time being, and the recorder of the said borough for the time being, may and shall from henceforth for ever, be justices of us, our heirs and successors, to keep the peace in the same borough and parish, and the liberties and precincts thereof, and also to keep and correct and to cause to be kept and corrected, the statute concerning artificers and labourers, weights and measures, within the borough and parish aforesaid, the suburbs, liberties, and precincts thereof, and that the said mayor and recorder of the said borough for the time being, and their successors, may by virtue of these our letters patent, from henceforth for ever, have and shall be able to have full power and authority to inquire concerning whatsoever trespasses, misprisions, and other minor offences, defaults, and articles done, moved, or committed within the borough and parish aforesaid, the suburbs, precincts and liberties thereof, which ought or might be inquired into before the keepers and justices of the peace in any county of our kingdom of England, by the laws and statutes of the same kingdom as justices of the peace, so, nevertheless, that they do not hereafter in any manner proceed to

the determination of any treason, murder, or felony, or any other matter touching the loss of life or limb within the borough and parish aforesaid, the liberties or precincts thereof, without the special mandate of us, our heirs and successors. And further we will, and by these presents for us, our heirs and successors, do grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the mayor and burgesses of the borough aforesaid for the time being, and their successors, may and shall have in the borough aforesaid one discreet man, and learned in the laws of England, to be elected and nominated in form hereafter expressed, who shall be and be named the recorder of the borough aforesaid.

Then follows the appointment of the first recorder by name, and a power to appoint sergeants-at-mace, a grant to have a guild merchant or market and fairs.

Wherefore we do will and firmly enjoining command, for us, our heirs and successors, that the aforesaid mayor and burgesses of the borough aforesaid and their successors, may have, hold, use and enjoy for ever all liberties, authorities, jurisdictions, franchises and acquittances aforesaid, according to the tenor and effect of these our letters patent, without the let or impeachment of us, our heirs or successors, the justices, sheriffs, bailiffs, or ministers of us, our heirs or successors whatsoever, being unwilling that the said mayor and burgesses of the borough aforesaid, or any or either of them, or any burgesses of the borough aforesaid, shall by reason of the premises, or any of them, be thereto letted, molested, vexed, or in any manner disturbed by us, our heirs or successors, the justices, sheriffs, escheators, or other bailiffs or ministers of us, our heirs or successors whatsoever; willing, and by these presents ordering and commanding, as well the treasurer, Chancellor and Barons of the Exchequer of us, our heirs and successors, and others the justices of us, our heirs and successors, as our Attorney and Solicitor-General for the time being and every of them, and all other the officers and ministers of us, our heirs and successors whatsoever, that neither they, nor any, or either of them, do prosecute or continue, or make, or cause to be prosecuted or continued, any writ of summons of *que serravit*, or any other writ or writs, or process whatsoever against the mayor and burgesses of the borough aforesaid, or any or either of them, for any causes things, matters, offences, claims, or usurpations, or any of them, by them, or any of them, done, claimed, attempted, used, had, or usurped before the day of the making of these presents; willing also that the said mayor and burgesses of the borough aforesaid, or any of them, shall not be molested or impeached by any or either of the justices, officers, or ministers aforesaid in or concerning the due use, claim, or abuse of any liberties, franchises, or jurisdiction within the borough aforesaid, the suburbs, liberties and precincts thereof, before the day of the making of these presents, or be compelled to answer for the same or any of them. We will also without fine in the Hanager, &c., although express mention, &c. In witness whereof, &c. Witness, the King, at Westminster, the 13th day of Nov.

Up to the year 1858, no county rate had ever been levied in Bradninch, but rates in the nature of county rates were made by order of the borough in sessions for the purposes of the borough.

And the borough justices have always held their quarter sessions, and tried felons and misdemeanors in the same manner and to the same extent in all respects as the justices of the county of Devon in their sessions.

And the county magistrates have, on several occasions, at their county quarter sessions, tried prisoners for offences committed within the borough, but they have not, in any other manner, interfered for any purpose within the limits of the said borough.

The borough of Bradninch has also been treated as a borough not liable to the general county rate, under the Militia Law Amendment Act 1854 (17 & 18 Vict. c. 105), and the rateable proportion of its contribution for the militia expenses was settled by two justices on behalf of the county, and two members of the corporation of Bradninch, in the mode provided by sect. 11.

The questions for the opinion of the court were, whether Bradninch was liable to contribute to the general county rate and to the general police rate for the county.

Karslake, Q.C. (Lopes with him) in support of the rates.—First, as to the liability of the borough to the county rates. That depends on the charter of James I., which grants commissions to the mayor and recorder as justices to keep the peace, and also to inquire concerning trespasses, misprisions and

Q. B.]

HOWARD v. THE QUEEN.

[Q. B.]

other minor offences in the borough which might be inquired into by county justices, "provided that they do not hereafter proceed to the trial of any treason, murder, or felony, or of any matters touching life and limb." [CROMPTON, J.—Grand larceny touched life and limb, petty larceny did not.] The main consideration is, whether the county justices are excluded from exercising any jurisdiction within the borough, because, if not, the borough has no separate jurisdiction within the meaning of 15 & 16 Vict. c. 81, sect. 51, and is liable to the general county rate. Does the borough fall within the meaning of the word "county" in the 15 & 16 Vict. c. 81, s. 51 (County Rates Act), by which it is enacted that "the word 'county' shall mean and include any liberty, franchise, or other place in which rates in the nature of a county rate may be levied, *having a separate commission of the peace, and not subject to the jurisdiction of the county at large in which such liberty, franchise, or place may be, nor contributing or paying to the county rates made for such county at large.*" The words are somewhat different to those in the charter in the *East Loos* case, 6 L. T. Rep. N. S. 748; 3 B. & S. 20; but it is clear law that the county justices can only be excluded from having jurisdiction in the borough by express words to be found in the charter. It is doubtful whether the mayor and recorder have any right to hold sessions in the borough. The charter does not seem to contain any power enabling them to hold sessions and summon juries. (a) In the *East Loos* case the charter contained a non-intromittant clause, which this does not. It is submitted, therefore, that the county justices have concurrent jurisdiction with the borough justices; that the borough justices have no exclusive jurisdiction, and therefore that the general county rate may be imposed on the borough. Secondly, as to the liability to the police rate. The 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, s. 6, empower justices to appoint police constables for the county, and to levy a police rate for liberties and detached parts of counties. The case of *Reg. v. Lachmanstone*, 3 L. T. Rep. N. S. 215, is in point, and shows that the police rate was properly made.

*Coleridge, Q.C.* (Kingdon with him) against the rates.—First, as to the county rate. Although the charter is different to the one in the *East Loos* case, nevertheless the facts found in the case show that the borough justices have exclusive jurisdiction within the borough within the meaning of sect. 51 of 15 & 16 Vict. c. 81. [CROMPTON, J.—Is there any authority to show that the non-exercise of jurisdiction by the county justices is evidence of prescriptive exemption, or a substitute for the non-intromittant clause in charters?] There is no decided authority; but the facts in this case show that there never has been any jurisdiction exercised by the county justices. The borough had a gallows, pillory, and a tumbrell. [BLACKBURN, J.—But that does not show that the borough justices had exclusive jurisdiction.] That is one step towards it. The borough had the grant of *estreats of writs and pleas of withernam*. [BLACKBURN, J.—In Com. Dig. "Courts," p. 1, it is said, a grant *tenere placita* gives jurisdiction, but not exclusive of other courts, if there be no negative words.] The charter calls it a borough, and the recitals are evidence of a lost commission from the Crown. The charter shows that the borough had large powers, even to try capital offences, and then confirms them. [CROMPTON, J.—What words are there to exclude county justices from trying capital

offences in the borough? *Karslake* referred to Dickinson Q.S., c. 3, to show that county justices have, by virtue of their commissions, power to try murder.] As to the police rate, if the court are of opinion that the county rate is binding, it is conceded that the objection to the police rate cannot be sustained.

COCKBURN, C.J.—We are all agreed that we cannot draw the inference Mr. Coleridge would have us draw, and supply what is defective in the charter of James I. On the contrary, the silence of the charter leads to the opposite inference, that the exclusive jurisdiction claimed for the justices of the borough does not exist. There is, therefore, in our opinion, no separate jurisdiction in them so as to make the borough not liable to the general county and police rate.

CROMPTON and BLACKBURN, JJ. concurred.

*Rates confirmed.*

Attorney for resp., G. F. Cooke.

Attorney for app., H. B. Wers.

Monday, Jan. 28, 1865.

HOWARD v. THE QUEEN (in error).

Indictment—Writ of error—Motion for judgment.

Upon a motion by the *plt.* in error for judgment upon an indictment for a misdemeanor, he must be personally in court.

The rule is *nisi* only. On whom to be served.

This was a writ of error upon an indictment which contained three counts. The first count was framed upon sect. 49 of the 24 & 25 Vict. c. 100, which enacts that

Whoever shall by false pretences, false representations, or other fraudulent means, procure any woman or girl under the age of twenty-one years to have illicit carnal connection with any man, shall be guilty of a misdemeanor, and, being convicted thereof, shall, &c.

There were two other counts. At the trial at the Central Criminal Court the *def.* was convicted upon the first count only. The writ of error was brought on the ground that the count did not set out or allege what were the false pretences, false representations, or other fraudulent means. The Crown had not joined in error. Notice had been duly given to the Attorney-General of this intended motion, and he had given a certificate that such notice had been given pursuant to sect. 3 of the 16 & 17 Vict. c. 82, which enacts that

Whenever any writ of error shall be brought under the provisions of the said Act for reversing any judgment in misdemeanor and error shall be assigned thereon, no judgment of reversal shall be entered either for want of a joinder in error or otherwise, without the especial order of the court in which such writ of error shall be pending pronounced in open court; and upon a certificate signed by or on behalf of the Attorney or Solicitor-General, that notice has been given to one of them of such intended application, and in the event of there being no joinder in error, such court of error may proceed to examine the record in error, and may give such judgment thereon as the court from which error is brought ought to have done, although no joinder in error may have been filed

*Orridge* now moved the court to pronounce judgment for the *plt.* in error. [BLACKBURN, J.—It would seem that it is necessary that the *def.* should be in court to receive sentence in the event of the judgment of the court being against him.] He is here in court. The count upon which he has been convicted is clearly bad. [COCKBURN, C. J.—The rule should be *nisi* only, as otherwise there might be collusion between the prosecutor and the *def.* The rule should be served on the officer of the court and on the prosecutor.] There may be a difficulty in serving the prosecutrix, as she is a child, and her residence may not be known. [COCKBURN, C. J.—

(a) Com. Dig. "Courts," p. 4: "If the king grants to a borough, &c., power *tenere placita*, it shall have all incidents, though not mentioned in the charter, as it shall have officers, a serjeant, bailiff, &c., to return juries, execute process, &c.:" (R. 1 Rol. 526, l. 30.)

Q. B.]

THE MAYOR, &amp;c. OF WEYMOUTH v. C. H. NUGENT.

[Q. B.]

If there was an attorney conducting the prosecution he might be served. CROMPTON, J.—[If there is any difficulty you can come to the court about it.]

*Rule nisi.*

Wednesday, Jan. 25, 1865.

THE MAYOR, &c. OF WEYMOUTH (apps.) v.  
C. H. NUGENT (resp.)

*Wharfage duties—Prerogative of the Crown—  
Exemption from payment.*

*The prerogatives of the Crown cannot be affected except by express legislative enactment.*

*Where, therefore, a local Act of Parliament gave a right to the corporation of W. to demand and take certain wharfage duties for (inter alia) stone brought into the harbour of W. in any ship or vessel, and certain stone was brought by a barge into the said harbour, for the use only of Her Majesty's Government works there, and delivered there to persons in the employment of such Government for the use of the said works:*

*Held, that no duties were payable in respect thereof.*

This was a case stated under the 20 & 21 Vict. c. 43, at the instance of the apps., upon a dismissal of an information.

The case stated "That at a petty session of the peace holden at the Guildhall, Weymouth, on the 28rd Aug. 1864, an information and complaint came on to be heard before us the undersigned Edward Bayley, John Taylor, and Richard Cotterell, Esqrs., three of Her Majesty's justices of the peace acting in and for the said borough, by which the apps. complained that the resp., the above-named Charles Hodges Nugent had refused to pay the sum of 2s. 6d. wharfage duties on ten tons of block stone brought into the harbour of the said borough, on the 22nd Oct. then last past. The information was laid under an Act of Parliament passed in the 6th year of the reign of George the Fourth, intituled 'An Act to amend and enlarge the powers and provisions of several Acts relating to the harbour and bridge of the borough and town of Weymouth and Melcombe Regis, in the county of Dorset.' At the hearing the apps. and resp. duly appeared. It was proved by witnesses called by the apps., that the stone described in the information was, on the 22nd Oct. 1863, brought by a barge into the harbour of Weymouth, for the use only of Her Majesty's Government works on the Nothe; that it was brought there from Portland for such use, and delivered there by the resp.'s orders to persons in the employ of the Government for the use of the said works; that the resp., as one of Her Majesty's officers, took charge of it on behalf the Government; that the sum of 2s. 6d. would be the amount of wharfage dues payable in respect of the said stone so brought into the harbour, if any were payable; that the collector, on the 29th Oct. 1863, demanded of the resp. payment thereof, and that he refused to pay it; that such demand was made of him as commanding officer of the Royal Engineers taking charge of the stone. (The case then set out the form of receipt given on the delivery of the stone.) The resp. did not cross-examine the apps.' witnesses, nor was any witness called on his behalf. It was contended on behalf of the resp., that he was not liable for the wharfage dues claimed, inasmuch as the Act of Parliament did not give the apps. any right to petty customs or wharfage dues in respect of stone brought into the harbour of the said borough for the use of Her Majesty's Government works, and that by Her Majesty's prerogative the stone was exempt from such dues in such a case, and we the said justices, being of that opinion, dismissed the information and complaint. The ques-

tion for the opinion of the court is, whether the said justices were right in dismissing the said complaint? If the court should be of opinion that our determination was wrong, we request them to remit the matter to us with their opinion thereon accordingly, or to make such other order relative to this matter as the court shall deem meet."

By the 6 Geo. 4, c. 116 (local), powers are conferred upon the corporation of Weymouth to levy and take certain petty customs and wharfage duties according as they are set out in two schedules for goods brought into the harbour of Weymouth.

The 2nd section enacts,

That from and immediately after the passing of this Act, the petty customs and wharfage duties mentioned and contained in the first schedule to this Act annexed, and the harbour dues and ballast duties mentioned and contained in the second schedule to this Act annexed shall be demanded and taken upon every ship, barge, or other vessel which shall be brought into the harbour of Weymouth and Melcombe Regis aforesaid, which said petty customs and wharfage duties, harbour dues and ballast duties shall be and the same are hereby declared to be vested in the said mayor, aldermen, bailiffs, burgesses and commonalty of the said borough and town for the time being for the purpose of repairing, improving and maintaining the harbour, wharfs, quays and piers within the borough and town of Weymouth and Melcombe Regis aforesaid.

By sect. 23 there is an exemption from toll of the bridge for horses, carriages, &c., connected with the mails, and also the horses, carriages, &c. attending Her Majesty, &c.

Sect. 29 also exempts from duty all coal imported into the said port for the use of Her Majesty's steam-packets, and actually used on board the same.

*Jush, Q. C. (J. Brown with him)* now appeared for the apps., and contended that the language of the Act was sufficiently comprehensive to include the Crown, and that there was no implied exception; that where the tolls are levied to make good costs incurred by individuals, or public bodies not connected with the Government of the country, there are always clauses inserted expressly exempting the Crown from liability to pay toll. He referred to

The Turnpike Act, 3 Geo. 4, c. 126;

The Harbours, Docks and Pier Clauses Act 1847 (10 Vict. c. 27), s. 28;

The Railway Clauses Consolidation Act 1845 (8 Vict. c. 20), s. 92;

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 4.

[COCKBURN, C. J.—If the Crown had granted the dues it would undoubtedly have been itself exempt, why not equally so when the grant is by the Parliament?] If the Legislature had intended any exemption, it would have enacted it. He referred also to the express exemptions in clauses 23 and 29. [COCKBURN, C. J.—The prerogatives of the Crown are never affected except by express enactment.]

The *Solicitor-General (Dowdeswell with him)* argued that the Crown not being bound unless expressly named, its prerogative cannot be affected by implication merely. That to this doctrine there is only the exception of cases where the enactment is for the general advancement of religion, the promotion of justice, or the general public good, which is not the case in the present instance. That it being admitted that the stone was to be employed by the Crown, no wharfage duty could be demanded. He argued also that the clauses themselves of the local Act altogether excluded the idea of the Crown being included. He cited

11 Co. 68;

*Attorney-General v. Donaldson*, 10 M. & W. 117-123;

*Bac. Abr.* tit. "Prerogative," 5;

*Brooks's Abr.* tit. "Prerogative," pl. 112;

*Comyn's Dig.* tit. "Prerogative," B. 1;

*R. v. Cook*, 5 T. R. 519;

*Chitty on Prerogative*;

*Westover v. Perkins*, 2 Ell. & Bl. 57, Lord Campbell's judgment.

C. P.]

BAKER v LOCKE.

[C. P.]

Lush, Q.C. replied.

COCKBURN, C. J.—I am of opinion that the decision of the magistrates is right. There is a great principle or rule which, from an ancient period, has obtained, with regard to the prerogatives of the Crown: namely, that except with reference to certain matters of a public character, the Crown is not bound by statute unless specifically mentioned therein. It may be said that the *status* of immunity from toll or dues arose at a remote time, when the right to impose such was founded upon a grant from the Crown, and that the Crown, in such case, never intended to tax itself, and therefore it may well be assumed that, whether tolls and dues have been taken by grant from the Crown or by statute, the Crown never intended to include itself. But however this may be, the exemption has obtained from the earliest time, and we cannot suppose that the Legislature, in this instance, have intended to make the Crown liable without, in fact, making any direct reference to it. The rule I have mentioned applies to such a case as this, where dues are taken under a local Act of Parliament. Mr. Lush relies upon the exception in the Act as to the toll of the bridge, and upon the general rule that, where there is an express exception, cases not expressed are not to be included. We must, however, take it that the exception was merely inserted *ex abundantia cautela*. The case of *Westover v. Perkins*, which is strongly in point, justifies me in these views. The principle applicable to the two cases is identical. The prerogative of the Crown, which is clearly established from ancient times, would be materially affected by the adoption of Mr. Lush's views; and we should be acting directly contrary to the rule established by so many cases if we were to hold that the Crown is liable. The argument that it was intended by implication to bind the Crown has no validity for the reasons I have given, and there is, moreover, no evidence to show that there was any such intention.

CROMPTON, BLACKBURN and MELLOR, JJ. concurred.

Judgment affirmed.

### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Saturday, Nov. 19, 1864.

BAKER v. LOCKE.

*Registration appeal—Nonpayment of rate, good on the face of it, invalidates the vote—2 Will. 4, c. 45, s. 27.*

*A. refused to pay a rate which was signed by one overseer, two churchwardens and the assistant-overseer, on the ground that it was not signed by a majority of the parish officers, the assistant-overseer not being a parish officer within the meaning of the Act; and that therefore the rate was not signed by a majority of the officers:*

*Held, that the rate was presumably a valid rate on the face of it, and therefore that A. was bound to pay it, and not having done so, he had no right to a vote.*

*Quære, per Byles, J., whether a rate so signed would be valid on appeal or not.*

This was a consolidated appeal from the decision of the revising barrister for Taunton.

At a court held before the revising barrister for the borough of Taunton, at Taunton, Thomas Locke duly objected to the name of George Baker and those of nine other persons being retained on the list of voters for the borough.

The following are the facts of the case as proved before the barrister:

George Baker occupied as tenant premises within the said borough, in the parish of Taunton St. James, of sufficient value and for a sufficient time to entitle him to a vote for the said borough, under 2 Will. 4, c. 45, s. 27, subject to the following qualification as to his nonpayment of rates.

During the period of his occupation required by law to entitle him to a vote, a poor-rate of the said parish was made and signed by an overseer of the said parish and also by the two churchwardens and by the assistant-overseer of the said parish. The rate was duly allowed and confirmed at Taunton by two magistrates for the county of Somerset, who in the usual form appended their joint signatures to a certificate of allowance immediately following in the rate-book the signatures of the overseer, assistant-overseer and churchwardens, but in point of fact the signatures of the two magistrates were obtained on the same day in Taunton and separately.

The rate was duly published the day after it was allowed, and in the said rate George Baker was rated in respect of the premises he occupied, and on its being demanded he did not pay and has not paid the rate. The rate was not appealed against, and the time for appeal has now expired, and the rate has been generally paid. There are four overseers appointed for the said parish. The assistant overseer is appointed under 59 Geo. 3, c. 12, s. 7, and his appointment in its material parts is as follows:

Poor Law.—Assistant Overseer's Appointment.

(59 Geo. 3, c. 12, s. 7; 7 & 8 Vict. c. 101, s. 61.)

County of Somerset.—Whereas the inhabitants of the parish of Taunton St. James, in the said county of Somerset, in vestry assembled in the said parish on the 8th day of April last, elected and nominated Walter Chorley Brannam, of Taunton St. James aforesaid, accountant to the assistant overseer of the poor of the said parish of Taunton St. James, and did determine that the duties to be by him executed and performed should be to assist the overseers of the poor of the said parish in the performance of all the duties incident to the office of overseer of the said parish (except the collection of rates), and that his salary for the execution of the said office should be 10*l.* yearly, to be paid quarterly.

[Then follows the clause appointing Brannam assistant-overseer.]

The assistant-overseer was also duly appointed collector of rates by the board of guardians.

It was contended on behalf of George Baker that the said rate was void on the ground that it was not signed by a majority of the parish officers, and that consequently its nonpayment by George Baker did not invalidate his right to be retained on the list of voters for the said borough. The revising barrister was of opinion that the rate had been signed by a majority of the parish officers, but that at all events, having been signed as above and allowed and published, it was, while unappealed against, a rate which must have been paid by George Baker to entitle him to a vote under the said 27th section, and he accordingly expunged his name from the list of voters. He also expunged from the same list the other nine names and consolidated the appeals. If his decision in the case of Baker was right, the list as revised by him was to remain unaltered; but if it was wrong, then the name of George Baker and the other names were to be registered in the list.

Hannen (Underdown with him), for the apps., contended that this was a void rate, because it was not signed by a majority of the parish officers, as the assistant-overseer was not such officer, but only a servant of the officers, and that the nonpayment of a void rate did not disqualify a person from having a vote. He referred to

43 Eliz. c. 2, s. 1;

59 Geo. 3, c. 12, s. 7;

7 & 8 Vict. c. 101, ss. 61, 62;

C. P.]

BAKER v. LOCKE.

[C. P.]

Glon on Duties of Overseers;  
*Bennett v. Edwards*, 8 B. & C. 702;  
*Fox v. Overseers of Shaston St. Peter's, Shaftesbury*,  
 2 Lutw. Reg. Cas. 97.

*Prideaux*, for the resp., contended that the rate was valid on the face of it, and therefore that the app. was bound to pay it; and as he had not done so he was disqualified from voting. He cited

*Reg. v. Watts*, 7 A. & E. 461;  
*Points v. Attwood*, 6 C. B. 38;  
*Cassiter v. Adams*, 1 H. & P. 80;  
*Skingley v. Surridge*, 11 M. & W. 503.

ERLE, C. J.—I am of opinion that the revising barrister was right in the conclusion that he came to, that the claimant was not qualified by reason of the nonpayment of the rates. The Legislature has made the qualification to depend on the party having paid certain public dues, and it is found by the case that the rate to the parish had not been paid by the claimant. It further appears that the rate left unpaid by him is, on the face of it, a valid rate; it purports to be signed by four persons, two churchwardens, an overseer, and an assistant-overseer. The statute of Elizabeth has enacted that a rate to be valid shall be signed by a majority of parish officers; four would be presumably a majority, and when we inquire into the facts, four might have been a majority if there had been two overseers and two churchwardens. There are four signatures here, but the point taken by the claimant is, that he refused to pay the rate because one of the four who signed it was an assistant-overseer, and he contended that the rate ought to be signed by the overseers strictly so called, and that an assistant-overseer was not capable of signing a rate. Now, I do not intend to give what I consider a binding opinion upon the point whether this was a valid rate. It is laid down by the editor of a treatise early after the assistant-overseer's office was created, that, in the opinion of the editor of that treatise, an assistant-overseer could not join in making a rate. But if it was found on the other hand, as on the present occasion, that the assistant-overseer has, in point of fact, joined in making the rate, I must say there appears to me presumably authority for him to do so, by the 59 Geo. 3, c. 12, which gives him authority to perform all the duties of overseers except the collection of rates, unless otherwise laid down by the warrant of appointment, and we have before us here the warrant of appointment, and the vestry who appointed this man have determined that the duties to be performed by him should be those of assistant-overseer of the poor in the performance of all the duties incident to the office of overseer in the parish except the collection of rates. According to the words of the statute, and according to the words of the appointment, he is to perform all the duties incident to the office of overseer, and signing the rate is one of those duties. It is contended by Mr. Hannen, that the assistant-overseer is in reality a servant appointed to assist the overseers; that he is to obey their directions, and cannot act in the place of one of them. I do not think Mr. Hannen is well sustained in that argument. The statute says, and the Court of Q. B., in the case of *Reg. v. Watts*, has decided, that the assistant-overseer is appointed by the vestry, and is the servant of the vestry. Those are words of office. He is the assistant-overseer, and many hundreds of people would be misled if they were relied on as defining the duties of the officer. In many corporations a deputy recorder is just as much an officer as the recorder himself. He is not an officer, but has duties under the officer. Under the 7 & 8 Vict. he must obey the directions of the majority of the overseers. Still the appointment remains as before; there would be a rate valid

upon the face of it; there would be an allowance for that rate by two magistrates. I advert to the case cited by my brother Maule in *Fox v. The Overseers of Shaston St. Peter's, Shaftesbury*, 2 Lutw. 101, as in that case the magistrates had allowed a rate, and it was discussed in the Court of Q. B. in the case of *Res v. Folly*, 1 Bott's Poor Law, pl. 86, and Maule, J., citing that case, says: "The justices of the peace are said to act ministerially only in allowing the rate, which is correct in this sense, that they have no power of judging of the intrinsic goodness or badness of the rate;" and that learned judge adds, "I apprehend the justices may act judicially, when a rate is brought for allowance, so far as to judge whether the churchwardens and overseers who offer the rate are the proper persons to make it." Now, this is presumably a valid rate, which the claimant has objected to pay, and I am clearly of opinion that, if the claimant wished to try whether it was a valid rate, he could have done so by appeal, and he would have done no harm to himself by paying it at once, whether valid or not, because the law has declared that if the rate turns out to be void the app. is to be allowed the payment on account. I think, therefore, this was presumably a valid rate, but the claimant has kept the money which Parliament requires him to pay in order to qualify him to vote and to show that he is a solvent man and to be trusted with the qualification. The app. says, "My reason for not paying the rate is, because one of the four names in the making of it is, in my judgment, a name that ought not to have been there." Without considering that point, I think it was presumably as against him a valid rate, and I should be setting a very bad example if I held that a person should be entitled to all the privileges acquired by the paying of the rate, when, in fact, he has withheld the payment of it on a ground which appears to me to be a matter of perfect indifference. The men holding rateable property must maintain the poor, and the law has declared, if he pays under a void rate, and proves afterwards that it is void, he is then entitled to have the payment allowed on account, and if we were to authorise parties to dispute the point of form about the validity of a rate, and keep back the funds required for the maintenance of the poor, we should be setting a bad example. I think, therefore, in this case that the claimant is not entitled to vote.

BYLES, J.—I am of the same opinion. The rate is perfectly good on the face of it, and it is found in the case that it has been published, and has been allowed by two magistrates. The statute that creates the office of assistant-overseer makes him appointable by the vestry, and says nothing about obedience to the orders of his fellow-overseers, but authorises him in the largest terms to exercise all such of the duties of the office of overseer of the poor as shall in the warrant of his appointment be expressed. Now, the warrant here is in the fullest terms. He is to assist in the performance of all the duties incident to the office of overseer, except in the collection of rates. It is said, first, he ought not to be trusted with the responsible power of discriminating who should be charged or distrained upon, or who should not. Looking at the statute, therefore, and the appointment of the assistant-overseer, he seems to be invested with the full power of an overseer. Mr. Hannen says that he is in the nature of a servant. It would not appear from the language of the statute that he was a servant, but rather that he was a coadjutor or fellow-officer; and that point is now past dispute, because both this court (*Points v. Attwood*) and the Court of Q. B. (*R. v. Watts*) have held that he is not, but that he is a fellow-officer of the churchwardens and overseers. That is the fair result of both those cases.

C. P.]

ROBERTS v. PERCEVAL.

[C. P.]

That being so, if it had stood there, if we were now going into the merits of the case on appeal, I own, without giving any distinct opinion upon it, I should doubt whether it was a bad rate. My Lord has pointed out, in the course of the argument, a case which, I confess, I was not aware of before. I have always understood as a general rule that the allowance of the magistrates was simply a ministerial act. It seems a strange thing that an Act of Parliament should require the magistrates to do what was of no use when done; but looking at the case cited from *Bott (R. v. Folly)*, there seems to be a very good reason for that, because strangers in the parish would not know who were the overseers who ought to sign; but the signature of two justices resident in the neighbourhood may satisfy them upon the point, and although it does not make the rate good if the proper persons have not signed it, yet it may make the rate so far good that it is not void so as to be questionable in an action of trespass. What Mr. Prideaux said is indisputable. A man can never be excused the payment of rates. I venture to say in this metropolis there is scarcely a rate which is not liable to a reduction in the value. Lord Ellenborough's Act gives powers to amend, and it may be quashed on appeal, and is therefore void. It seems to me impossible to say that the revising barrister has come to a wrong conclusion.

KEATING, J.—I am of the same opinion, and I entirely agree with the reasons given by my Lord and my brother Byles. Mr. Hannen relies in his view of the case upon the terms of the statute of Victoria, insisting that by that statute the assistant overseer was to obey the orders of the majority of the overseers. Now I do not know why we should in this case hold that, in signing the rate, the assistant ought not to obey the orders of the majority of the overseers. It is not stated that he did. It is not stated that he did not. I do not know how you can contend against the rate itself being a valid one, against the decision of the revising barrister. Under these circumstances, I think the decision ought to be affirmed.

— Judgment for resp. —

ROBERTS v. PERCEVAL.

*Registration appeal—Inmates of hospital—Equitable freehold—Decision of court upon similar facts—6 Vict. c. 18, s. 66.*

*Burleigh Hospital was founded after 36 Eliz. c. 7, s. 27, and 39 Eliz. c. 5. The building is a freehold building divided into rooms, each of which is of the annual value of 4*l*. Each inmate has a separate room, and keeps the key. No charter, deed, or other document relating to the foundation can be discovered. The ordinances referred to certain feoffees and their heirs; but none were known. By the rules, which bore date the 20th Aug. 1597, it was provided that certain persons should not be admitted, and that any one guilty of any of the specified offences should be displaced; but there was no instance on record of an inmate having ever been displaced. Part of the premises were let, and part had been sold:*

*Held, that the inmates were entitled to vote, as they were not members of a corporation, but were respectively entitled to a freehold in their rooms, and that it made no difference whether the institution was of an eleemosynary nature or not.*

*Simpson v. Wilkinson, 7 M. & G. 50, affirmed.*

*Where a decision of this court had been given upon similar facts, but the claimants were no longer alive, the revising barrister, notwithstanding s. 66 of 6 Vict. c. 18, has power to enter upon the inquiry.*

This was an appeal from the decision of the re-

vising barrister for the northern division of the county of Northampton, who stated the following case for the opinion of this court:

Thomas Wallington duly objected to the name of Abraham Bell being retained on the list of voters for the northern division of the county of Northampton. The name and description of the voter on the registry were:

Bell, Abraham	Lord Burleigh's Hospital, St. Martin's, Stamford.	Freehold tenement or room.	Abraham Bell, occupier.
---------------	---	----------------------------	-------------------------

He also objected to the names of twelve other persons, whose qualifications on the lists were described in like manner, and depended on the like facts; and the appeals were therefore consolidated. The facts as to the appointment of the several claimants, and the nature and mode of enjoyment of the qualifying property, are similar to the facts as stated in *Simpson v. Wilkinson*, 7 M. & G. 51; and the facts of that case are admitted and are to be taken *mutatis mutandis* as if stated as part of this case, as is also the copy of the ordinances printed in such report.

Upon the objections being called on, it was contended on behalf of the resp., that the revising barrister had no power to enter upon the inquiry according to the 66th section of the statute 6 Vict. c. 18, s. 66, the judgment of the court having been given upon facts similar to those which are the foundation of the present claim. The whole of the claimants in the present case have been appointed since the judgment was delivered.

The revising barrister decided to go into the case, and to hear the evidence, being of opinion that the words "the case" in the said section referred only to the current register, or, at any rate, to the particular individuals affected.

If the court should be of opinion that this contention should have prevailed, the names were to be retained, without reference to the remainder of this case.

The following additional facts were then proved: That in 1846 part of the hospital premises not separately used by the then occupiers was sold to the Midland Railway Company for the purposes of a railway. That the sale was conducted by the then wardens and bedesmen as owners without the intervention of any other person. That the warden and each of the bedesmen signed the conveyance to the company, the money was paid to the warden and bedesmen, and expended by them in erecting buildings upon part of the garden attached to the hospital, which buildings are now used for a wash-house by the warden and bedesmen as they have occasion.

It was then contended by the objector that, assuming the legal origin of the foundation, if the claimants had any estate, it was only as members of a corporation aggregate, and that the additional facts above stated led to this conclusion. That they had no freehold estate. That, if they had, it was only a joint tenancy in the whole hospital, and not an exclusive and separate one in each of the rooms, and that this also appeared from the new facts. That they were in receipt of alms. And that, looking at the recent decisions, and especially *Freeman v. Gainsford*, 11 C. B., N. S., the claims were bad.

The revising barrister overruled the objections, and retained the several names on the list of voters, being of opinion that the facts were substantially unaltered, and that there was therefore nothing to disentitle the claimants to the benefit of the judgment already given by this court upon the same foundation, whatever were the reasons of such decision; and also that they did not receive alms within the meaning of 2 Will. 4, c. 45, s. 86.

Hannen (*Underdown* with him), for the app., contended, first, that the revising barrister was not prevented by the decision in *Simpson v. Wilkinson*

C. P.]

ROBERTS v. PERCEVAL.

[C. P.]

from going into the case. (He was stopped by the Court on this point.) Secondly, that the claimant had not such an equitable freehold in this room as to entitle him to a vote, inasmuch as the hospital was of an eleemosynary character, for the rooms were only occupied by the claimants as objects of the bounty of the founder, and it could not be his intention to give them the rooms for their lives; and moreover they were removable for certain acts of misconduct. He referred to

2 Will. 4, c. 45, ss. 18, 52;

39 Eliz. c. 5;

*Freeman v. Gainsford*, K. & G. 448; and  
*Heartley v. Banks*, K. & G. 219.

*Field*, Q. C., for the resp., was not called on,

ERLE, C. J.—I think the revising barrister was right. In the case of *Simpson v. Wilkinson*, to which I was a party, the court were of opinion that the inmates of Burleigh's Hospital had a freehold interest in the rooms that were assigned to them, and I am of opinion now, when the same question arises again, that the inmates of the hospital have such an equitable freehold interest in the rooms assigned to them as to entitle them to a vote. The origin of the hospital is unknown, but the ordinances and the two statutes that have been referred to satisfy me that the court had a right to presume that it had a legal origin. The 39 Eliz. c. 5, refers to the 85 Eliz. c. 7, s. 27, under which the court gathered that rights could be granted to what were called at the time feoffees in trust for persons to be admitted to a hospital, and that Burleigh Hospital had been created and endowed by Lord Burleigh, by granting the lands to feoffees in trust for the members of that hospital. Now it seems to me that the interest of the parties under the endowment to feoffees in trust for the inmates of the hospital would convey to them an equitable freehold; they would have all the rights of property in the endowment that were given by the terms of the feoffment; they would have all the property in the shape of an equitable freehold just as if they were a corporation. Under the 39 Eliz. c. 5 the whole of the property would be vested in the corporation. The difference between the two results as to the qualification to vote is this, that the members of a corporation aggregate by reason of their membership are not qualified; the whole of the estate, for all the interest in the property, is in the corporation. The majority of the hospitals now are incorporated, and so there is an end of any question about the members of such hospitals having a right to vote. If there is nothing more in the case than that the lands are conveyed to feoffees in trust for the inmates of the hospital, then the legal interest would be in the feoffees and the equitable interest in the members of the hospital, and that interest would be according to the terms of the deed; and where the deed is lost, the terms of it are to be presumed from the way in which the property has been enjoyed. The way in which the property in the Burleigh Hospital has been enjoyed seems entirely consistent with the supposition I have put forward. Each member is placed in a room, and he occupies that room for life. The warden and bedesmen, as legal owners, manage the property irrespective of the separate ownership of each of its members, and nobody interferes with them. The members get what they can by letting part of the hospital; they do not occupy the granary; they act in every respect as persons having the entire interest in the hospital. The additional facts find that they executed a deed of conveyance of part of it and the proceeds were divided for their own use. Then the ground for inferring that the feoffees had

merely a legal estate in trust for carrying out the intention of the donor's charity points out to me that each man took a separate freehold in his own room, and that the rest of the property belonged to the warden and bedesmen beneficially in the manner I have mentioned. There is no doubt that in the ordinances of Lord Burleigh for the time being there is a good deal of language that would imply a supervision, control and interference in some degree with the rights of the inmates of the hospital. The ordinances are, that Lord Burleigh, or certain persons, should, in case of irregularity of conduct, have the power of removal. That is a power that has never been acted upon, and if an attempt was made to act upon it, there probably would be found abundance of difficulty in the way, and I do not think that the fact of there being such a power makes the conclusion which the court came to in *Simpkins v. Wilkinson* wrong. The strength of Mr. Hannen's argument has been, that the court held, in the case of *Heartley v. Banks*, that the poor Knights of Windsor, and in *Freeman v. Gainsford*, that the inmates of Lord Shrewsbury's Hospital were persons taking shares of the profits of the estates with which these hospitals were endowed, but were not qualified. But there is a broad distinction in my mind between the present case and each of those cases; for in them there was a governing body in whom the legal estate was vested, and in whom the legal estate was necessarily to continue vested for the purpose of the trust to be performed by them, and that the profits of the endowment did not belong absolutely, without any intervening personage, beneficially to the persons who claimed to be qualified by reason thereof. The trustees were to receive the profits and then the poor Knights of Windsor were entitled to claim a portion of the money out of those profits, and so the inmates of Lord Shrewsbury's Hospital were entitled to receive a portion of the money out of those estates from the trustees without having an estate at all; and in each of those cases the trustees were bound to find a lodging for the inmates. But I see that in Lord Burleigh's case they are, when named, to be placed in a set of rooms, and in those rooms they are to continue till they die. In the other cases, as I read them, certainly in *Freeman v. Gainsford*, one of the grounds of the judgment of the court was that the inmates were to be placed in the rooms, but were not to have an estate for life in their rooms; and the Court assumed, though I cannot say it is expressly stated, that the governing body had the power to shift them from time to time from room to room; whereas in Lord Burleigh's Hospital the inmates are to have an estate for life in the rooms which were assigned to them. In Lord Burleigh's Hospital the feoffees had merely held the legal estate, the equitable estate being in the inmates. In Lord Shrewsbury's Hospital the trustees held the legal estate, and continued possessed of the equitable estate, subject to the disposing of the profits in the proper way. A great deal of ambiguity has been brought into these cases by saying that the mode of occupation would prevent a man from being qualified if he had a legal or equitable freehold, if the mode of occupation was eleemosynary. I have a great desire to avoid introducing anything that is to my mind an entirely mistaken notion as to the question whether the party is owner of the equitable freehold or not; in deciding that question it may be very material to see whether the trustees hold in trust to take the profits and dispose of them in an eleemosynary manner to the objects of the donor's bounty; and it is in deciding whether the equitable freehold is in the donees, or whether they are merely entitled to receive a portion of the charge of an eleemosynary nature, desirable to see whether it is a matter that has



C. P.]

POWELL v. GUEST.

[C. P.]

any logical application; because, if a person have an estate, whether legal or equitable, it matters not whether the motive of the donor of the estate was of a charitable nature, or whether the feelings of the parties who took the estate and enjoyed the profits under it ought to be the feelings of eleemosynary grantees. The motives of the grantor and the motives of the grantees are, in deciding whether there is an estate, absolutely irrelevant otherwise than to the extent that I have before stated. The trustees who hold the legal estate—the equitable freehold being in the inmates of the hospital—apply the proceeds in an eleemosynary way; *semble*, most probably, that they hold the legal estate as trustees, to hand over some of the money to the persons entitled to take the money or other benefits under the trust, only in an eleemosynary sense. There is nothing in the rest of the Reform Act to say that the recipient of an estate given to him from eleemosynary motives is a man not as well qualified as the owner of the largest estate in the kingdom.

KIRKING, J.—I am of the same opinion. Mr. Hannen asks us to reconsider the decision in *Simpson v. Wilkinson*, upon the ground that since that decision this court, in the two cases of *Heurley v. Banks* and *Freeman v. Gainsford*, have laid down principles which would not conflict with the actual decision in that case, but which would induce the court to come to a different conclusion upon the facts; but it seems to me he has failed in showing an identity of circumstances between those cases and *Simpson v. Wilkinson*, for there is between the facts of those cases and the case of *Simpson v. Wilkinson* the important distinction that has been adverted to by my Lord, namely, that in those two cases the property was vested in persons who, as trustees, had active trusts to perform, without the objects of the bounty of the donors in either case taking that which could be said to amount to an equitable estate in any particular land; whereas, in *Simpson v. Wilkinson*, there is no such body exercising any such active trust, but the management of the property was from the beginning vested in these inmates themselves. They managed it, and let portions of it; and although it is true, as Mr. Hannen says, that an estate in mere joint tenancy might not qualify each claimant, and that they deal with the granary over the various rooms, dividing the profits amongst themselves as joint tenants, yet with the rooms themselves they deal severally and separately, and make a profit of those rooms, and when a portion of the property comes to be sold, they are the persons who sell without the intervention of a trustee or any governing body; they receive the profits of the sale, and expend those profits upon the land for their own benefit. Under these circumstances it seems to me that, as my Lord has pointed out, the inmates in the other two cases had no equitable estate in the lands, but that the facts in *Simpson v. Wilkinson* show there was an equitable estate in the lands in the inmates.

*Decision affirmed.*

Attorneys: for app., Amory, Travers and Smith; for resp., Clarke, Son and Rawlins.

Tuesday, Nov. 22, 1864.

POWELL v. GUEST.

*Election law—Borough vote—Qualification—Residence for twelve months within the borough—Imprisonment—2 Will. 4, c. 45, s. 27.*

*A person claiming to be placed upon the register of voters for a borough, as having been an occupier for twelve calendar months of premises within the borough, in the*

*manner required by sect. 27 of the Reform Act (2 Will. 4, c. 45), had been for a considerable portion of that period in a gaol not within the limits of the borough, nor within seven miles of it, having been imprisoned for committing an assault, without any option of paying a fine. His house had been occupied, and his business carried on, by his servant during his absence, and he always had the intention of returning home at the end of his imprisonment:*

*Held, that he had not resided in the borough within the meaning of the statute.*

*Semble, if the imprisonment had been on civil process, or for nonpayment of a fine, the residence would have been sufficient.*

Case stated by the barrister appointed to revise the list of voters for the borough of Kidderminster.

At a court held before me for the revision of the lists of voters for the borough of Kidderminster, Richard Powell duly objected to the name of Thomas Guest, jun. being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of the occupation of a house in Stourbridge-street, in the parish of Kidderminster borough, on the ground that the said Thomas Guest, jun. had not resided for six calendar months next previous to the last day of July in the present year within the said borough, or within seven miles thereof.

The qualification of the said Thomas Guest, jun. was duly proved in all other respects.

On the 27th Feb. in the present year the said Thomas Guest, jun. was convicted of an assault and committed by the magistrates of the borough of Kidderminster to Worcester gaol for six months' imprisonment without the option of paying a fine. He duly served the said term of imprisonment, and returned to Kidderminster on the 25th Aug. in the present year.

Worcester gaol is situate more than seven miles from the borough of Kidderminster or any part thereof. At the time of his conviction the said Thomas Guest, jun. resided at the above-mentioned house, and carried on there the business of a butcher and beerseller, and after his conviction, but before leaving Kidderminster, he made arrangements by which the said businesses were carried on, and the said house was occupied by his servant on his behalf during his absence, to whom he gave the key of the house, and paid him 15s. per week to conduct the said businesses. His furniture remained undisturbed in the house during his imprisonment, and immediately on the termination thereof he returned to his said house, and has continued to reside there ever since.

The said Thomas Guest, jun. is a widower, and has no family.

It was contended on behalf of the said Richard Powell, that under the circumstances stated the said Thomas Guest, jun. had not resided for six calendar months next previous to the last day of July in the present year within the said parish of Kidderminster borough, or within seven statute miles thereof, or any part thereof. I held that, under the circumstances stated, the said Thomas Guest, jun. had resided for six calendar months previous to the said last day of July in the present year within the said parish of Kidderminster borough, and I therefore retained his name on the list of voters.

The said Richard Powell having given notice that he was desirous to appeal from my decision, I allowed his appeal.

If the court shall be of opinion that, under the circumstances stated, the said Thomas Guest, jun. had not resided for six calendar months previous to the last day of July in the present year, within the said parish of Kidderminster borough, then the name of the said Thomas Guest,

C. P.]

POWELL v. GUEST.

[C. P.]

jun. shall be expunged from the list of voters, and the register of voters shall be altered accordingly. But if the court shall be of opinion that the said Thomas Guest, jun. had resided during the time and in manner aforesaid within the said parish of Kidderminster borough, the register of voters is to remain unaltered.

*Keane, Q.C.* for the app.—The resp. had not resided for six months previous to the 31st July, for the imprisonment caused a break in the residence. It was not even as if the imprisonment had been for debt or nonpayment of a fine, which the resp. could have put an end to when he pleased by paying the debt or fine. As to the meaning of the word residence and the effect of imprisonment as a break of residence, he referred to

*Whithorn v. Thomas*, 7 M. & G. 1;  
*Reg. v. The Inhabitants of Salford*, 12 Q. B. 106;  
*Hartfield v. Rotherfield*, 17 Q. B. 746; s. c. nom. *Reg. v. The Overseers of Hartfield*, 21 L. J. 65, M. C.;  
*Reg. v. The Inhabitants of Potterhanworth*, E. & E. 262; s. c. 28 L. J. 56, M. C.;  
*Reg. v. The Inhabitants of Halifax*, 12 Q. B. 111;  
*Reg. v. The Inhabitants of Seend*, 12 Q. B. 188;  
*Reg. v. The Inhabitants of Barnsley*, 12 Q. B. 198; and  
 6 Vict. c. 18 (the Registration Act). s. 79;  
 9 & 10 Vict. c. 63 (the Poor Removal Act), s. 1.

*Karslake, Q.C. (R. Bourke with him)* for the resp.—The resp. during the whole time of his imprisonment had the *animus revertendi*, and therefore it constituted no break in the residence:

*Nias v. Davis*, 4 C. B. 444;  
*Dunston v. Paterson*, 2 C. B., N. S., 495; s. c. 26 L. J. 267, C. P.;  
*Rex v. Mitchell*, 10 East, 511;  
*Reg. v. The Overseers of Holbeck*, 16 Q. B. 404.

*ERLE, C.J.*—I think that the revising barrister was wrong, and that the claimant did not acquire a vote. The statute, as part of the qualification, requires that the claimant shall have resided for a certain period within the boundary of the borough, and the claimant upon the present occasion was in prison under a sentence for misdemeanor for a great part of the time during which the statute requires residence as the qualification. Now, did he reside during the time that he was so imprisoned? I will assume that he had a house, and that he had a wife and family, and the *animus revertendi* as soon as his imprisonment might be over, but during the time that he was imprisoned he had not the liberty to return, he had lost the liberty of returning by a wrongful act on his part leading to such a confinement as prevented his being bodily present. Now, the doctrine appears to me to be laid down very correctly in Mr. Elliott's book at p. 204 (2nd edit.): "In order to constitute residence the party must possess a sleeping apartment, but an uninterrupted abiding at the dwelling is not requisite. Absence, no matter how long, if there be the liberty of returning at any time and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience, will not prevent a constructive legal residence; but if he has debarred himself of the liberty of returning to such dwelling by letting it for a period, however short, or has abandoned the intention of returning, he cannot any longer be said to have a legal residence there." Now, the learned author has put it, "If he has debarred himself of the liberty of returning to such dwelling, he has not a legal residence," and he has put the two examples "by letting it" or "by abandoning his intention to return." I think that the claimant did "debar himself of the liberty of returning to such dwelling." He was voluntarily guilty of a criminal act by reason of which, according to the laws of his country, he was put in

prison. His power of moving was taken away from him, and he lost the liberty of returning to his dwelling. If we had to discuss the meaning of the word residence, we should have to advert to innumerable occasions in which the meaning of that word has shifted according to the shifting intention of the Legislature in the statutes in which the word occurs. For the purpose of bankruptcy a man may be held to reside in a prison where he can carry on his business and see his debtors and creditors, and attend to other matters of that kind. It has been held in one of the cases cited during the argument (*Nias v. Davis*), that a person imprisoned in Presteign gaol had a sufficient residence for the purpose of giving the bankruptcy commissioners power to send for him and examine him. I should say that statute would be *alto intuitu* from the present statute, and I also should say that in my opinion a party imprisoned for a civil debt would not have debarred himself irrevocably from having the liberty of returning to his dwelling, because, by payment of his debt, by compounding with his creditors, by obtaining protection under the Bankruptcy Act, or in various other ways, he would be able so to return. So in the case cited of a militiaman (*Reg. v. Mitchell*), his service is in some degree consistent with the power of returning home from time to time, whereas there is an absolute incapacity in the case of a person in prison on a criminal charge, without any option of paying a penalty. I think that all those cases can be well distinguished, and that in this statute the Legislature, in bestowing the qualification, proceeded partly upon residential considerations, and partly upon commercial considerations, desiring that the privilege should be exercised by a person who resided, or had commercial interests, in the district, and so was likely to have his attention turned to the interest of the district, and through that district to the interests of the nation at large. If a person is imprisoned, he is not, in my judgment, complying with the requisites of the statute. If imprisonment for five months would not take away his qualification, I do not see why an imprisonment for two years, or any other number of years, should not allow him still to be qualified. It would be eluding the intention of the Legislature, requiring that there should be residential or commercial qualification in the district and a residence there, to say that a man who has been absent in consequence of his own wilful misconduct has complied with the qualification of "residence."

*BYLES, J.*—I am of the same opinion. It is not necessary nor convenient to lay down any universal rule as to what is the result of the cases cited as to a legal inability to reside; that is, how far the inability created by the claimant's own criminal and voluntary act, and not by his misfortune, will break the residence. In the first place, this case is distinguishable from the case of sickness or accidental absence, which are none of them legal disabilities. This case is distinguishable from the cases of persons being innocent and remanded for acts not caused by their own criminal and voluntary acts. It is distinguishable from a case of legal process under a *capias ad satisfaciendum*, and from the case of imprisonment for nonpayment of a fine; because in both cases the payment of the debt or the fine would relieve the party from imprisonment. Extreme cases may be put on both sides, and there is as much inconvenience in those extreme cases on the one side as on the other. On the one side, it may be said that imprisonment for twenty-four hours may deprive the party of his franchise; on the other side, there is the case put by my Lord of an imprisonment for two years or more. Under those circumstances, I confess, I was hardly able at first sight to reconcile the difficulties that presented

C. P.]

POWELL v. JONES.

[C. P.]

themselves. I agree with my Lord that the revising barrister was wrong.

KEATING, J.—I am of the same opinion. Though this case, no doubt, has been involved in considerable difficulty by considerations as to where the line should be drawn, still I am of opinion with the other members of the court, that a party who debars himself from actually residing by his own criminal act, does not constructively reside.

*Judgment for the app.*

Attorneys: for the app., Lawrence and Markby; for the resp., H. Smith.

POWELL (app.) v. JONES (resp.)

*Election law—Borough vote—Payment of rates—Composition—Appropriation of payments—2 Will. 4, c. 45, s. 27—4 & 5 Vict. c. lxxii.*

*A person occupying a house and garden in a borough, and also two adjoining houses, compounded with the overseers according to the provisions of a local Act, and was in consequence assessed to the poor-rate in respect of all the premises, at about one-half of what he would otherwise have been assessed at. He subsequently improved the house and garden, so as to raise their annual value to more than 10l., and applied to the overseers to rate him in respect thereof separately from the other houses, for the purpose, as he told them, of enabling him to get a vote. Some arrears of rates were then due, and as he did not then pay them, the overseers did not alter the rating. He subsequently paid more than enough to pay all rates due in respect of the house and garden, but not enough to cover the arrears in respect of the whole of the premises, and the overseers appropriated the payment to the arrears, nothing being said at the time of payment respecting the premises in respect of which it was made. The revising barrister allowed him a vote in respect of the house and garden:*

*Held, on appeal, that there was sufficient evidence from which the barrister might infer that it was understood between the claimant and the collector at the time of payment, that it was made for the rates due on the house and garden in respect of which the vote was claimed.*

Case stated by the barrister appointed to revise the list of voters for the borough of Kidderminster.

At a court held for the revision of the list of voters for the borough of Kidderminster, Richard Powell objected to the name of William Jones being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied within the parish of Kidderminster borough.

The said William Jones occupied in St. John-street, within the parish of Kidderminster borough, for twelve calendar months previous to the last day of July in the present year, a house and garden of upwards of the clear yearly value of 10l.

The said William Jones was the owner of the said house and garden in his occupation, and also the two adjoining houses.

The said William Jones, some years since, under the provisions of an Act made and passed in the fourth year of the reign of her present Majesty Queen Victoria, entitled "An Act for better assessing and collecting the poor-rates in the borough of Kidderminster, in the county of Worcester," compounded with the overseers for the said borough for the poor-rates of the above houses for the term of one year, and by entering into such composition only one-half the amount was assessed on the said houses and garden for poor-rates as would have been assessed thereon if the said William Jones

had not entered into such composition. At the expiration of the year for which such composition was entered into, and down to the month of July last inclusive, the July rate being made and allowed on the 22nd day of that month, the overseers continued to assess the said house and garden on composition, although the said Wm. Jones did not enter into any composition agreement with them other than as above stated, neither did he attend any meeting of the overseers for the purpose of entering into any other composition agreement, but the demand made by the overseers, and the receipt given by the collector, stated that the rates were composition poor-rates. Subsequently to the said Wm. Jones entering into such composition as aforesaid, and previously to the 31st July 1863, he made improvements to the said house and garden by which the clear yearly value was raised to upwards of 10l.

The said Wm. Jones in Oct. 1863—but he could not state the precise day—claimed to be rated separately from the said two other houses, and to the full rate for and in respect of the house and garden in his occupation, for the purpose, as he then stated to the overseers, of "getting his vote;" but he did not at the same time pay or tender the arrears of rates then due. The overseers did not alter the rating in respect of the said house and garden in the occupation of the said Wm. Jones.

The composition rate laid in Oct. 1863 amounted for all three houses and gardens to 4s. 9d.; there were arrears of former rates brought forward of 1l. 8s. 9d. The total rates then due in respect of the three houses were 1l. 8s. 6d.

The said William Jones, subsequent to his claiming to be separately rated as aforesaid and previous to the 20th July in the present year, paid to the overseers of the said borough the sums of 10s. and 12s. 6d., making together 1l. 2s. 6d., which was more than sufficient to pay all rates due previously to the 5th Jan. last in respect of the house and garden in his own occupation, but at the time of making such payment he did not state or specify to what rate or in respect of which house he paid the said amounts, and the collector placed the amount against all the rates due, namely, 1l. 8s. 6d.

It was objected on behalf of the said Richard Powell that the name of the said Wm. Jones should be expunged from the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied within the said parish of Kidderminster borough, inasmuch as he had not been rated in respect of such house and garden to all rates for the relief of the poor in such parish of Kidderminster borough made during the time of such his occupation as aforesaid.

Secondly, that the said William Jones had not paid the poor-rates payable from him previously to the 5th Jan. on or before the 20th July in the present year.

I held that the said William Jones was rated in respect of such house and garden to all rates for the relief of the poor in such parish of Kidderminster borough made during the time of his occupation, and that he had paid the poor-rates payable from him previously to the 5th Jan. on or before the 20th July in the present year, and accordingly retained his name on the list of voters.

The said Richard Powell having given notice that he was desirous to appeal from my decision, I allowed his appeal.

If the court shall be of opinion that, under the circumstances stated, the said William Jones was not rated in respect of such house and garden to all rates for the relief of the poor during the time aforesaid, or that he had not paid the poor-rates payable from him previously to the 5th Jan. on or before the 20th July in the present year, then the

C. P.]

POWELL v. BRADLEY.

[C. P.]

name of the said William Jones is to be expunged from the list of voters, and the register of voters is to be altered accordingly.

But if the court shall be of opinion that, under the circumstances stated, the said William Jones was rated in respect of such house and garden, and had paid all rates payable from him previously to the 5th Jan. on or before the 20th July in the present year, the register of voters is to remain unaltered.

Keane, Q.C. appeared for the app., and contended that the claimant had not complied with the requisitions of sect. 27 of the Reform Act, 2 Will. c. 45, as he had not paid the full rates. He also referred to 17 Geo. 2, c. 38, s. 4;

*Rez v. George*, 6 A. & E. 305.

Karslake, Q. C. (*R. Bourke* with him), for the resp., was not called on.

ERLE, C. J.—It seems that the party is rated, and we should assume that the rate was a valid rate, and that, as his name has been upon the rate-book, and any objection such as those Mr. Keane has alluded to might have been set right, if we can take the rate *prima facie* to be valid we need not go into those questions which possibly might arise if it were a doubt whether the party was rated. Then, has he paid his rate? Now, there was much strength in Mr. Keane's argument, that the payment ought to be appropriated, and if not appropriated by the payer, that the receiver has a right to appropriate it. Actual express words are not essential; the thing may be done in the course of business, or by what one may call a tacit expression between the parties; and though there is very little to found an observation on in the statement of the case, it is clear to my mind that the resp. desired to be qualified; he knew that he ought to pay the arrears of rates in order to be qualified, and he did pay enough to pay off the arrears, but he did not use words to appropriate it to the arrears. I cannot say that there is a great deal as a question of fact to be discussed about the matter. It appears to have been all before the revising barrister; he has given attention to it, and he has found as a fact that the party had so paid as to redeem the qualification. I do not think that he was disentitled.

BYLES, J.—I am of the same opinion. The rate is *prima facie* good; at all events it is only reversible on appeal. With respect to the appropriation of payments, there cannot be the least doubt as to the intention of the payer. I think the receiver knew what the intention of the payer was; but whether that be so or not, there is at least evidence visously to the 5th Jan. last in respect of the house and garden in his own occupation, but at the time of making such payment he did not state or specify to what rate or in respect of which house he paid the said amounts, and the collector placed the amount against all the rates due, namely, 1l. 8s. 6d.

It was objected on behalf of the said Richard Powell that the name of the said Wm. Jones should be expunged from the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied within the said parish of Kidderminster borough, inasmuch as he had not been rated in respect of such house and garden to all rates for the relief of the poor in such parish of Kidderminster borough made during the time of such his occupation as aforesaid, but he had paid. The revising barrister has found that he had, and that being so, it is impossible for us to say that he is not qualified.

KEATING, J.—I am of the same opinion. Mr. Keane very frankly admitted that if what passed when the

resp. claimed to be rated had passed when he paid the rate, there could have been no doubt that there would have been complete evidence of an appropriation. The revising barrister does not find what time elapsed between the claim and the payment, and it is quite consistent with all the facts stated that, in truth, the same impression may have been in the minds of both the payer and the receiver at the time when the payment was actually made. There was, therefore, strong evidence of appropriation; and the revising barrister was right.

*Judgment for the resp. with costs.*

Attorneys: for the app., *Lawrence and Marbury*; for the resp., *H. Smith*.

#### POWELL v. BRADLEY.

*Election law—Borough vote—Qualification—Occupation of premises by a person not of full age—2 Will. 4, c. 45, s. 27—6 Vict. c. 18, s. 40.*

*A person claiming to be placed upon the register of voters for a borough, as having been an occupier for twelve calendar months of premises in the borough in the manner required by sect. 27 of the Reform Act (2 Will. 4, c. 45), need not have been of the full age of twenty-one years at the time when his occupation of the premises commenced, it being sufficient if he is of full age when he applies to be placed upon the register.*

*Per Erle, C. J.—The question which a revising barrister has to decide for himself, whenever a person claims to be placed upon the register, is this, "If an election were now going on would the claimant be legally qualified to vote?"*

Case stated by the barrister appointed to revise the list of voters for the borough of Kidderminster.

At a court held before me for the revision of the list of voters for the borough of Kidderminster, Frederick Bradley duly claimed to have his name inserted in the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of the joint occupation of a foundry and premises at Clensmore, in the parish of Kidderminster borough. The said Richard Powell duly objected to the name of the said Frederick Bradley being inserted in such list of voters.

The said foundry and premises were in the joint occupation of Frederick Bradley and his brother Samuel Bradley for twelve calendar months next previous to the last day of July in the present year.

The said Frederick Bradley attained the age of twenty-one years in the month of March in the present year.

At the said foundry the trade or business of ironfounders was carried on under the firm of John Bradley and Company.

It was objected on behalf of the said Richard Powell that the said Frederick Bradley's name ought not to be inserted in the list of voters for the parish of Kidderminster borough inasmuch as—1. As the said Frederick Bradley was only twenty-one years of age in March in the present year, he could not have occupied as owner or tenant the said foundry and premises for twelve calendar months previous to the last day of July in the present year. 2. The said Frederick Bradley was not of full age during the whole of the twelve calendar months previously to the last day of July in the present year.

I held that the fact that the said Frederick Bradley had attained the age of twenty-one years in March last did not preclude him from occupying the said foundry and premises for twelve calendar months previous to the last day of July in the present year. And I also held that the minority of the said

C. P.]

POWELL v. BRADLEY.

[C. P.]

Frederick Bradley during a portion of the twelve calendar months previous to the last day of July in the present year, did not of itself constitute a disqualification to his name being retained on the list of voters, and I therefore retained his name on the list of voters.

The said Richard Powell having given notice that he was desirous to appeal from my decision, I allowed his appeal.

If the court shall be of opinion that the said Frederick Bradley's having attained the age of twenty-one years in March last did preclude him from occupying the said foundry and premises for twelve calendar months previous to the last day of July in the present year and was a disqualification, then the name of the said Frederick Bradley is to be expunged from the list of voters and the register of voters is to be altered accordingly.

But if the court shall be of opinion that the said Frederick Bradley's having attained the age of twenty-one years in March last did not preclude him from occupying the said foundry and premises for the time and in manner aforesaid; and that the minority of the said Frederick Bradley during a portion of the said twelve calendar months previous to the last day of July in the present year was not a disqualification, the register of voters is to remain unaltered.

*Keane, Q. C.* appeared for the app. and referred to 2 Will. 4, c. 45, s. 27;

6 Vict. c. 18, s. 40.

*Deakurst v. Feilden*, 7 M. & G. 182.

*Karslake, Q. C.* (*R. Bourke* with him) appeared for the resp.

*ERZL, C.J.*—I think in this case that the revising barrister was right. The qualification given by the 2 Will. 4, c. 45, s. 27, is that "every male person of full age, and not subject to any legal incapacity," who shall occupy the proper premises, shall, if duly registered, be entitled to vote. It is by the proviso provided that "no such person shall be so registered in any year unless he shall have occupied such premises for twelve calendar months previous to the last day of July in such year." The person entitled to vote must be of full age at the time when he claims to vote. By the statute I am about to refer to, he must be equally of full age at the time when he claims to be put upon the register; but does the statute enact that he must be of full age at the time when the twelve months began to run, during which he must have occupied the property that qualifies him? I think that the statute intended no such thing; and though it has put in the words "every male person of full age, and not subject to any legal incapacity, who shall occupy within such city or borough, and as owner or tenant, any house, &c., of the yearly value of not less than 10*l.*, shall, if duly registered, &c., be entitled to vote," the meaning of that is "who shall have occupied," and the proviso is, "that no such person shall be so registered in any year unless he shall have occupied such premises as aforesaid for twelve calendar months," where I think that "such person" means such person of full age, without any legal incapacity at the time of claiming his vote; and I think that this statute, 2 Will. 4, c. 45, ought to be construed together with the 6 Vict. c. 18, s. 40, and that statute makes perfectly clear the idea that was in my mind, namely, that the question for the revising barrister is the question whether, at the time when the claimant claims to be put upon the register, he would, if an election was being held, be a party qualified to vote according to the proper description. Really and truly the revising barrister was substituted for a discussion at the polling booth, *passim exempli*, whether the party was qualified or

not. The words of sect. 40 of the 6 Vict. c. 18, are that the revising barrister "shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote." That makes the revising barrister imagine to himself, that an election is going on and that a vote is tendered, and he must ask himself, "Is the claimant entitled according to the description here given?" That part of the section relates to qualification by property. But then you come to the objections and the striking out. The same idea is presented in respect of full age, "and in case the same (qualification) shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was *then* (that is at the time of making up the register) incapacitated by any law or statute from voting in the election of members to serve in Parliament, such barrister shall expunge the name of every such person from the lists." I will imagine an election being held; a party comes up claiming to have his name put on the register; the revising barrister has a right to ask him, "Are you of full age?" if the party is incapacitated, he is ordered to expunge the name, and therefore it comes to this, no man shall be put upon the register until he proves his capacity to vote if an election were going on; and therefore it is clear to my mind that what the Legislature intended was, that those who are of full age at the time of an election, and have the other requisites, shall be entitled to give their votes. Upon the construction contended for on behalf of the app. in this case it would create a disability—that the party could not vote till twenty-two years old; whereas the Legislature has for a long time considered that a man is of age at twenty-one, and of full capacity for the enjoyment of all his rights.

*BYLES, J.*—I am of the same opinion. The statute 7 & 8 Will. 3, c. 25, s. 8, enacts, whatever the common law may be, that infants shall not vote, and shall not be elected. That makes the votes of infants void, and subjects elected infants who presume to sit in Parliament to very serious penalties. Now, we ought not, unless we are obliged, to extend the time of legal incapacity beyond the term of twenty-one years, reckoned at the time of voting. Of the questions which can be asked at the election, the question relating to the voter's majority is not one; and, therefore, it is absolutely necessary that he should be of full age at the time of registration. Now, we are asked, without any necessity (as it seems to me), to strain the words of the Act of Parliament, and go further and say that, on the true construction of sect. 27, he must have been of age from the commencement of the occupation which confers on him the qualification. The words are, "every person of full age, who shall occupy,"—that is, as my Lord has pointed out, "who shall have occupied for twelve months." Now, he may occupy for twelve months under two categories, either of which would fall within the Act of Parliament. He may have occupied for twelve months, being during the whole or part of the time under age, which, I apprehend, would be within the words of the Act of Parliament, and he may have occupied for twelve months, being during the whole time of full age. It seems that the contention of the counsel for the app. is this, that he must insert this additional qualification, "being of full age during the whole time of such occupation." There is no necessity to do that in order to give a sensible construction to the Act of Parliament. As I said before, the other construction seems to be the natural one, and it is not followed by the consequence of extending the period of nonage from the age of twenty-one to twenty-two.

[C. P.]

SMITH v. FOREMAN.

[C. P.]

KEATING, J.—I am of the same opinion. The only difficulty I had in this case was as to how far, if Mr. Keane's argument were not to prevail, an infant could be kept off the register who had occupied for twelve months; but the 40th section of the 6 Vict. c. 18, to which Mr. Keane referred, and which my Lord commented on, has removed any difficulty I felt upon the subject. Therefore I think the revising barrister was right.

*Judgment for the resp.*

Attorneys: for the resp., *Lawrence and Markby*; for the app., *H. Smith*.

Thursday, Jan. 12, 1865.

SMITH (app.) v. FOREMAN (resp.)

*Election law—County franchise—Qualification—Rental of 50l.—Joint occupancy—Tacking of rents of different tenements—2 Will. 4, c. 25, s. 20—6 Vict. c. 18, s. 73.*

A person claiming a county vote occupied land at an annual rental of 40l., and occupied other land in the same county held of the same landlord, but under a different tenancy, at the annual rental of 64l. jointly with another person. He claimed to add the moiety of the latter rent to the rent for which he was solely liable, in order to gain a qualification for the county franchise as paying rent to a greater amount than 50l.:

*Held, that neither by the Reform Act nor the Registration Act was he qualified to vote, and that nothing in those Acts authorised the tacking together of rentals for which he was solely and jointly liable, so as to make a gross rental sufficient to confer a qualification.*

At a court holden at Ashford, in the eastern division of the county of Kent, on the 30th Sept. 1864, for the revision of the list of voters for the parish of Braybourne, Henry George Allen duly objected to the name of John Rolfe being retained on the list and register of voters for the said parish.

The facts of the case are these:—

The name of John Rolfe appeared on the copy of the register of persons entitled to vote as follows: "John Rolfe, West Braybourne, occupation of house and land, West Braybourne;" and his name had stood in the register thus for several previous years. John Rolfe had during the qualifying period and for several previous years occupied solely as tenant a house and land at West Braybourne, for which he was *bonâ fide* liable to a yearly rent of 40l. He had also occupied during the qualifying period, and for several previous years as tenant jointly with his father, under the same landlord, other lands, three-fourths of which were also in West Braybourne, and about one-fourth in a neighbouring parish, also within the said eastern division, for which he and his father were *bonâ fide* liable to a rent of 64l. per annum. The hiring of these latter named lands was at a different and subsequent period from the hiring of the first-mentioned house and land, of which John was sole tenant.

I decided that, inasmuch as the occupation and holding of the joint tenant is *per tout* as well as *pro mi*, and that John Rolfe was actually *bonâ fide* liable to pay to one landlord a yearly sum as rent exceeding 50l., that is to say, 40l. for his sole occupation; and 32l. at least as his *bonâ fide* share of the rent of the joint occupation, for the lands and other tenements holden and occupied by him as aforesaid, he was entitled to be retained on the same list and register of voters by virtue of the 20th section of 2 Will. 4, c. 25, which enacts that "every male person of full age who shall occupy as tenant any lands or tenements for which he shall be *bonâ fide*

liable to a yearly rent of not less than 50l. shall be entitled to vote," and I retained his name on the register and list of voters accordingly.

If the court shall be of a contrary opinion, the name of John Rolfe ought to be expunged from the said register of voters for the eastern division of Kent.

Henry G. Smith, on behalf of Henry George Allen, was the app. from this decision, and F. Foreman, on behalf of J. Rolfe, was the resp.

*R. Bourke* appeared for the app.—The two rents paid by the claimant cannot be joined together so as to make up 50l. He pays 40l. for rent within the provisions of the Reform Act, and 32l. for rent within those of the Registration Act, as he is sole tenant of lands at 40l. and joint tenant of lands at 64l. The case differs only from *Gadsby v. Barrow*, 1 Lutw. 142, inasmuch as in that case the properties were held under different landlords. In this case they are held of the same landlord. He referred to 1 & 2 Will. 4, c. 25 (the Reform Act), s. 20; 5 & 6 Vict. c. 18 (the Registration Act), s. 73.

*Hannen* (Underdown with him) for the resp.—No reason can be given why the Legislature should prevent a man from tacking two single holdings held under the same landlord. It has never, however, been decided. Elliot, in his book on Registration, says that revising barristers have differed in opinion on the subject. It has been decided under a local Act requiring a certain rental to give a qualification for voting that the rentals of separate tenements may be tacked:

*R. v. The Churchwardens of St. Pancras*, 1 A. & E. 30.

ERLE, C. J.—I think that the decision of the revising barrister in this case was wrong. The qualification given under the Reform Act is a rent of 50l. The claimant pays a rent of 40l., and he cannot qualify without the aid of the Registration Act, 6 Vict. c. 18, which provides for the qualification of persons occupying jointly. The words which give that qualification are precisely limited, and I do not feel myself at liberty to say that any qualification arises out of a state of things not mentioned by the words of the enactment, "where any such lands and tenements shall be jointly rented and occupied by more persons than one, each of such joint occupiers shall be entitled to be registered and vote in such election as last aforesaid in respect of the lands and tenements so jointly rented and occupied, in case the yearly rent for which they shall be *bonâ fide* liable in respect of such lands and tenements shall be of an amount which, when divided by the number of such occupiers, shall give a *bonâ fide* rent of not less than 50l. for each and every such occupier, but not otherwise." Now the claimant occupied, jointly with his father, another tenement, for which they together were liable for 64l., and the claim is to have 32l. of the jointly-rented premises added to 40l., and so to make up the 50l. But the words of the statute do not authorise the junction of these two rents. If he claims under the qualification given to the joint occupants he must show a joint occupation giving to each of the joint occupiers 50l. If they have each less than 50l. the statute says they shall not be qualified. I do not pretend to fathom the intentions of the Legislature further than the clear words of the enactment guide me. The first statute says, if you are a tenant for 50l. you may vote; the second says, if you are a joint tenant, and hold 100l. jointly with another person, then each of you may vote; but unless the joint holding is such as to give every one of the joint holders 50l., then you are not entitled. It may be that the difficulty of adding the separate rent to the apportionment

C. P.]

FLATCHER v. BOODLE.

[C. P.]

of a joint tenancy might be expected to create confusion; but I do not pretend to fathom the intentions of the Legislature. It seems that the claimant is unqualified under either of the statutes, and that the revising barrister's decision is wrong, and must be reversed.

WILLIAMS, J.—I am entirely of the same opinion. It seems to me impossible to come to any other conclusion upon the language employed in the 73rd section of the Registration Act, and upon the ordinary construction of the words used.

WILLES and KEATINGE, JJ. concurred.

*Judgment for the app.*

Attorney for the app., H. Smith.

Attorneys for the resp., Amory, Travers and Smith.

Jan. 13 and 14, 1865.

FLATCHER v. BOODLE.

*Rates—Payment by incoming tenant of proportionate part of a rate—17 Geo. 2, c. 38, s. 12—2 Will. 4, c. 45, s. 27.*

A. entered on the occupation of some premises in a borough before the 1st Aug. 1863, and claimed in respect of the same to be registered as a 10l. householder. The outgoing tenant left part of a rate, which was made in April 1863, and extended to September, unpaid; neither did A. pay it, as it was not demanded of him; neither was his name inserted in the rate; he, however, paid the subsequent rates, which were made half-yearly:

*Held (Williams, J. dissentiente), notwithstanding the 12th section of 17 Geo. 2, c. 38, which enacts that the incoming tenant is liable to pay a proportionate part of such rate, and the 27th of 2 Will. 4, c. 45, which enacts that no householder shall be registered unless he has paid all rates payable from him in respect of the premises for which he claims; that, as he had no notice from the parish officers to pay the proportionate part of the rate of April 1863, it was not payable from him within the meaning of the 27th section, and that he was entitled to be registered.*

This was a consolidated appeal from the revising barrister of the borough of Cheltenham.

J. Fletcher duly objected to the name of James Barrington being retained on the list of voters for the borough of Cheltenham, on the ground that a portion of the poor-rate for the qualifying year had not been paid. It was proved before the revising barrister, that the poor-rates of the parish in which the qualifying premises are situated are made half-yearly; and that one was made in April 1863, which extended to the following September, when another was made which extended to March 1864, in which month a new rate was made, which is the existing rate.

The voter went into occupation of the qualifying premises prior to Aug. 1, 1863, but paid no portion of the rate then in existence, which was not demanded of him, neither was his name inserted in that rate.

It was contended against the voter, that inasmuch as 2 Will. 4, c. 45, s. 27, requires the payment of all rates payable from the voter, he should have gone to the overseers and paid his portion of the April 1863 rate, to which he was rendered liable by 17 Geo. 2, c. 38, s. 12, and if any dispute had arisen as to the amount they could have had it settled by the justices in the manner provided by that section, and the voter having failed to adopt this course, he was disqualified, for the omission was not

remedied by any provision in the Registration Acts, as 6 & 7 Vict. c. 18, s. 75, only applies to a misnomer, or inaccurate or insufficient description.

The revising barrister held that, as the Act of Geo. 2 does not say that the incoming tenant shall pay, but only that he shall be liable to pay, and as his proportion which he is so liable to pay must before he can pay it be first ascertained either by agreement between the parties, or in case of dispute by the decision of two or more justices of the peace, and as by 6 Vict. c. 18, s. 75, a person in other respects qualified shall be considered as having paid all rates when he shall have *bond fide* paid all sums of money which he shall have been called upon to pay as rates, therefore an unascertained proportion which the voter had never been called upon to pay was not such a rate as had become payable from him in respect of the qualifying premises within the meaning of 2 Will. 4, c. 45, s. 27, and he overruled the objection and retained the name.

If the court should be of opinion that the revising barrister was wrong, the name of J. Barrington was to be expunged from the list. There were three other cases in which the same point was raised, which were consolidated with this case.

Sect. 12 of 17 Geo. 2, c. 38, recites that "persons frequently remove out of parishes and places without paying the rates assessed upon them, and other persons do enter and occupy their houses or tenements part of the year, by reason whereof great sums are annually lost to such parishes," and enacts,

That where any person or persons shall come into or occupy any house, land, tenement, or hereditament or other premises, out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively in the same manner and under the like penalty of distress as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate, which said proportion shall, in case of dispute, be ascertained by any two or more of His Majesty's justices of the peace.

Sect. 27 of 2 Will. 4, c. 45, which confers a vote upon the occupier of a house, &c., of the annual value of 10l, if duly registered, provides that

No such person shall be so registered in any year unless such person shall have been rated in respect of such premises to all rates for the relief of the poor, &c., or unless he shall have paid on or before the 20th day of July in such year all the poor's rates and assessed taxes which shall have become payable from him in respect of such premises previously to the sixth day of April then next preceding.

Sect. 75 of 6 Vict. c. 18, after reciting 2 Will. 4, c. 45, and that doubts had arisen how far any misnomer or inaccurate or insufficient description in a rate of the person occupying any such premises as in the said recited Acts are mentioned, enacts

That where any person shall have occupied such premises as in the said recited Acts are mentioned, for twelve calendar months next previous to the last day in July in any year, and such person being the person liable to be rated for such premises, shall have been *bond fide* called upon to pay in respect of such premises all rates made for the relief of the poor in such parish or township, during the time of such his occupation so required as aforesaid, and such person shall have *bond fide* paid, on or before the twentieth day of July in such year, all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously to the sixth day of April then next preceding, such person shall be considered as having been rated and paid all rates in respect of such premises within the meaning of the said recited Act, and be entitled to be registered in respect of the same in any year; any misnomer or inaccurate description in any rate of the person so occupying or of the premises occupied notwithstanding.

Dowdeswell, for the app., contended that the statute of 17 Geo. 2, c. 38, created a liability to pay such proportion of the existing rate as the outgoing tenant had not paid from the termination of his tenancy, and that this proportion not having been



C. P.]

FLATCHEE v. BOODLE.

[C. P.]

paid, it was payable by the claimant under sect. 27 of the Reform Act, and he was bound to pay it in order to be entitled to vote. If he did not know the proportion, it was easy for him to have ascertained it and then tendered the amount to the parish officer, and then, in case of dispute, he could have had the amount settled by the justices. He cited

*Bishop v. Smedley*, 2 C. B. 90;

*Ford v. Smedley*, 12 C. B. 822;

*Moss v. Lichfield*, 7 M. & G. 72.

*Campbell Forster*, for the resp., contended that no part of the existing rate was payable by the incoming tenant until a demand had been made upon him of the proportionate amount of the existing rate to which he was liable. That, on a demand being made, then the sum demanded, if not disputed, became an existing debt, "payable" by the incoming tenant. If disputed, two justices were to assess the amount to be paid, which, when "assessed," but not before, could be enforced by distress-warrant, if payment were refused. That the incoming tenant could not know what amount was his proportion of the existing rate until a demand was made; for the outgoing tenant might have paid the whole, and rates were irregular as to the periods when they were made, differed in their amount, and were due when made; they were not on the same footing as assessed taxes, for, as Maule, J. pointed out in *Ford v. Smedley*, they were ascertained in amount, and were made payable quarterly. That even if the unascertained amount which a man was liable to pay was a sum "payable from him" within the 27th section of the Reform Act, it was nevertheless cured by the 75th section of 6 Vict. c. 18.

*Dowdeswell* replied.

ERLE, C. J.—In this case the question for the consideration of the court is, whether the claimant is disqualified from voting by reason of the non-payment of rates which have become payable from him in respect of the qualifying premises. The facts are, that the claimant came into possession before Aug. 1863, and that the custom in the parish was to make rates half-yearly. The claimant has paid all the rates during the time of his occupation of the premises, but some portion of the rate, from April to Oct. 1863, was left unpaid; and it is contended that portion had become payable from him within 2 Will. 4, c. 45, s. 27, by virtue of 17 Geo. 2, c. 38, s. 12. In this case some arrear of that rate had been left unpaid by the outgoing tenant, but, until the sitting of the revising barrister, the claimant believed that everything due from him had been paid. Mr. Dowdeswell contends that there was a liability to pay under the statute of Geo. 2, and that the rate was "payable from" the claimant by virtue of that statute; but I take the words of the 12th section of that statute to mean that the claimant was subject to be made liable to pay a proportion of the rate, and not that he was primarily liable. It was not a liability of which the claimant had a means of knowledge. The amount depended on a contingency, because the outgoing tenant might have paid the rates beyond the time that he was in occupation, and until the claimant had been called upon to make good the default of the outgoing tenant to pay the whole rate, I think that amount was not "payable" by him, and that he was not disqualified under the 27th section of the Reform Act. The words in that proviso, "payable from him," in my opinion involve the idea of a definite sum payable *in present*, of which he has been guilty of some default, and it was not a sum which the claimant had no possibility of ascertaining till called upon to pay it. The words in the section are "payable from him," not "in respect of what he shall have become liable to," but in respect of "what

shall have become payable," and until the contingent amount of his liability had been ascertained, he could not know what was payable from him. The proviso takes away the franchise in case the claimant has not borne his share of the public burden imposed by poor-rates and assessed taxes. But poor-rates differ totally from assessed taxes, the latter being payable at certain periods and of certain amounts, whereas the extent of the poor-rates cannot be foreseen, as they are laid according to the requirements of the parish, and in some cases a peremptory *mandamus* may be made by the Q. B. to make and pay them forthwith; they are due the instant the rate is complete. This rate, too, is variously paid; by the wealthy, at any time the collector chooses to call for it; from the poor as it can be obtained. Nobody, therefore, can tell what has been left unpaid by the outgoing tenant. It might be, if the tenant were rated at one shilling in the pound, and the rate was collected weekly, that the sum might be a halfpenny per week, and the outgoing tenant might have left an arrear of only a week or so; was the election agent to be able to disfranchise the incoming tenant because these trifling sums had not been paid, and of which he could know nothing? It is clear to my mind that the proportionate amount of the rate never became "payable" until the amount was ascertained; and I think, therefore, that the revising barrister was right in his decision.

WILLIAMS, J.—I have the misfortune to differ with the rest of the court. The franchise was made subject to certain conditions, one of which was that the party claiming to vote shall have paid, before the 20th July, the poor-rates which shall have become payable from him in respect of the premises; and the question is, has the claimant fulfilled that condition? It appears to me that he has not. Under the statute of Geo. 2, the incoming tenant is liable to pay his portion of the existing rate, and the question is, what proportionate amount is payable by him? It is said that it is not payable by him, because, whether he is liable to pay any given amount depends on a variety of circumstances not ascertained, and until they are ascertained no particular amount is payable. But the statute of Geo. 2 says he is "liable to pay," and I am of opinion that he is liable to pay a sum which becomes payable within the meaning of the 27th section of the Reform Act. I think he is liable to pay the proportionate part of the rate when ascertained, and it matters not whether there may be a difficulty in ascertaining it or not; and as to no demand being made, it cannot properly be made for a thing that is already payable. He is therefore liable for the proportionate amount, whatever that amount may be. That being so, it is impossible to say that the claimant has paid all the poor-rates to which he has become liable in respect of his occupation, or that he has paid all that have become payable, inasmuch as he has not paid the proportion of the rate due from him under the statute of Geo. 2, and which I think he is liable to pay, and is payable from him under the words of that statute.

WILLES, J.—I am of opinion that the revising barrister was right, or at all events I cannot see my way clearly to say that he was wrong. The question no doubt is one of very considerable nicety. The incoming tenant could not know what portion of the rate was paid, and no claim was made on him by the parish officers. The revising barrister held there was a distinction between nonpayment of such a rate, and nonpayment of a rate made while the claimant was in occupation. The incoming tenant cannot be bound to take notice if such a rate were paid, and unless one goes the length of

C. P.]

FREEMAN v. GAINSFORD.

[C. P.]

saying that he was bound to make the inquiry, how was he to know? I think the statute of Geo. 2 was not intended to regulate generally the rights of outgoing and incoming tenants, but to give the parish officers a remedy in respect of a proportion of the rate according to the time of occupation; and provision is made in the case of an outgoing tenant not paying the rate. There is a distinction between the ordinary liability to pay a rate, and the conditional liability to pay where the outgoing tenant has not done so. In construing this Act it should be borne in mind, that the register is but evidence of the right to vote, and that the liability under the statute of George is but a condition imposed upon the right; and I see no reason why the ordinary law respecting conditions should not be applied. The claimant is entitled to have the condition enforced against him, with the same strictness as a condition regarding any other right would be enforced but no more. The parish officers were like the obligees in an ordinary bond, and the claimant was like the obligor. If the condition had not been performed the ordinary principle ought to be applied, which was to give notice, and the notice ought to be given by the person who was to receive the money or the estate, otherwise there could be no forfeiture. That person here is represented by the parish officers, and until they gave notice of the rate being due, there was no default. I think therefore that this claimant is entitled to his vote.

**HEATING, J.**—I agree with my Lord and my brother Willes that the revising barrister was right. The claimant not having himself necessarily any notice of the state of things which would make the existing rate payable by him, when he entered upon his occupation, there was an obligation on some one to give him notice, and I think the parish officers ought to have done so. The statute of Geo. 2 contemplates the outgoing tenant going away and leaving the rate unpaid, and the rate so unpaid would become payable by the incoming tenant. But it seems to me to be a reasonable construction, that no demand having been made, or notice given to the claimant that a proportion of the existing rate was due, it has not been shown this was a rate "payable" by him.

*Decision affirmed.*

Tuesday, Jan. 17, 1865.

FREEMAN v. GAINSFORD.

*Claim to a vote as a 40s. freeholder in respect of a share in a music-hall—Shareholders entitled to a share in the profits.*

*The app. claimed a right to vote in respect of a share in a music-hall. The proprietors had in 1864 by deed vested the music-hall, and the power of management, in trustees, reserving to themselves a right to proportionate shares of the profits, but no direct interest in the lands or property, and one of the provisions of the deed was, that if all the proprietors should not execute it, the same should nevertheless bind all the parties who did execute the same:*

*Held, in accordance with the case of Bennett v. Blain, that the claimants had no direct interest in the land so as to entitle them to be registered, but only a share of the profits, and also that the argument that some of the proprietors had not executed was not available on account of the provision above referred to.*

At a court held before me, the revising barrister appointed to revise the list of voters for the West Riding of the county of York, Thomas Hadfield objected to Charles Stanley as not having been entitled on the last day of July 1864 to have his

name retained on the list of voters for the township of Sheffield in and for the West Riding. The name stood on the copy of the register relating to the township of Sheffield as follows:

Christian name.	Place of abode.	Nature of qualification.	Place in township.
Charles Stanley.	St. Throgmorton-street, London.	Freehold shares.	Music-hall, Surry-street.

By a deed made on the 2nd Oct. 1828, certain persons became entitled to undivided freehold shares in the Sheffield Music-hall, and claimed to be on the register of voters, and it was admitted that the provisions of that deed were such as to qualify them to be there. A subsequent deed, dated the 13th June 1864, was prepared, a copy of which is appended to and is to be read and taken as a part of this case.

It was agreed that the income received by the claimant, and by each of the other four claimants after-mentioned, is in annual amount sufficient to qualify, if the court should be of opinion that he and they are in other respects qualified and entitled to remain on the register. This deed was, previous to the 31st July last, executed by but thirty-two of the proprietors of shares in the music-hall, they being proprietors of 110 out of the whole 184 shares. There are twenty-five other proprietors by whom it was not then executed: by some small number of whom it has since been executed. The present claimant and the four other claimants after-named had, however, all executed this deed previous to 31st July last, as also had all the new trustees.

It was contended, for the claimant, that the second deed of the 13th June last had not yet come into operation so as to constitute a new body of trustees; and inasmuch as twenty-five proprietors representing the seventy-four 184th share, have not yet executed the deed, that until the whole had signed no trustees thereunder are effectually appointed and the rights of those who have not are not affected by its provisions. It was also urged that the said deed could not operate in any way until it had been executed by all the shareholders, and that the only deed before the court was the original deed of 1828.

It was also argued, on behalf of the claimant, that even if the effect of the deed of the 13th June was to create a body of trustees for the purposes therein named, such creation would not destroy the equitable freehold interests of the claimant and his co-proprietors in the music-hall.

For the resp. it was argued that the proprietors, being resident in various distant places, and inasmuch as it would, in all probability, be long before the deed of 1864 could be executed by all of them, clause 32 of that deed was inserted for the very purpose of making the deed valid and effectual as to the share of those who from time to time executed it, even although not executed by all of the proprietors; that all the present claimants had executed the deed of 1864, and that their shares were therefore liable to the operation of it; that each proprietor of an undivided 184th share was competent to execute a deed declaring trusts respecting his share, and that, on the execution of such deed, his share would be liable to such trusts; that what one could do without the concurrence of any intermediate number of proprietors, he could do without the concurrence of all, and bind his own shares as effectually as all the shares would be bound by the execution of all, and that in this instance a majority of the shareholders holding a majority of the shares, and all the new trustees had executed the deed of 1864, and they had therefore practically the power and control in their hands.

Under the circumstances I was of opinion that the

C. P.]

FREEMAN v. GAINSFORD.

[C. P.]

claimant ought not to have been on the register, and expunged his vote. If the court should be of opinion that the said Charles Stanley and the other claimants are not disqualified under the provisions of the said deed of 13th June 1864, the register should be amended by the insertion of the names of the said Charles Stanley and the other claimants; but if the court should be of opinion that they are disqualified by that deed, then the register should remain as amended by me.

This is a consolidated appeal of five cases, which all depend on the same decision; and I hereby appoint John Freeman, a party interested and consenting, to appear for the apps., to prosecute the said appeals, and I hereby appoint Robert John Gainsford in like manner to be resp. in the said appeals.

The deed of the 13th June 1864 was made between the proprietors of the music-hall, whose names and seals were affixed of the first part, and the trustees of the second part; and which after reciting the deed of 1828 vesting the fee of the music-hall in trustees for the proprietors, and a subsequent mortgage under the powers of that deed, contained a mutual agreement between the parties thereto, that the Sheffield Music-hall, and the shares, estates and interests therein of the parties of the first part should be governed by the rules thereafter appearing numbered 1 to 83.

The following are the material rules :—

1. The parties hereto of the second part, their heirs, assigns and successors in office, shall be trustees of the Sheffield Music-hall, and shall have the several powers hereinafter appearing and distinguished by the letters A. to L.:

A. To vest or cause to be vested the fee-simple and inheritance of the Sheffield Music-hall in themselves or any of their body for the time being or in such person or persons as the trustees shall think proper.

B. To give directions to the said Offley Shore, his heirs and assigns, or other the person or persons for the time being entitled to the fee-simple and inheritance of the said Sheffield Music-hall, and to the said Marcus Smith, and James Henry Barber, or their executors, administrators and assigns, or other the person or persons for the time being entitled to the term of years mentioned in the said indenture of the 26th day of Aug. 1853, with regard to any lease, mortgage, sale, agreement, deed, conveyance, or assurance action, suit or other proceeding, matter, or thing which the trustees may think it proper that the persons receiving such directions should make, begin, do, or concur in.

C. To grant or cause to be granted any lease, or create any tenancy for any period not exceeding a tenancy from year to year, and subject to any provision.

D. With such consent as is mentioned in rule 7, to grant or cause to be granted any lease, or create any tenancy for any period exceeding a tenancy from year to year.

E. With such consent as aforesaid to enlarge or alter the existing buildings, and to acquire any additional land, buildings, easements or rights.

F. To pay off, transfer, or otherwise deal with any mortgage for the time being existing, or to make or cause to be made any new mortgage either in fee or for any term of years or otherwise for any sum or sums not exceeding the amount of such existing mortgage.

G. With such consent as aforesaid to make or cause to be made, any new mortgage either in fee or for any term of years or otherwise for any money exceeding £5000 or other existing principal mortgage money.

H. With such consent as aforesaid to sell.

I. To execute and cause to be executed such agreements, mortgages, conveyances, deeds and assurances, as they shall think proper, and to receive or direct the payment or receipt of any money, and generally to do all acts necessary for effectually exercising the foregoing powers or any of them, and especially to confer on any mortgagee or mortgagees any powers of sale or lease or other powers, and upon any sale to make any reservations especially with regard to minerals or easements.

J. Generally in all matters not hereinbefore specified to deal with and manage the Sheffield Music-hall as if the trustees were the absolute beneficial owners thereof.

K. To receive the rents and annual profits and all income and capital monies arising from the Sheffield Music-hall or the exercise of the powers aforesaid.

L. To make from time to time bye-laws for regulating their proceedings as amongst themselves, and especially to name a quorum for meetings of their own body.

5. Out of the rents and annual profits, and money in the nature of income and not capital, the trustees shall annually, or oftener if they think proper, declare a dividend, and such dividend shall be divided amongst the proprietors, according to their respective shares in the Sheffield Music-hall. The trustees

may, from time to time, set aside such money (if any) as they shall think proper, as a reserved fund, to meet contingencies and in aid of future dividends, and such reserved fund shall rank as capital until it is otherwise appropriated. The reserved fund shall never, however, exceed £5000; it may be invested by the trustees upon any securities allowed by law for trust-money, or upon mortgage of freehold, copyhold, or leasehold hereditaments, or upon the mortgages or debentures; or if preferential stocks or shares of any municipal or other corporation or company incorporated by special Act of Parliament, and the income therefrom shall rank as income from the Sheffield Music-hall.

7. The several powers hereinbefore given to the trustees, and respectively distinguished by the letters D, F, G and H, shall be exercised by the trustees with the consent of the proprietors, testified by the resolution of a special general meeting of them, or by writing under the hands of such number of the proprietors as shall represent two-thirds of the shares.

#### "FORM OF TRANSFER."

"I, of , being the proprietor of the share No. in the Sheffield Music-hall, in consideration of the sum of £ sterling, paid to me by , of , do hereby grant the same share to the said , his heirs and assigns, subject to the provisions of the association-deed, dated the 13th day of June 1864, and to any rules in force in pursuance of such deed; and I, the said , do hereby accept the said shares, subject to such provisions and rules.

"As witness our hands and seals this day of "

82. If all the proprietors of shares in the Sheffield Music-hall shall not execute these presents, the same shall nevertheless bind all the parties who do execute the same, and the same proportion of majorities of the parties who do so execute shall bind the whole of them as are hereinbefore appointed to bind the whole body of proprietors.

Cleasby, Q.C., for the app., contended that the deed of 1864 did not deprive the shareholders of the equitable interests which they had previously enjoyed, but merely altered the management of the affairs of the music-hall; and that the shares were actual shares in the building itself, and not merely in the profits, and consequently that the case did not come within that of *Bennett v. Blain*, 9 L. T. Rep. N. S. 506; 15 C. B., N. S., 533; and also that the deed was not operative until all the proprietors had executed it.

Hannen, for the resp., contended that as to the last point the 32nd rule was conclusive; and as to the other, that the shareholders had only a right to a share of the profits, and had no direct interest in or right to any specific portion of the property of the company, and therefore that they were not qualified to vote.

Cleasby, in reply, referred to

*Baxter v. Brown*, 7 M. & Gr. 198.

ERLE, C. J.—I am of opinion that the decision of the revising barrister ought to be affirmed. I have looked at the provisions of this deed, and at those in the case of *Bennett v. Blain*, and it seems to me that the two deeds operate substantially to produce the same interest, and that is the interest in the profits which are made by the management of the concern. I take the principle laid down by my brother Williams in *Bennett v. Blain* to be sound in law; that under deeds like this the shareholder has no direct interest in the land, but only a right to a share of the profits. The point about the whole of the shareholders not having executed, I think, is not available for the app., because the 32nd clause has made a provision that the deed shall be binding on every one who executes it, which precludes the app. from any benefit on that point.

WILLIAMS, J.—I am also of opinion that we are bound in this case by the case of *Bennett v. Blain*; the principle on which that case was decided is quite applicable to the present, and I do not see anything that Mr. Cleasby has said that prevents its application. That principle I apprehend to be, that the trust on which the equitable claim in question is founded gives no direct right to any portion of the receipts of the music-hall, but only to a proportionate share of the profits. That is a principle that has governed a long series of cases;

C. P.]

SCOTT v. DURANT.

[C. P.]

on a question of whether this sort of property is real or personal estate within the Statute of Mortmain. On that principle all the cases have been based, and it seems to me it is impossible to say that this decision is wrong.

WILLES, J.—I am of the same opinion, and I give judgment in the language of my brother Williams in *Bennett v. Blain*, where he says "a shareholder in a company of this description has no direct interest in or right to any specific portion of the property of the company, but only a right to receive a share of the profits."

KEATING, J.—I am of the same opinion. I think there is nothing in this deed to distinguish this case in principle from the case of *Bennett v. Blain*.

*Judgment for the resp.*

Wednesday, Jan. 18, 1865.

SCOTT (app.) v. DURANT (resp.)

*Borough vote—Signature of case by resp.*

The revising barrister for a borough held his court on the 21st Oct., when certain objections were raised by the attorneys of the resp. to the app.'s vote. The barrister adjourned the court till the 28th, when he decided in favour of the resp. on one point, and against him on the others. He was asked by the app. to grant a case, which he said he would do, and it was agreed that all objections on points of law should be waived, and that the resp. should appear to answer the appeal; it was also agreed that the case should be brought to the barrister's chambers to be settled, and that the resp.'s attorney should have an opportunity of stating the points he had raised, which had been overruled. On the 4th Nov. the attorney of the app. showed the case to the resp., but, as he was unable to show it to his attorney, and as a point raised by him had not been inserted, he refused to sign it. On the following day the barrister signed it:

*Held, that the appeal must be struck out, as it was incomplete, and therefore not before the court.*

This was a rule calling on the app. to show cause why the case should not be struck out of the list of appeals in this court from the decisions of the revising barristers, on the grounds that there was no notice in writing given by or on behalf of the said app. before the revising barrister's court; that the revising barrister did not state the case on his decision, or read the statement, or indorse or sign it in open court, or as required by the statute, 6 Vict. c. 18, s. 42; and that the requisitions of the 44th section of the said statute were not complied with; and that no declarations were signed, and no resp. or app. appointed as required by the said last-mentioned statute; and that Durant was improperly entered as resp.

It appeared from affidavits produced that at the court of the revising barrister for the borough of New Windsor, held on the 21st Oct. last, Mr. Rogers, as attorney for Durant, the resp., raised certain objections against the names of the app. and others being retained on the register. The revising barrister said that he should take time to consider, and adjourned his court to the 28th Oct., when he gave his decision in favour of the objector on one point, and against him on the others, and struck out the names from the list. He was then asked by the parties who appeared for the app. for a case, which he said he would grant if he could, but as it was getting near the end of the day, and a good deal of business to be done, it was agreed that all objections on points of law should be waived, and that the resp. should appear to answer the appeal

in this court; Durant at the time stating in open court that he would so appear, and that the appeals might be consolidated. This being settled, the revising barrister said that Rogers should have an opportunity of stating the objections which he had raised, and which had been overruled. It was then agreed that the parties should bring the case to the chambers of the revising barrister, which were in London, for him to settle. On the 4th Nov. nothing having been done prior to that day, Long, the solicitor to the app., brought a draft of the case to Durant, which he took to Reading for Rogers's approval, but as he was absent from home he brought it back and returned it to Long, stating that he could not sign it, as Rogers had not seen it, and also as a point raised by him had not been inserted.

On the 5th Nov., which was the last day for doing it, the barrister signed the case, and Long on the same day gave a copy of it to Durant.

The rule having been obtained upon these facts,

*Sawyer* now showed cause against it.—It was agreed by the parties that the requirements in ss. 42-45, of 6 Vict. c. 18, should be dispensed with, which could be done, as they are merely directory and not imperative, and they differ from ss. 62 and 64, the latter having negative words in them which make them imperative, which the others have not: (*Autey v. Topham*, 5 M. & Gr. 1.) Then they say that the barrister has no jurisdiction to sign a case out of court, and that consent cannot give the jurisdiction; and *Knowles v. Holden*, 24 L. J. 223, Ex., will probably be relied on. But there the Court held that there was no jurisdiction, because there were negative words, and it is not like a case where there is jurisdiction at first, which is afterwards extended by the consent of the parties: (*Andrews v. Elliott*, 5 E. & Bl. 502.) Then it is said that, under sect. 43, Durant ought to have signed the case, and been resp.; but, as he did not decline to be resp. in writing, the barrister could not name any one else as resp., and therefore the signature, under sect. 44, became unnecessary. Then, by sect. 33, the barrister is to hold his court between the 15th and 31st Oct. and they therefore say that section prevents the barrister from doing anything after that date; but I contend that is a provision which only applies to the actual business, and does not apply to the mere signing of a case, and even if it did, then it would be cured by the consent I have relied on. There is the case under the Irish Act, of *Agnew v. Fowler*, 1 Ir. C. L. Rep. 462, relied on by the other side, which, however, I submit, is not good law; and, even if it was, it does not apply here, as in that case there was no consent between the parties. [KEATING, J.—In *Whithorn v. Thomas*, 7 M. & Gr. 1, I was the revising barrister, and signed the amended case in this court.] He also referred to

*Pring v. Estcourt*, 4 C. B. 71;

*Freeman v. Reed*, 30 L. J. 123, M. C.;

*R. v. Mayor of Rochester*, 7 E. & Bl. 910.

*Griffiths* in support of the rule.—There was no consent to the case as now stated. There was an understanding that the app.'s attorneys should state a case subject to the approval of Rogers, and then that it was to be taken to the revising barrister for signature. Then there was no written notice of the desire of the parties whose names were struck out to appeal; and the barrister did not state the facts and his decision in writing, nor read such statement in open court to the app. and then and there sign it. Then, as this is a consolidated appeal, the Act requires that the case should be stated and read in open court, and unless it is so stated and read there is no appeal. Now, the app. did not make the written declaration as required by sect. 42. There was no statement of the case by

C. P.]

STACEY v. WHITEHURST.

[C. P.]

the revising barrister; nor was the case read in open court, nor signed then and there by the barrister, nor signed by the app. at that time; nor was there such indorsement on the statement as required by the Act; neither did the barrister declare the appeals consolidated, or appoint a resp. according to sect. 44. Then, where the statute gives the subject power to appeal under certain conditions, these conditions must be complied with before the parties can appeal, and the matters required by the statute cannot be waived by consent, and even if they can, there was no consent here.

ERLE, C. J.—A great many points have been raised in this case, but we are obliged so give judgment in favour of Mr. Griffiths, on the ground that the appeal is incomplete, and therefore not before us.

WILLIAMS, WILLES and KEATING, JJ. concurred.

*Rule absolute.*

Wednesday, Jan. 25, 1865.

STACEY (app.) v. WHITEHURST (resp.)

Game—Trespass in pursuit—Aiding and abetting—  
11 & 12 Vict. c. 43, s. 5.

*The resp. was charged before justices, under 11 & 12 Vict. c. 43, s. 5, with aiding and abetting A. in committing a trespass in pursuit of game. The evidence before the magistrates was, that the resp. and A. were driving along a high-road in a trap, and that A. got down and went into an adjoining field, and shot a hare which he brought back and placed in the trap. The resp. remained in the trap, which he kept standing still till A. returned with the hare. The resp. then drove the trap along the road, A. walking behind. A. was convicted of trespassing in pursuit of game:*

*Held, that there was evidence from which the justices might convict the resp. of aiding and abetting in the offence of trespassing in pursuit of game, and that the resp. might have been convicted as a principal.*

Case stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Cruckton, in and for the division of Foed, in the county of Salop, on the 20th Oct. 1864, an information was preferred by Charles Stacey (hereinafter called the app.) against Thomas Teece Whitehurst (hereinafter called the resp.) under sect. 5 of the Act of 11 & 12 Vict. c. 43, charging that John Whitehurst, on the 11th Oct. 1864, at the parish of Pontesbury in the county aforesaid, did unlawfully commit a certain trespass by entering and being in the daytime of the same day upon a certain piece of land in the possession and occupation of Stephen Jones, there in search or pursuit of game, to wit, a hare, without the licence and consent of the owner of the land so trespassed upon, or of any persons having any right of killing the game upon such land, or of any other person having any right to authorise the said John Whitehurst to enter or be upon the said land for the purpose aforesaid, contrary to the form of the statute in such case made and provided; and that Thomas Teece Whitehurst, of the Mount, Shrewsbury, in the said county, was then and there present aiding and abetting the said John Whitehurst to do and commit the said offence. And upon the hearing we dismissed the said information against the said Thomas Teece Whitehurst upon the grounds hereinafter stated.

The said John Whitehurst was, before the hearing of the above information, convicted of the trespass and fined in the penalty of 2*l.* and costs.

Upon the hearing of the information it was proved on the part of the app., that on the 11th Oct. 1864, at the parish of Pontesbury, in the county of Salop, the said John Whitehurst and the resp. were

passing along the turnpike-road in a trap on their way to shoot at the Oaks Farm, belonging to their sister; and when near the Lea-cross in the said parish of Pontesbury, the trap, which was driven by the said Thomas Teece Whitehurst, was stopped, and that the said John Whitehurst got out of the trap and entered a field in the occupation of Mr. Stephen Jones with a gun and a dog, and shot a hare, which he picked up, and on returning into the turnpike-road, where the trap had stopped a minute or so, gave the hare to the resp., according to the evidence of two witnesses at the distance of 100 yards and a quarter of a mile respectively. The resp. then drove along the road, and the said John Whitehurst walked about five or six yards behind the trap to the public-house at the Lea-cross.

It was contended, on the part of the resp., that he was not an aider and abettor in the trespass, inasmuch as he was passing along the turnpike-road for a lawful purpose on his way to shoot on his sister's farm at the Oaks (which was not denied or questioned), and that he (the resp.) was not there for the purpose of aiding and abetting in the commission of the trespass, and that not having left the trap he could not be an aider and abettor; and that so soon as the said John Whitehurst returned into the said turnpike-road, the trespass had been committed and completed. And we being doubtful whether upon the evidence given before us the resp. was in law an aider and abettor, thought it right to dismiss the case as against the said resp. Thomas Teece Whitehurst.

A copy of the depositions accompanies this case, and which copy, so far as relates to the said Thomas Teece Whitehurst, is to be taken to form part of this case.

The questions of law arising on the above statement for the opinion of the court therefore are,

First, whether the said Thomas Teece Whitehurst was an aider and abettor in the commission of the trespass within the meaning of the said Act of the 11 & 12 Vict. c. 43, s. 5.

Second, whether the said dismissal is valid or otherwise. And the court is humbly solicited, according to the power vested in this court by the said statute 20 & 21 Vict. c. 43, to remit the case to us, the said justices, with the opinion of the court thereon, or to make such other order as to the court may seem fit.

*H. James*, for the app., was stopped.

*Raymond*, for the resp., referred to

11 & 12 Vict. c. 43, s. 5;

*Reg. v. Scott*, 5 Q. B. 498.

ERLE, C. J.—We think that the case should be sent back to the magistrates. The duty is not thrown on the court of drawing inferences of fact, which is the duty of the magistrates. The question of law sent up to us is, whether there is any evidence on which, according to law, they could be justified in finding the resp. guilty of the offence. I find abundant evidence on which the justices might do so, though I do not say that it was their duty to do so. From the facts before them, the magistrates came to the conclusion that the app. and John Whitehurst were engaged in the common unlawful purpose of taking the hare, so that the app. committed the offence which is comprised in aiding and abetting.

WILLIAMS, J.—The magistrates seem to have come to the conclusion that, in point of law, there was no evidence upon which they could find the resp. guilty of aiding and abetting. It is clear that there was evidence. The definition of a principal in the first degree is a person who commits an offence with his own hands. That of a principal in

[C. P.]

WHYMPER v. HARNEY.

[C. P.]

the second degree is a person who is present and aiding and abetting. The evidence is that the trap was stopped, and that the resp., by what he did, promoted the capture of the hare. On the evidence it is clear that the resp. might have been convicted as a principal. The magistrates were justified in finding him guilty of aiding and abetting.

WILLES, J.—I am of the same opinion. I agree that it would have been better if the resp. had been charged as a principal. If the statement in the information did not, if true, amount to an irresistible conclusion that John Whitehurst did trespass in the pursuit of game, I should think the information against the resp. bad; but I think that it in fact does. If the offence had been a felony, the resp. would have been an accessory, but the distinction between principal and accessory is not necessary in a misdemeanor. There are terms of art such as *felonice*, *burglariter*, *murdravit*, but it is sufficient to describe an offence in words which amount to an irresistible conclusion that the offence has been committed. It is simply a question if there was evidence of a trespass. The witnesses proved not merely that there was a trespass in pursuit of game, but that it was committed for the use of the resp.

KEATING, J.—I agree that the facts show that the resp. participated in the trespass, and was a principal. The information would have been more artificial if it had been laid under the Game Act instead of the Act of 11 & 12 Vict. c. 43.

*Judgment for the app.*

Attorneys for the resp., *Tate and Jourdain*.

WHYMPER (app.) v. HARNEY (resp.)

*Factory Acts—3 & 4 Will 4, c. 103, s. 1—7 & 8 Vict. c. 16, s. 73—Manufacture of cotton—Crimoline.*

*A building in which steam power is used, and the manufacture of crinoline steel and crinoline skirts is carried on, the process being that steel plates are cut into strips and covered with cotton, the cotton being either wound round the steel, or plaited so as to make a case for the steel, and the steel strips when covered being sewn up in the skirts for sale, is a cotton factory within the meaning of the Factory Acts.*

Case stated by justices under 20 & 21 Vict. c. 43. On the 14th Oct. 1864, John Jones Harney (hereinafter called the resp.) appeared in petty sessions before us to answer to a summons issued on the complaint of Frederick Hayes Whympier, sub-inspector of factories (hereinafter called the app.), charging that he, the resp., had offended against the Act made in the session of Parliament holden in the 13th and 14th years of Her present Majesty's reign, intituled "An Act to amend the Acts relating to labour in factories," inasmuch as the resp. on the 26th Aug. last past, at the parish and borough of Sheffield, did unlawfully employ a female above the age of eighteen years, named Charlotte Roxburgh, in the factory of him, the resp., after six of the clock of the evening of the said day, to wit, at thirty minutes past the same hour (and not to recover lost time as provided by the said Act). The resp. is the occupier of premises in Granville-street, in Sheffield, in which he carries on the trade of a manufacturer of crinoline steel, crinoline skirts, &c. There is a steam-engine on the premises, the power of which is employed to move and work machinery in three rooms used in cutting steel into strips, and working and preparing such strips as hereinafter described, and also in wrapping or covering the strips of steel with cotton thread as hereinafter described. There are four other rooms in the premises in which by hand sewing-machines

are used, steel strips inserted into skirts and the skirts finished for market.

The course of manufacturing crinoline steel is, that the resp. purchases of the steel manufacturers sheets of steel rolled very thin about three inches in width and about fifty feet in length, which sheets are cut by circular shears into strips of from one inch to three-sixteenths of an inch in width; these strips are then rivetted together by the ends in lengths of 1000 yards or thereabouts, and are reeled or wound into coils of about 80 lbs. each. The coils are then unwound, and as the strip of steel passes along, it is exposed to the influence of heat, then to that of oil, or passed over or between chilled dies or plates of cold steel. By this operation the steel strips are hardened, and, being again heated, become properly tempered, they are then ground or polished and blued in a finished state, and are then again reeled or measured out into coils, of 36, 72 and 144 yards each. In this process women are employed. Some portions of such coils are sold or tied up into skirts, without undergoing any other process than has been above described; but other portions are previously wrapped or covered with cotton thread. This cotton thread is invariably purchased by the resp. from spinners or their agents in hanks or bundles which on the resp.'s premises undergo no further manufacturing process, but by means of steam power are next wound or reeled up on bobbins of various sizes for more convenient application around or about the strips of steel. One process of such application is effected by a machine called a wrapping machine, which by steam power turns the cotton thread into single file round and round the strips of steel, as appears by the sample now produced marked "A." The other process or application of the cotton thread is effected by a machine called a plaiting machine, which by steam power effects a covering for the steel by the interlacing or plaiting of sixteen threads together around and over every part of the strips, as appears from the sample now produced marked "B." In the process of covering the steel with cotton, as above described, by steam power women are employed. The whole of the rooms and premises are within one boundary or curtilage.

On the hearing of the complaint before the justices the app. proved that he was sub-inspector of factories for the district in which Sheffield is included; that on the 26th Aug. last, in consequence of some information, he went to the works of the resp. in Granville-street between half-past six and a quarter to seven o'clock in the evening, and on going up stairs he found in a first room a number of girls and young women standing in an opening on one side of the room, which he could best describe as resembling the bar of an inn; and that the persons were in the act of delivering their work to a woman inside an apartment, where the skirts are received after they are made. Charlotte Roxburgh named in the information was at the bar delivering or passing over skirts. Then he (the app.) proceeded into a further room, and there seated on benches by the side of long tables he found a second and larger number of females occupied in making up crinoline skirts. Two male assistants of the resp. were present, and he (the app.) pointed out to them what he conceived to be the illegality of the proceedings in their being employed after six o'clock; that he (the app.) had on previous occasions been in other parts of the resp.'s premises; that there is machinery propelled by steam power, and the process in such other parts carried on is the covering of steel with cotton by machinery which twists or winds the cotton round the steel; that the piece of steel covered with cotton produced marked "A." is similar to that made on resp.'s premises; that the rooms in which the young

C. P.]

WHYMPER v. HARNET.

[C. P.]

women were working are within the outer gate and the boundary walls of the premises where the steam power is applied; that some of the young women were employed in inserting or securing the covered steel into skirts for garments called crinoline skirts.

On cross-examination by the resp.'s attorney the app. stated that he saw no machinery in the two rooms, and the young women could have done the work they were doing just as well at their own homes. That the resp. is what is termed a crinoline manufacturer. The skirts referred to in the above evidence are composed of gores cut from pieces of calico nets or plain or coloured cloths of various kinds, and sewed together into the folds or hems of which the strips of steel are run or inserted, and so the articles are formed into the female garment or appendage called a crinoline skirt.

On the above statement of facts and evidence we, the undersigned justices, were of opinion that the resp.'s premises at Sheffield were not and could not be called and considered, in the ordinary use of words, a cotton-mill, and did not become a cotton-mill or factory within the intent of the 3 & 4 Will. 4, c. 103, by reason of the application of the steam power to machinery used therein for manufacturing steel and cotton thread and other materials into crinoline by the means and in manner hereinbefore described. We were also of opinion that on such premises and for such a purpose the process of wrapping or covering by machinery crinoline steel with cotton thread was not, within the meaning of the 7 & 8 Vict. c. 15, s. 73, a process incident in any way to the manufacture of cotton or to any fabric made thereof or mixed therewith, but was incident to the manufacture of crinoline steel in like manner as the covering or wrapping of driving or riding whips, if effected by machinery of the same character with silk twist, or strong linen thread and other materials, is not a process incident to the manufacture of silk or linen, or to any fabric made thereof, but would be a process incident to the making of whips. We therefore dismissed the summons. If the court should be of opinion that our determination is correct, the same will be confirmed; if otherwise the court will make such order as the court may direct.

*Hannen* (the *Solicitor-General* with him) for the app.—The premises of the resp. are used for the manufacture of cotton within the meaning of the Factory Acts. The 3 & 4 Will. 4, c. 103, s. 1, enacts:

That no person under eighteen years of age shall be allowed to work in the night (that is to say) between the hours of half-past eight o'clock in the evening and half-past five o'clock in the morning, except as hereinafter provided, in or about any cotton, woollen, worsted, hemp, flax, tow, linen, or silk mill or factory wherein steam or water, or any other mechanical power, is or shall be used to propel or work the machinery in such mill or factory, either in scutching, carding, roving, spinning, piecing, twisting, winding, drawing, doubling, netting, making thread, dressing, or weaving of cotton, wool, worsted, hemp, flax, tow, or silk, either separately or mixed, in any such mill or factory.

By 7 & 8 Vict. c. 15, s. 73,

The word "factory," notwithstanding any provision or exemption in the Factory Act, shall be taken to mean all buildings and premises situated within any part of the United Kingdom of Great Britain and Ireland, wherein or within the close or curtilage of which steam, water, or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, or mixed with any other material or any fabric made thereof; and any room situated within the outward gate or boundary of any factory wherein children or young persons are employed in any process incident to the manufacture carried on in the factory, shall be taken to be a part of the factory, although it may not contain any machinery; and any part of such factory may be taken to be a factory within the meaning of this Act.

[The subsequent Act of 13 & 14 Vict. c. 54, under which the information is laid, regulates

the age at which women may be employed, but does not affect the question to be decided here.] It does not follow, that because the woman mentioned in the information was not proved to be engaged in working at cotton, she does not come within the Act, because the Act is for the regulation of cotton factories and applies to any person within the curtilage. The result of the two sections is, that any building will be a cotton factory if steam power is used in it in preparing cotton, or in any process incident thereto. Steam power here is used in twisting and winding the cotton for the purpose of being used in the manufacture carried on in the building. It makes no difference that steel is also employed. In *Haydon v. Taylor*, 83 L. J. 30, M. C., 9 L. T. Rep. N. S. 882, a detached set of premises in which all that was done was to wind cotton from one reel on to another, was held to be a cotton factory. The manufacturer could protect himself if he pleases under sect. 73, by having the cotton process all carried on in one room. An illustration may be drawn from

*Taylor v. Hickes*, 12 C. B. N. S., 152; 31 L. J. 242, M. C.; 6 L. T. Rep. N. S. 784.

*Quain* for the resp.—The statutes are penal, and to be construed strictly. They were intended to apply to cotton-mills: (see 3 & 4 Will. 4, c. 103, s. 2, and the penalty clause in 7 & 8 Vict. c. 15, s. 56.) A building is only a factory if it is used for the preparation of cotton, and if cotton goes through numerous stages in it. "Process incident to it" means incident to the manufacturing of the cotton. The words "mixed with other material" are only inserted to prevent persons from evading the Act by mixing it with other material, as at Bradford, where it is mixed with wool and made into what are called "mixed fabrics." [KEATING, J.—But is not plaiting cotton a process within the statute? Suppose there was a factory exclusively devoted to plaiting the cotton, which might be sold to the persons who placed it round the steel, would it not be a cotton factory? Does it make any difference that the plaiting and the winding round the steel are done on the same premises?] It depends on how the plaiting is done. *Cole v. Dickenson*, 10 L. T. Rep. N. S. 616, is an authority in favour of the resp.

*Hannen* in reply.—The Act of 3 & 4 Will. 4 actually contains the word "winding," and the process in *Haydon v. Taylor* was held to be a winding within the meaning of that Act, as well as a process within that of 7 & 8 Vict. c. 15.

ERLE, C. J.—The question in this case is, whether the premises of the resp. were shown, on the facts stated, to be a factory within the meaning of the Factory Acts. [His Lordship read the words of the sections set out above.] I am of opinion that they were shown to be a factory. Cotton is employed on them in two ways: first, for winding round steel; secondly, for making a fabric as a case for the steel, crinoline skirts being the product manufactured for sale. The fabric is composed of a plait of sixteen threads, and that is a fabric made by manufacturing cotton within the words of the statute. The case put by my brother Keating in the course of the argument is decisive of the judgment to be given here. If cotton were made up in a separate building into a material which was to be used for covering crinoline steels, no one would doubt that the building would be one used for manufacturing a cotton fabric. Cotton was used on these premises, and steam power was used; and I think that the decision of the magistrates was wrong.

WILLIAMS, J.—I am of the same opinion. Cotton thread is here woven by machinery into a fabric, and



[Ex.]

MASON AND ANOTHER v. MITCHELL.

[Ex.]

the case comes, I think, within the very words of the statute.

WILLES, J.—I am of the same opinion. A cotton fabric is certainly manufactured on the premises, and it is not the less so because it is intended to be used in combination with steel for the purpose of producing the article to be sold. I am inclined to doubt if this is a manufacture of a combination of cotton and steel. It is a manufacture of a cotton fabric which is afterwards to be combined with steel.

KEATING, J. concurred.

*Judgment for the app., the case to be remitted to the magistrates.*

Attorney for the app., *The Solicitor to the Treasury.*

Attorney for the resp., *W. Pitman.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY AND H. LEIGH, Esqrs. Barristers-at-Law.

Thursday, Jan. 26, 1865.

MASON AND ANOTHER (Administrators, &c.) v. MITCHELL.

*Husband and wife—Protection order under 20 & 21 Vict. c. 85, s. 21—Produce of "lawful industry"—Jurisdiction.*

*The protection afforded to a deserted wife by the Divorce Act (20 & 21 Vict. c. 85) is confined to the lawful earnings of her lawful industry, and does not extend to the profits acquired by her by a licentious and immoral course of life; and therefore an order of protection, obtained from a magistrate, under sect. 21 of the above Act, by a wife alleged to be deserted by her husband, will not protect her goods and property acquired by her gains and earnings as a brothel keeper.*

*Quere, whether an order obtained on a false statement of desertion, when, in fact, the wife has not been deserted, is a valid order; and whether, under such circumstances, the magistrate had any jurisdiction.*

Trover and detinue by pils. as administrators of one Ann Wild, deceased, against deft. to recover the value of certain household goods and furniture. Pleas (amongst others), not possessed and leave and licence.

At the trial before Blackburn, J., at the last winter assizes at Liverpool, the following appeared to be the facts of the case as given in evidence:

The deceased, Ann Wild, was the wife of one Anthony Wild, to whom she was married in 1847. After living not too comfortably together for some ten years, the wife, who had, as her husband alleged, been in the habit of constantly getting drunk, associating with improper characters, and harbouring men at his house, left her home one day in 1857, stripping the house of the furniture; and they never afterwards lived together. From that time, up to her death in 1864, she led an immoral life; keeping a brothel and cohabiting with different men, with one of whom, named Sanderson, she had at the time of her death been cohabiting for the previous two or three years. On the 9th Nov. 1860 she applied for and obtained from the stipendiary magistrate at Manchester, on an *ex parte* statement, a protection order under sect. 21 of 20 & 21 Vict. c. 85 (the Divorce Act), on the alleged ground that her husband had deserted her on and since 7th June 1857. At the very time of obtaining this order she was supporting herself by keeping a brothel, and the money to defray the costs of getting the order was furnished by her paramour Sanderson, with whom she was then living in adultery. The order was

duly registered in compliance with the requirements of the Act on the 12th of the same month of November.

Upon her death, in July 1864, her husband went to the house where she had been living and had died, and took possession of the furniture and effects there, and gave directions to deft., an auctioneer, to sell the same by auction. The sale took place accordingly, and realised 52l. 7s. 2d., the balance of which, after deducting rent, taxes and expenses of sale, was handed over by deft. to Wild, the husband. More than two months after this the pils., the brothers of the deceased wife, having taken out letters of administration to her estate, limited to estate acquired after the alleged desertion, claimed from the deft., and subsequently brought the present action against him to recover, the value of such estate.

The above facts having been proved, the jury, in reply to questions from the learned judge, said they believed the wife had not been deserted, and that the protection order was obtained by fraud; secondly, that the property of the deceased woman was acquired by unlawful means, being the gains of prostitution; whereupon, by direction of the learned judge, who ruled for the day that the order of protection was good until discharged, they found a verdict for the pils., with damages equal to the value of the goods, which, after deducting rent and expenses, &c., they assessed at 46l. 18s. 9d., and leave was reserved to the deft. to move on the above points.

The following are the material sections of the statute 20 & 21 Vict. c. 85 (Divorce Act) on the construction of which the case turned:

Sect. 21:

A wife deserted by her husband may, at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country to justices in petty sessions, or in either case to the court, for an order to protect any money or property she may acquire by her own lawful industry and property which she may become possessed of after such desertion, against her husband or his creditors, or any person claiming under him, and such magistrate or justice, or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property, acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*. Provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall within ten days after the making thereof be entered with the registrar of the County Court within whose jurisdiction the wife is resident, and that it shall be lawful for the husband, and any creditor or other person claiming under him to apply to the court or to the magistrates or justices by whom such order was made for the discharge thereof. Provided also, that if the husband or any creditor or person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring) to restore the specific property, also for a sum equal to double the value of the property so seized or held after such notice as aforesaid. If any such order of protection be made the wife shall, during the continuance thereof, be and be deemed to have been during such desertion of her in the like position in all respects with regard to property and earnings, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

Sect. 25:

In every case of a judicial separation the wife shall from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her, and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same, in case she shall die intestate, shall go as the same would have gone if her husband had been then dead, &c.

A rule was obtained in this term to enter a non-suit or verdict for the deft. pursuant to leave on the ground that the order, having been fraudulently obtained, was a nullity as regards the deft.; also, even if the order were valid, yet the goods, not having been the proceeds of lawful industry, were not

[Ex.]

MASON AND ANOTHER v. MITCHELL.

[Ex.]

protected, or for a new trial on the ground that the verdict was against the evidence, against which rule,

Quain, for plts., showed cause. (a)—This was the first case on these points under the Act. As to the first branch of the rule, the statute, by sect. 21, declared that the wife's position under a protection order should, "during the continuance thereof, be the same as if she had obtained a decree of judicial separation;" which position was defined, by sect. 25, to be the same as "a *feme sole* with respect to property of every description acquired by or devolving upon her." The magistrate having jurisdiction, the order, when registered under the Act, was conclusive, whether there had been desertion or not. Although only a magistrate's order, and made *ex parte* (as it needs must be), it involved the question whether a decree of judicial separation, if obtained by fraud, could be questioned by this court. It was submitted it could not be. The Act pointed out the mode of getting rid of the order; and in no other way and by no other tribunal could it be set aside. Moreover, the fraud here alleged was not of the kind to invalidate the order. [CHANNELL, B.—It would seem to be more like contradictory evidence of the facts than a fraud on the court, as in the case of one party falsely personating another. POLLOCK, C.B.—The expression "obtained by fraud" imports not merely contradictory evidence, but the getting an order on evidence known at the time, by the party producing it, to be false.] Although a new point, the authority of analogous cases supported the plt.'s view; e.g., a conviction by a magistrate having jurisdiction, if not defective on its face, was conclusive as to facts therein stated: (*Britain v. Kinaird*, 1 B. & B. 482; and notes to *Crepes v. Durden*, 1 Sm. L. C. 649, 5th edit.) [MARTIN, B.—I do not think the cases on convictions will help you. A conviction follows a hearing of both sides; but this is an *ex parte* proceeding, which is a different thing.] It was made *ex parte* by the statute which provided the mode of setting it aside, and that assimilated it to a conviction. The attribute of being conclusive evidence of the facts stated therein, and properly tending thereto, belonged to every adjudication emanating from a competent tribunal: (*Aldridge v. Haines*, 2 B. & Ad. 395; 1 Sm. L. C. 559, 5th edit.) To a plea in an action for arrest under judge's order under 1 & 2 Vict. c. 110, justifying by virtue of the order, a replication that it was obtained by fraud would be no answer; proceedings must be taken to set it aside. So a deft. could not plead that a judgment against him had been obtained by fraud: (*Moore v. Bowmaker*, 7 Taunt. 97; 1 Wms. Saund. 92 b, note f.) Probates and administrations also, which were *ex parte*, were conclusive both at law and equity, until revoked, and could not be impeached by evidence even of fraud: (1 Wms. Exors. 476, 5th edit.) [MARTIN, B.—If, in point of fact, the wife was not deserted, was there any jurisdiction? The magistrates finding it would not give him jurisdiction unless the fact were so. [His Lordship referred to *Thompson v. Ingham*, 14 Q. B. 710; 19 L. J., N. S., 189, Q. B.] There it was a preliminary inquiry to found jurisdiction, but here the desertion which gave jurisdiction was the very offence to be tried by the tribunal appointed by Parliament to try it; and if the finding of the fact, on which jurisdiction was founded, was not conclusive, it would not be binding as to the offence itself, which was the very, and the only, thing the magistrate had to inquire into. The cases were all collected in *Reg. v. Bolton*, 1 Q. B. 66; 10 L. J., N. S., 49, M. C. [MARTIN, B.—The

Act of Parliament is subject to the rule of the common law, that every judgment obtained by fraud is void. PIGOTT, B.—The magistrate has jurisdiction even if there should be no desertion, for he has jurisdiction to hear and inquire; then, when the order is made, it is to have the effect of a decree of judicial separation. Now, would it be competent for this court to inquire into the legality of such a decree? That was the point, and it was contended it would not be. Again, third parties dealing with the wife as a *feme sole*, would be wholly unprotected if an order, whilst unreversed, were no protection. He cited also

*Tarry v. Newman*, 15 M. & W. 645; 15 L. J., N. S., 160, M. C. (Judgment of Pollock, C.B.);  
*Shedden v. Patrick*, 1 Macq. H. of L. Cas. 585;  
*Paley on Convictions* (5th edit. by Macnamara), 389, quoting *Fullers v. Fitch*, Holt, 287;  
Cases collected in notes to *Manby v. Scott*, 2 Sm. L. C. (5th edit.) 418;  
27 & 28 Vict. c. 44.

[E. James, Q. C. referred to *Perry v. Meadowcroft*, 10 Beav. 122. MARTIN, B.—My brother Keating has an impression that there has been a case on this very section of the Act.] None such had been found. The husband was a *quasi* party, and had a *locus standi* to appeal in the way pointed out by the statute. As to the second point, the goods, though found by the jury to be the proceeds of prostitution, were yet protected. The enacting part of sect. 21 protected her "earnings and property" generally, not limiting it to the earnings of "*lawful industry*." [POLLOCK, C.B.—The original introduction of the matter, in the earlier part of the section, being founded on "*lawful earnings*," all subsequent mention of earnings must mean "*lawful earnings*." PIGOTT, B.—Could we say that the earnings of dishonesty, a *g.*, picking pockets or stealing, would be protected under this section? They would not be her property, but the goods here were; for though the money might have been immorally acquired, the furniture bought therewith was not, and the money so converted could not be followed. Sect. 25 threw light on sect. 21, and covered every description of property acquired by, coming to, or devolving upon her. The intention of the Legislature might also be gathered from subsequent statutes *in pari materia*: 21 & 22 Vict. c. 108, ss. 6, 7, 8, and the Scotch Act, 24 & 25 Vict. c. 36, in the corresponding section of which latter Act the word "*lawful*" was omitted.

E. James, Q. C. (*Holker* with him) contra for deft. in support of the rule.—The Legislature meant to protect a wife improperly deserted by her husband; to protect her *lawfully* acquired earnings from him, and to enable her to deal with third persons free from his interference. There was no pretence for saying that any property here had devolved upon her passively; it was all acquired by her active exertions. Assuming the order good in other respects, it must have reference only to "*lawfully* acquired" property. The furniture here was used for a business not only immoral but unlawful and indictable. The Legislature would not give a premium or boon to immorality. But, irrespective of fraud, the order was a nullity, being without jurisdiction. Without the requisite actually existing state of things at the time the magistrate was called on to act, the order would not bind strangers, whatever it might do as between principals. The foundation of jurisdiction here was that the applicant must be a *deserted* wife. If she were not in that category there was no jurisdiction. All the cases cited on the other side presupposed jurisdiction. Having jurisdiction the courts would not review a mistake, but leave the party to appeal. [PIGOTT, B.—You would say that if the magistrate finds the wife to be deserted and without reasonable cause,

(a) Although the Court gave judgment on the second ground of the rule only, yet, as the question under this statute is a new one, the whole of the arguments on both points are here given.

Ex.]

REG. v. ASKERTON.

Q. B.

then the order is good, even if there were no reasonable cause; but that if he finds desertion when in fact she has not been deserted, then the order is invalid? Yes, the "reasonable cause" was incidental only to his inquiry, and the evidence taken to satisfy his mind might be to absolve him from consequences. [He was here stopped by the Court.]

**POLLOCK, C. B.**—Although there may seem to be some little difficulty at first sight in construing for the first time an Act of Parliament which introduced a new principle into our legislation as regarded the relation of husband and wife, and which gave to a *feme covert* the position, rights and privileges in many respects of a *feme sole*, or of a wife who had obtained a decree of judicial separation, it is, I think, abundantly clear that the Legislature intended to confine the protection, afforded to a deserted wife by the Act of Parliament, to the legal fruits of her legal industry; and that they were expressly anxious to restrict the operation of the Act to her obviously lawful and meritorious gains, and did not intend to give, but on the contrary studiously avoided giving, any protection under a plea of desertion, to the profits which she might acquire by a licentious and immoral course of life, which would, in effect, have been holding out an incentive to a wife to desert her husband for the purpose of indulging, unchecked, her vicious and immoral propensities. On this ground, therefore, I think that the goods in question, which were found to be, and admittedly were, the proceeds of prostitution, were not protected by the order. This renders it unnecessary to consider further the other ground of the rule, or to give any judgment upon the question involved therein. The rule will be made absolute to enter a nonsuit.

**CHANNELL, B.**—I am entirely of the same opinion, and for the same reasons as my Lord, and I desire to confine myself to this second point, namely, that the property not being the proceeds of the wife's "lawful industry," was not protected by the order. As to the other point of jurisdiction, it is unnecessary to discuss that point further, or to give any decision upon it. It is enough that this order did not protect these goods, which were the produce of her earnings as the keeper of a brothel, and not the product of her "lawful industry."

**PIGOTT, B.**—I agree with my Lord Chief Baron and my brother Channell in the judgment which they have pronounced on the second point. On the first point, of the jurisdiction, I must confess that my mind was coming to a different view from that which I had entertained at first; but it is quite unnecessary to dwell further or to say more on that point. With regard to the second point, it is clear to my mind that the Legislature intended, where a wife was deserted by her husband, that the *bona fide* proceeds of her lawful and honest industry should be protected from his interference with them; and that, in giving her this protection, they made a special distinction between *any property whatever*, and that which she might acquire by her "lawful industry," and took care that the privilege of coming to the court for protection as a *feme sole* should be granted to her in respect of her lawful earnings only. The distinction would have been needless if it had been intended to include within the protection her property of all kinds and however obtained.

MARTIN, B. had gone to chambers before the  
[MAG. CAS.—VOL. III.]

argument was concluded, and so took no part in the judgment.

*Rule absolute to enter a nonsuit.*

Attorneys for plts., *Torr, Janeway and Tagart*, 38, Bedford-row, agents for *W. Lancaster*, Bradford, Yorkshire.

Attorneys for defts., *Johnson and Wetherall*, 7, King's Bench-walk, Temple, agents for *Storer*, Manchester.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Thursday, Jan. 26, 1865.

REG. v. ASKERTON.

*Highway—Indictment for non-repair—Jurisdiction of justices to make order for—5 & 6 Will. 4, c. 50, ss. 94–5.*

*Before directing an order under sect. 95 of the 5 & 6 Will. 4, c. 50, for an indictment to be preferred against a parish for non-repair of a highway, the justices should satisfy themselves from the evidence that the road in question is a highway, if the fact is disputed.*

Rule nisi to bring up an order of justices made under the Highway Act (5 & 6 Will. 4, c. 50), s. 95, directing an indictment to be preferred against the parish of Askerton, Cumberland, for the non-repair of a highway.

At the hearing of the summons, taken out under sects. 94, 95, the surveyor of the parish of Askerton denied that the road out of repair was a highway, and he said that he consequently denied the liability of the parish to repair the road in question. The other side cited the case of *Reg. v. Arnould*, 8 E. & B. 550, and 27 L. J. 92, M. C., and contended that the justices were bound to direct an indictment to be preferred; but on the other hand, *Ex parte Bartlett*, 29 L. J. 65, M. C., was quoted. The justices then proceeded to hear evidence as to the road being a highway, but another justice came in, and the discussion was renewed before him. The justices ultimately refused to hear further evidence, and made the order now brought up.

*McLeod* showed cause.—The order is good. Where the liability to repair a road is disputed by a parish, the justices are bound to direct an indictment to be preferred under sect. 95: (*Ex parte Bartlett*, and *Reg. v. Arnould*.) [BLACKBURN, J.—If a private road in a gentleman's park is out of repair, and proceedings are taken as here, can the justices under this section direct an order to be preferred against the parish? No doubt the argument must go that length. The case of *Reg. v. Heanor*, 6 Q. B. 745, only decides that where the road is not a highway the costs cannot be levied out of the highway rate. Here there was *prima facie* evidence before the justices that this was a highway, and they had jurisdiction to make this order. In this section the word highway is used simply to mean the place or road in question, and is not descriptive of its legal character.

*Hayes*, Serjt. in support of the rule.—The justices had no jurisdiction to make the order, this not being an admitted highway. The justices at all events ought to have heard the evidence:

*Reg. v. Heanor*, 6 Q. B. 745.

COCKBURN, C. J.—The rule must be made absolute. It is not necessary to say whether, on the construction of the 5 & 6 Will. 4, c. 50, it is competent for the justices to order an indictment to be preferred against the parish on the

R

Q. B.] *Ex parte* INHABITANTS OF EAST STONEHOUSE—REG. v. CORONER OF MARGATE. [Q. B.]

denial of their liability to repair only, or whether they have any authority unless the road is an admitted highway. It is clear that it is not simply because the surveyor denies that it is a highway, and therefore the liability of the parish to repair, that the justices can order an indictment to be preferred. The justices must have some evidence before them to lead to the inference that it is a highway; but here, on the denial of the surveyor that the road was a highway, and the liability of the parish to make the order, they proceed to make an order. They stopped short of the point at which their power to make an order arose.

BLACKBURN, J.—I am of the same opinion. In any view of the statute, the justices have made an order which they were not justified in doing. Under both sects. 94 and 95 the road out of repair must be a highway. The enactment is based on that. *Reg. v. Heanor* shows that it is only where the road is a highway that an order for costs can be made. When the road is an admitted highway, and the liability to repair is denied on the part of the parish, then it is quite clear that an order is to be made. If it is alleged on the one side, and denied on the other, that the road is a highway, the justices are not at once to make the order, but they should see whether there is any evidence that it is a highway. Otherwise it would lead to the absurdity, that if a private road in a gentleman's park was alleged to be a highway, the justices would be bound to order an indictment to be preferred. In the case where it is alleged on the one side to be a highway, and resisted on the other, and the justices hear evidence, and come to the conclusion that it is not a highway, then it is clear they should not order an indictment; but if they come to a conclusion that it is a highway, then whether they ought to order an indictment is a question we are not called upon to decide now. In the present case they have proceeded without any evidence, and that is clearly wrong.

MELLOR, J.—In this case the justices have acted on a mistaken view of the law. At present I give no opinion as to what is the correct construction of the section. The justices at least should satisfy themselves, upon the evidence before them, whether the road in question is really a highway or not.

*Rule absolute.*

*Ex parte* THE INHABITANTS OF EAST STONEHOUSE.

County constabulary—Formation of districts—  
3 & 4 Vict. c. 88, ss. 27, 28.

Under the County Constabulary Act (3 & 4 Vict. c. 88), s. 27, a single parish may be constituted a separate police district by itself.

It is no objection to an order of quarter sessions forming county police districts, which a court of law can entertain, that the report required by the 3 & 4 Vict. c. 88, s. 27, to be sent from the sessions to the Secretary of State, does not contain sufficient materials.

Arundel Rogers, on behalf of the Rev. George Nolan, representing the inhabitant ratepayers of the parish of East Stonehouse, moved for a *certiorari* to bring up an order made at the Devonshire Quarter Sessions, under the County Constabulary Act (3 & 4 Vict. c. 88), ss. 27, 28, by which the parish of East Stonehouse was constituted one district by itself. The effect of the order was stated to be that whereas two additional constables only were appointed for the parish, the rates were increased 2000*l.* It was contended that the order of sessions was bad, and that upon the true construc-

tion of sect. 27, giving the justices power to form police districts, the words "to divide the county, or any part thereof, into police districts, consisting of such parishes and places, or parts of parishes and places, as shall appear to them most convenient," did not empower the justices to make one single parish a police district by itself. They may unite parishes or parts of parishes into a district, but not form a single parish by itself into a district. [BLACKBURN, J.—It would have cost the inhabitants just as much if the justices had added to the district an acre out of the adjoining parish, which would have made the order unobjectionable according to your argument.] The Legislature meant not to oppress one parish alone by throwing on it the increased costs. [CROMPTON, J.—The Act is against you, both in the words and spirit. The word parishes includes parish. BLACKBURN, J.—The Legislature has said that the justices may do it, subject to an appeal to the Secretary of State.] Secondly, the justices have not set out sufficient materials in the report of the proposed alteration, which, by sect. 27, they are required to send to the Secretary of State.

COCKBURN, C. J.—We have nothing to do with that. The report is no part of the order of sessions, and any informality in the report does not invalidate the order of sessions. The term "parishes," in sect. 27, includes the singular, "parish." The sessions are to exercise their discretion as to whether a parish is or is not sufficiently large to be constituted one district by itself.

CROMPTON and BLACKBURN, JJ. concurred.

MELLOR, J.—The words in sect. 27 were intended to limit the maximum of the authority of the justices, and not the minimum.

*Rule refused.*

Tuesday, Jan. 31, 1865.

REG. v. THE CORONER OF MARGATE.

Coroner's inquest—Jurors dispersing without regular adjournment.

An inquest was adjourned to a given day in order that the inquisition and verdict might, in the meantime, be formally prepared for signature. Before the day arrived, the coroner wrote to the jurors not to attend on that day, nor until they received a further notice. Pursuant to a further notice, they met and signed the inquisition and verdict:

Held, that the inquisition and verdict were void, having been signed *coram non iudice*.

Rule nisi to quash an inquisition *super visum corporis*, which had been removed into this court by *certiorari* (see *ante*, p. 195.)

The inquest was held at Margate, before the coroner of the Cinque Ports, on the body of Susannah Lock, who was killed in consequence of a collision on the railway at the Margate station. The jury were originally empanelled on the 2nd Aug. 1864, and the inquest was regularly adjourned and continued to the 5th Aug., when the jury delivered the following verdict:—"That the deceased met with an accident which caused her death on the 1st Aug. 1864, at the South-Eastern Railway Terminus at Margate, by a collision between a mail train and an up-station train, the former being late; and that the negligence of the guard and inspector was the proximate cause of the accident, and, consequently, of the death." This the coroner pronounced to be a verdict of manslaughter, and, with the view of having the verdict recorded in a legal form, he adjourned the inquest

Q. B.]

KENTON v. HART.

[Q. B.]

until the 8th Aug., and in the meantime instructed counsel to settle the verdict and inquisition. Finding that counsel did not send back the draft in due time, the coroner, who lived at Dover, instead of going to Margate on the 8th Aug. and resuming the inquest and further adjourning it, wrote to the jurors informing them that they need not attend on the 8th, or until they had a fresh notice. The jury were then re-assembled on the 12th Aug., and the inquisition and verdict signed by them.

Shee, J., sitting in the Bail Court, held the inquisition so signed to have been signed *coram non iudice*, and void.

Parry, Serjt. and G. Francis showed cause.—The inquisition was not vitiated by the signing being delayed until the 12th. The verdict was given on the 5th, and the signing was merely a ministerial act. [COCKBURN, C.J.—The jury are not bound by the verdict until they have signed it. Signing is not a mere ministerial act. BLACKBURN, J.—Is there any authority for saying that any part of the business of an inquest cannot be done at a court not held by regular adjournment?] In Burn's Justice, tit. "Coroner," 37, edit. 1845, it is said that the inquisition may be signed by the coroner and jury at any time before they have dispersed. [BLACKBURN, J.—That rather shows that it is best to avoid even an adjournment.] The coroner might have adjourned the inquest *sine die*, or held it in secret. [BLACKBURN, J.—That may be doubted, and he did not do it.] The following cases were then cited:

*Reg. v. West Torrington*, Burr. S. C. 293;

*Garnett v. Ferrand*, 6 B. & C. 611.

[COCKBURN, C.J.—If some of the jurors had refused to attend on the 12th they could not have been fined because they were not properly summoned, the court having been dissolved. The inquest might have begun *de novo*. But the jury were summoned for a particular inquest, and the moment they were allowed to disperse, and the court was broken up and not adjourned, their duty and functions were gone.]

II. James, in support of the rule, was not called upon.

By the COURT:

Rule absolute.

Friday, Feb. 3, 1865.

KENTON (app.) v. HART (resp.)

Game—Illegal trespass in pursuit—1 & 2 Will. 4, c. 32, s. 30.

A. upon his own land shot at a pheasant which rose from his land, but the act of shooting took place while the pheasant was in the air over B.'s land. The pheasant fell dead on B.'s land, and A. went on B.'s land and picked it up.

The justices having refused to convict A. of a trespass in pursuit of game, under the 1 & 2 Will. 4, c. 32, s. 30, this Court held that they were right.

Case stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Ashford, Kent, on the 5th Nov., the resp. Stephen Hart, of the parish of Westwell, in the said county, farmer, appeared upon an information exhibited by the app. James Kenyon, of the said parish of Westwell, under-game-keeper, charging him the said resp. for that he did on the 1st Oct. 1864, at the parish of Westwell aforesaid, unlawfully commit a trespass by being in the daytime of the same day upon certain arable land in the possession and occupation of Henry Tappenden, there in search of game without the licence or consent of the owner of the land so trespassed upon, or of any other person having the right

to authorise the said Stephen Hart to enter or be upon the said land for the purpose aforesaid, contrary to the statute, &c., whereby the said Stephen Hart had forfeited a sum of money not exceeding 2l.

On the hearing of the case the app., upon his oath, stated: "I am under-keeper to Sir Richard Tufton, Bart. On the 1st Oct. last, about half-past ten in the morning, Mr. Hart (the resp.) was out shooting. He shot a cock pheasant and it fell on Mr. Tappenden's field, belonging to Sir Richard Tufton. He went and fetched the bird himself, taking his dog and gun with him. Mr. Hart was on his own land when he shot the pheasant, and it rose off Mr. Hart's land. The pheasant was dead when Mr. Hart picked it up, and it laid upon its back."

When the resp.'s counsel was addressing the court the chairman recalled the app. and asked him whether, when the resp. shot the pheasant, it was or was not in the air over the land belonging to Sir R. Tufton? The app. replied it was over Sir R. Tufton's land and fell a considerable distance within Sir Richard's boundary. The resp.'s solicitor objected to the question being put after the app. had heard the opening of the resp.'s case.

The resp.'s attorney contended on his behalf—1. That upon the app.'s evidence no trespass within the meaning of the Act 1 & 2 Will. 4, c. 32, s. 30, had been committed, as the pheasant rose off the resp.'s land and the resp. was upon his own land when he shot the bird. 2. That the 30th section of the above-mentioned Act did not apply to game when dead.

Having heard the evidence of the app. and the argument of the resp.'s attorney the justices dismissed the case, the grounds of their determination being, that as the pheasant was raised off the resp.'s land and shot by him when he (the resp.) was upon his own land, the mere act of entering the land stated in the information, for the purpose of picking up the pheasant which was then dead, as proved by the evidence, was, in our opinion, not such a trespass in pursuit of game as is contemplated by the 30th section of the 1 & 2 Will. 4, c. 32.

The question for the opinion of the court was, whether the justices were right in point of law in dismissing the case upon the grounds above stated.

Keane, Q.C. for the app.—The justices ought to have convicted the resp. It was immaterial that the pheasant arose on the resp.'s own land. It was a fact in the case that the resp. shot the pheasant when it was over a neighbour's land. That was in itself a civil trespass, and the entry upon the adjoining field to pick up the bird was an illegal trespass in pursuit or at least in search of game under 1 & 2 Will. 4, c. 32, s. 30:

*Osmond v. Meadows*, 81 L. J. 288, M. C.; L. T. Rep. N. S. 290;

*Morden v. Porter*, 29 L. J. 213, M. C.

[BLACKBURN, J.—The 30th section must mean living game and not dead game. The pheasant was dead in this case when the resp. went to pick it up.] It may mean dead game also. The word "search" applies as well to dead as to living game. If not, poachers may easily evade this enactment.

Denman, Q.C. for the resp.—The words "search" and "pursuit of" can only apply to living game, and the section cannot be held to apply to dead game found on land. In *Osmond v. Meadows* the information was for pursuit of game; here it is for search of game.

BLACKBURN, J.—The justices were right in refusing to convict. The 30th section of the 1 & 2 Will. 4, c. 32, was evidently directed against a trespass by entering land in pursuit of living game, and cannot apply, in my opinion, to game that is dead. We

C. P.]

POWELL v. BORASTON.

[C. P.]

have no doubt whatever upon that point. The resp. undoubtedly entered the land of his neighbour and committed a civil trespass, but he did so in search of a pheasant which had risen from his own land, and at which he had a right to shoot, as he did, from his own land. The case would have been precisely similar if it had been a hare which had started from his land and been shot when it had got to his neighbour's land. The case of *Reg. v. Pratt*, 4 E. & B. 860, decided that, in order to be a trespass to shoot at game under this sect. 30, it must be a personal trespass. Therefore, the sole point is, whether the mere fact of going in to pick up the dead bird brings the case within the 30th section. The case of *Osbond v. Meadows*, in the Court of C. P., was not capable of being taken to a court of error, and is not, therefore, binding upon us. But it is not necessary for us to dissent from that case. Here the justices declined to treat the shooting of the bird which had been shot at from the resp.'s own ground as one act with the trespass to pick it up, and we think they were quite right. It was, so far as the trespasser was concerned, matter of surprise that the bird fell on his neighbour's land, and it was no planned thing on his part to commit any trespass in pursuit of game such as is contemplated by the 30th section.

MELLOR, J.—I am of the same opinion. I think that the justices were not bound to convict in this case. I agree that the 30th section refers to living, and not to dead game, and the 31st section confirms that construction. If this case were not distinguished from *Osbond v. Meadows*, I confess I should have liked further time to consider, although that decision would not be binding on us sitting in this court. I do not think, however, there is any real conflict between that case and our present decision.

*Judgment for the resp.*

#### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUNLEY SMITH, Esqrs.,  
Barristers-at-Law.

#### REGISTRATION APPEALS.

Nov. 22, 1864, and Jan. 17, 1865.

POWELL v. BORASTON.

*Election law—Borough vote—Qualification—Occupation—Building-shed—Ejusdem generis—2 Will. 4, c. 45, s. 27.*

*A building, the occupation of which will, by sect. 27 of the Reform Act (2 Will. 4, c. 45), confer a borough franchise, must be a building ejusdem generis with the other buildings mentioned in the statute, namely, houses, warehouses, counting-houses and shops.*

*The claimant of a borough vote rented and occupied a farm, the greater part of which, including the farm-buildings, was beyond the limits of the borough, but a few acres of land of more than the clear yearly value of 10l. lay within the borough. There was no building upon this portion of the farm when the claimant took possession, but subsequently a wooden shed was placed upon it, supported on four posts let into the ground. There was no floor to the shed. The sides were of boards, and so frail that a portion of them was soon broken away. It was used by the claimant for keeping agricultural implements. It was avowedly placed upon the land in order to entitle the claimant to a vote for the borough, and there was no evidence that the claimant's landlord had given his permission to its erection:*

*Held, that the shed was not a building occupied by the claimant so as to entitle him to a vote for the borough.*

*Watson v. Cotton explained.*

At a court held before the revising barrister for the borough of Kidderminster, Richard Powell objected to the name of George Boraston being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied in the parish of Kidderminster Foreign.

The following facts were stated on appeal:

The said George Boraston is a farmer, and for several years has rented and occupied a farm at Sutton-common, within the said parish of Kidderminster Foreign, but being partly within and partly beyond the limits of the parliamentary borough of Kidderminster.

The greater portion of the farm, including the farm-buildings, is beyond the borough limits: but a few acres of land, of more than the clear yearly value of 10l., lie within the borough.

There was no building on the land within the borough when the said George Boraston took the farm of his landlord, but in the summer of 1862 a shed was placed upon the piece of land within the borough. This shed was made entirely of wood, having boarded sides and a boarded roof, and being supported by four posts let into the ground three feet. It adjoins a public road, and most of the side boards of the shed facing the road have been broken to pieces. There is no floor to the shed. It is entered by a door, and used by the tenant for keeping agricultural implements in. It was proved before the revising barrister that the shed was erected by a builder of Kidderminster in accordance with instructions received by him from an active political agent in that borough, who had no interest either as landlord or tenant in the land upon which it was erected. But previously to its erection the permission of the said George Boraston was asked, who replied that he could not give an answer, and that his landlord must be asked. There was no evidence of the landlord having given such permission, but the said George Boraston gave instructions to the builder as to the size of the door of the shed, and told him that if he required it floored he would do it himself. It was objected on behalf of the said R. Powell that the name of the said George Boraston ought to be expunged from the said list on the following grounds:

First, that the shed erected as aforesaid was not a building within the meaning of the Reform Act.

Secondly, that, under the circumstances stated respecting its erection, there was no occupation of the said shed by the said George Boraston within the meaning of the Reform Act.

Thirdly, that the shed formed no part of the property for which the said George Boraston paid rent, and could not be said to be occupied by him with the land as tenant under the same landlord.

The revising barrister held the contrary of these objections, and decided to retain the name of the said George Boraston on the said list. If the court shall be of opinion that the decision was wrong, the name of the said George Boraston is to be expunged from such list.

Keane, Q.C. appeared for the app., and

Karslake, Q.C. and R. Bourke appeared for the resp.

In the course of the argument in this case and the following (the two cases, depending on analogous principles, were considered together) reference was made to

*Watson v. Cotton*, 5 C. B. 51;

*Whitmore v. Bedford*, 5 M. & G. 9;

C. P.]

POWELL v. BORASTON.

[C. P.]

*R. v. Loundonthorpe*, 6 T. R. 377;  
*R. v. Otley*, 1 B. & Ad. 161;  
*Deuchur v. Feilden*, 7 M. & G. 182;  
 2 Will. 4, c. 45, s. 27;  
*Helawell v. Eastwood*, 6 Ex. 295;  
*Henreth v. Booth*, 9 L. T. Rep. N. S. 392;  
*Martin v. Roe*, 7 E. & B. 237.

Jan. 17.—ERLE, C. J. delivered the judgment of the Court.—The resp. occupied a farm, of which a few acres, worth more than 10*l.* annually, were within the borough, and on this part of the farm there was no building at the time of the demise, nor for years after. In 1862, an electioneering agent, having no interest of any sort in the land, caused a shed, made of boards nailed to posts, to be erected, and therein the resp. had kept some agricultural implements. There was no evidence that the landlord had any knowledge on the subject. The revising barrister decided that this shed was a building within the statute, and that it was occupied by the resp. as tenant. His decision is the subject of this appeal, and we are of opinion that it should be reversed on both points. The Legislature has not defined with clearness the qualification for a vote in a borough. In a county all that is comprised under the term "land" is the principal source of qualification; but in a borough land alone does not qualify. It can only be used as an accessory to a building for the sole purpose of making up the value of 10*l.* The intention of the Legislature respecting a qualification for a borough was much considered in *Cook v. Humber*, 11 C. B., N. S., 41. It is there laid down, that "a qualification is compounded of four elements: tenement, value, occupation, and estate. There must be for tenement, a house, warehouse, counting-house, shop, or other building analogous thereto: there must be for annual value, 10*l.*; there must be occupation—that is, actual exercise of the rights of an owner in possession during the requisite time; there must be an estate in the tenement either of fee or less. If these four distinct elements are combined in the claimant, he is qualified, if otherwise, not. Now, although they must exist in combination in order to qualify, still, in inquiring into the existence of the combination, each element must be separately ascertained: first, is the claimant tenant? secondly, is he occupier? thirdly, is the tenement sufficient in value? and, fourthly, in kind?" Again, in pages 44 and 45 it is said: "The statute requires some permanent occupation of and some independent interest in the property. The permanence prevents the sudden creation of votes. The ownership or the tenancy with rating indicates some independence; in other words, the requirement of at least a tenancy excludes some occupations of less independence, such as that of servants and objects of charity. . . . As to the kind of tenement which qualifies, the statute has described two classes of buildings, namely, those used for residential, and those used for commercial purposes—house for residence, warehouse, counting-house, shop, or other analogous building for commerce." To apply these principles to the present case, we think that the so-called building is not of the class specified in the statute; that is, it is neither in the residential class, nor in the class connected with commercial industry. We also think that the claimant's occupation thereof was not in the capacity of tenant. As to the first question, whether the so-called building is sufficient to qualify, &c., we are aware of the impossibility of defining clearly what is included in the class described in the statute by the words "other buildings," and of the difficulty of affirming that a thing is not in a class when the boundary of the class is unknown. We are also aware of the immense variety of structures which are sufficient buildings, considering the locality, and the use for which they are adapted in that locality.

Still, we are of opinion, that the intention of the Legislature would be defeated, and the words indicating the class of buildings which qualify would be without any effect, if everything which could be called a building was held sufficient. It ought to be in some degree adapted both to be used by man either for residence, or for the industry to which the statute relates, and also to have the degree of durability which is included in the idea of a building. The shed in question fulfils neither of these conditions. The boards were nailed to the posts for the purpose of performing the part of a shed, according to the revising barrister, not for any purpose connected with the interest of the occupier, and were so frail as to have been destroyed in part before the required year had elapsed. The Legislature intended that "building" should give the primary qualification, and that "land" should be a secondary resort, if the building was not worth 10*l.* per annum; but land would become the primary qualification if a shed of no value added to land of the required value was held to qualify. We are aware that the question whether a building qualifies is more a question of fact than law, to be answered by the revising barrister performing the part of a jury in applying the law to the facts before him. We are also aware of the soundness of the principle laid down in *Watson v. Cotton*, 5 C. B. 51, that if the revising barrister finds the building in question to be within the statute, the court will make every presumption for the purpose of supporting his finding, and will not reverse it unless the case shows it to be erroneous. We adopt these principles as sound, but still we think that this decision is shown to be erroneous. The case of *Watson v. Cotton* has been treated by some text writers as if it had decided that a tarpaulin, supported by poles, as described in the case, was a building within the statute, and they have drawn wide inferences therefrom, and these inferences are carried to the furthest extent in Lutwyche's Reports, 58. The learned reporter, in a note there, speaking of this case, thus expresses himself: "It will not be easy in future to say what is not a building, however slight and unsubstantial the structure may be, provided there be a roof to it;" and he goes on to say, "If a building be capable of holding any articles, it may fairly be considered to be a warehouse;" and he goes on to say, "On these principles there is no reason why a donkey-shed, a fowl-house, or a pigsty, should not qualify." The report of this case, in 5 C. B. 51, does not warrant the inference thus drawn from it. It appears there, that the judges, resolving to support the finding of the barrister unless he states facts showing that he must have been in error, take his description to be incomplete, and assume that the description, if it had been complete, would have shown that the shed was a building in the ordinary sense of the word, and was properly included in the same class as warehouse. In page 52, Maule, J. says: "The barrister gives a description embracing some of the incidents of a building. He describes two sides of the structure; the rest may be of solid masonry. He does not profess to give a full description of it." Wilde, C. J. says: "It is possible to conceive sheds of a very substantial and valuable character; for instance, the sheds in the docks, which, for the most part, consist of columns of iron or stone supporting slated roofs." Then, in his judgment, Wilde, C. J. says, "The barrister having found it to be a building within the Act, I must assume that it has all the requisites to constitute a building, except the incidents he sets out." And Maule, J. says: "It is not denied that the shed in question is a building. When once it is established that the thing is a building, the only question that remains is to be decided by the uses and purposes



to which the building is or may be put. If it is or may be applied to the purposes of a building such as is mentioned in the Act, it clearly may be said to be a building within the meaning of the Act. Its being more or less substantial cannot affect the question. Nobody would for a moment doubt that a place constructed at great expense and of great solidity, closed on two sides, and used for the stowage of goods, would be a building within the Act. Assume this to be a building, and in what does that differ from this?" It thus appears to us that the judges do not hold that the shed as described is a building within the Act, but they declare it to be their duty to assume any possible facts not excluded by the case for the purpose of affirming the barrister's finding. The barrister finds it to be a building; that finding is to stand, unless the case excludes the possibility of its being a building, and the judges say that, consistently with the case, the shed may have been on two sides of solid masonry, and may have been of a very substantial and valuable character, and may have been used for the stowage of goods. We may remark that it would have been better if the case had been sent back for restatement as Mr. Gray requested. The argument of that learned counsel on behalf of the app. seems to have been considered by the court as perfectly sound in law, but it did not prevail, because the facts were assumed to exist which made it irrelevant. Mr. Gray contended that the building must be something substantial, something *ejusdem generis* with those specifically mentioned, and not a mere temporary erection for the more convenient use of the land that could be removable by the tenant, and none of the judges disputed the correctness of this view of the law. In deciding whether a building is within the Act, the revising barrister is bound to give effect to the intention of the Legislature expressed in the statute, and in so doing, to be assisted by any rule of construction laid down in any of the cases relating thereto, but his attention should never be turned from the statute which he has to apply; and though general principles of construction laid down by the judges may help to guide his decision, the specific facts of one case form a very fallacious guide in the decision on other specific facts supposed to resemble them; the specific facts of the tarpaulin on poles seem to have led to unsound conclusions. In the present case, we consider that the description of the shed is complete, and according to that description it was not of a substantial character, nor *ejusdem generis* with the buildings specifically mentioned; that is, it was neither adapted to nor intended for any purpose analogous to the purposes for which warehouses are used, and that therefore the decision holding the shed to be a building within the Act must be reversed. Secondly, if the shed is taken to be a building within the statute, then the question is raised whether it was occupied by the resp. in his capacity of tenant; and the answer is in the negative. It is clear that the shed formed no part of the premises demised at the time of the demise; and although it might become parcel of the freehold by being annexed thereto under certain conditions, and so become parcel of the demised premises during the currency of the term, the case does not show that it was made under such conditions as would vest the property in the landlord, subject to the interest of the tenant during the term. It is an incumbrance brought on the land by the licence of the tenant, and, for aught that appears, subject to be removed at the will of the incumbrancer, or on the revocation of the licence by the tenant. The building—not the land—is the substance of the qualification; the resp. cannot hold the shed as tenant, unless the landlord has the property in it as reversioner. But the landlord is not

shown to have assented to its being brought, neither is there any ground for affirming that he could object to its removal, nor does it appear that either landlord or tenant has the property in the boards, if the maker of the shed carried it away.

*Judgment for the app.*

[See the next case.]

#### POWELL v. FARMER.

*Election law—Borough vote—Qualification—Occupation—Building—Potato shed—Pigstye—Ejusdem generis—2 Will. 4, c. 45, s. 27.*

*A building, the occupation of which will confer a borough franchise, must be a building ejusdem generis with the other buildings mentioned in the statute, namely houses, warehouses, counting-houses and shops.*

*A wooden structure erected by a market gardener on land which he rented and occupied for the purposes of his trade, and described as being supported by wooden posts let into the ground and as having boarded sides, a thatched roof and a door fastened by a padlock, and as being used for storing potatoes, may be a building, the occupation of which will confer on the market gardener a borough franchise under sect. 27 of the Reform Act (2 Will. 4, c. 45).*

*Quere, if a pigstye with a thatched roof and in other respects similar to the wooden structure described above is such a building.*

Case stated by the revising barrister for the borough of Kidderminster.

At a court held before me for the revision of the list of voters for the borough of Kidderminster, on the 3rd Oct. 1864, Richard Powell objected to the name of William Farmer being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied within the parish of Kidderminster borough. The said William Farmer is a market gardener, and for the purposes of that business had rented and occupied under the same landlord five acres of land in the parish of Kidderminster borough for more than twelve calendar months next previous to the last day of July 1864, of the clear yearly value of 20*l*.

There was no building on the land when the said William Farmer first took the same of his landlord, but previously to the 31st July 1863 the said William Farmer had erected on the land, at his own expense, a wooden structure with boarded sides and a thatched roof, and supported by wooden posts let into the ground.

The entrance to the structure was by a door fastened by a padlock, and it was used by the said Wm. Farmer for storing potatoes and other things connected with his business. The said Wm. Farmer had erected in like manner on the said land a pigstye with a thatched roof, but in other respects similar to the structure before mentioned. There was no floor made to the pigstye, but cinders were laid in the ground to keep it dry.

It was objected on behalf of the said Richard Powell, that the said Wm. Farmer's name ought to be expunged from the said list on the following grounds: First, that the structures erected by the said Wm. Farmer were not, nor was either of them, a building within the meaning of the Reform Act; secondly, that inasmuch as the structures had been erected by the tenant, they formed no part of the property for which he paid rent, and could not be said to be occupied by him with the land as tenant under the same landlord.

I held that the said structures were buildings within the meaning of the Act, and that they were affixed to the freehold, and decided to retain the

C. P.]

GRAY AND WIFE V. PULLEN AND HUBBLE.

[Ex. Ch.]

name of the said Wm. Farmer on the said list. If the court shall be of opinion that my decision was wrong, the name of the said Wm. Farmer is to be expunged from such list.

*Keane, Q.C.* for the app., *Karslake Q.C.* and *R. Bourke* for the resp.

The authorities referred to will be found in the preceding case.

*Jan. 17.*—*ERLE, C. J.* delivered the judgment of the court.—Upon this appeal two questions are raised: first, whether the shed described in the case was a building within the statute, that is, whether it had sufficient permanence, and was *ejusdem generis* with the buildings specified in the statute, that is, "house, warehouse, counting-house, shop." The revising barrister found it to be such a building, and, according to the principle laid down in *Watson v. Cotton*, we do not see sufficient in the description he has given to authorise us to reverse his decision. It is constructed of planks nailed to posts let into the ground, and used for storing potatoes, that being an article in the way of the claimant's trade of a market gardener. The second question is, whether this shed was occupied by the claimant in the capacity of tenant. As to this the facts are, that at the time of the demise there was no shed on the premises, but the claimant placed it there during his term, and used it as above mentioned. The revising barrister found that it was so occupied, and we do not see sufficient on his statement to authorise us to reverse his decision. If the shed had become the property of the landlord, it was occupied by the claimant in his capacity of tenant, although he constructed the shed and placed it there during the term. The general rule is, *quicquid plantatur solo, solo cedit*. It may be that the shed continued the property of the tenant and was subject to be removed by him at any time during the term. His right to do so might depend on his contract with his landlord, or on the nature of the construction being such as would make it removable as a trade fixture; but whatever might be the right of the tenant if further facts were added to the statement made, we act on the general presumption that things affixed to the freehold pass to the landlord, and we affirm the decision. The revising barrister has raised a further question, whether a pigstye is a building *ejusdem generis* with "house, warehouse, counting-house and shop." It is not necessary to answer this question, which is only raised in case the shed should be found insufficient; but we would add, that we are by no means prepared to assent to the revising barrister's opinion on this point without further discussion. We would further add, that the revising barrister has, in our judgment, done good service in sending this and the preceding case to us for our decision, and giving us the opportunity of explaining what we consider to be the true meaning of the court in *Watson v. Cotton*, and thereby putting some limitation upon the wide inferences drawn therefrom, contrary in some degree to the intention both of the Legislature expressed in the statute and of the judges expounding the same.

*Judgment for the resp.*

### EXCHEQUER CHAMBER.

Reported by J. THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

#### ERRORS FROM THE QUEEN'S BENCH.

*Saturday, Nov. 26, 1864.*

(Before *ERLE, C. J., POLLOCK, C. B., BRAMWELL and CHANNELL, BB., BYLES and KEATING, JJ.* and *PIGOTT, B.*)

GRAY AND WIFE V. PULLEN AND HUBBLE.

*Negligence — Contractor and employer — Liability — Making drain under Metropolis Local Management Act — Nuisance to highway.*

*The owner of premises within the Metropolis Local Management Act was authorised under sect. 77 of the Act to make a drain from his house into one of the public sewers. He employed a contractor to do the work, and in the course of doing it a trench was cut across the public footway, which was afterwards insufficiently reinstated, and in consequence thereof the deft. sustained an injury:*

*Held (reversing the judgment of the Q. B.), that the owner of the premises as well as the contractor was liable, by reason of the statutory duty cast on the owner to reinstate the highway properly:*

*Held also, that the penalty imposed by sect. 111 of the Act was a cumulative one, and did not take away the right of action.*

For that the defts. dug and caused to be dug a deep hole and trench in, along, and across a certain public and common highway, and thereby greatly obstructed the same and rendered the same dangerous to persons lawfully using the same, by means of which premises, and of the mere carelessness and wrongful and improper conduct of the defts. in that behalf.

The cause was tried before Blackburn, J., at the sittings in London after Hilary Term 1863, and a verdict was found for the plts.; as against the deft. Hubble with 65*l.* damages, but by direction of the learned judge a verdict was found for the deft. Pullen with leave reserved to the plts. to move under the 110th and 111th sections of the 18 & 19 Vict. c. 120 to enter the verdict against him if the Court should be of opinion that those sections apply to the circumstances of this case.

The facts proved in evidence were as follows: The deft. Pullen was the owner of a house and premises situated at the corner of a certain street called Clark's-terrace, Lewisham-road, where it is crossed by Evelyn-street, having a garden attached to the said house, and extending for some distance down Evelyn-street parallel with and next adjoining the same, being only divided from it by the garden wall.

The deft. Hubble was inspector of nuisances under the district board of works for the Lewisham district, in which the house was situated, formed under the 18 & 19 Vict. c. 120, and having been applied to by the occupier of the said house in respect of a nuisance caused by the cesspool of the said house and situate in the garden belonging thereto, the deft. Hubble thereupon gave notice to the deft. Pullen, the owner, under the provisions of the said Act, and required the said deft. Pullen to cure the said nuisance, and pointing out how it could be done by making a drain from the said cesspool, carrying it under the said garden wall, and thence across the public footpath in Evelyn-street, adjoining the said garden wall, into a pipe-drain in Evelyn-street running alongside of the said footpath, and so into a sewer in Nicholas-street vested in the said district board.

The deft. Pullen thereupon employed the deft. Hubble as a contractor to do the work in question for the sum of 20*l.*, and the same was accordingly done under the immediate inspection and direction

EX. CH.]

GRAY AND WIFE v. PULLEN AND HUBBLE.

[EX. CH.]

of the said deft. Hubble, and the earth filled in over the said drain and the work left.

A few nights afterwards, namely, on the night of the 25th April 1862, the plt. Maria Gray, whilst passing along Evelyn-street, on the public footpath next adjoining the said garden, and across which the said drain had been cut, fell violently into a hole or trench over the said drain, and sustained the injuries complained of without any negligence on her part.

It was proved that there had been heavy rains a day or two before the accident, which had caused the ground so to sink as to make the hole into which the plt. fell.

At the close of the plts.' case the learned Judge ruled that there was no evidence to go to the jury that Hubble had acted as the servant of Pullen in making the drain; but the evidence was, he had acted as a contractor for the work; that the said deft. Pullen had authority to cause the said drain to be made under the 18 & 19 Vict. c. 120, s. 77, and did not come within the scope of the 111th section of the said Act so as to be responsible for the performance of the work, and he withdrew the consideration of the case against Pullen from the jury.

And as to the deft. Hubble, the learned judge left it to the jury to say whether the filling in of the hole or trench over the said drain, and which had doubtless been caused by the said rain, had been properly done, or whether there had been any negligence with regard to the filling in of the same.

The jury found that the ramming in of the said earth was insufficient, and found a verdict against Hubble, with 65% damages; and thereupon the learned judge directed a verdict to be entered for the deft. Pullen, but reserved leave to the plts. to move to enter the verdict against him also under the 110th and 111th sections, if, on the proper construction of the said Act of Parliament, he was responsible for the surface of the said drain not having been properly filled in.

A rule was accordingly moved for and refused.

The question for the opinion of the Court of Ex. Ch. is, whether, on the proper construction of the said Act, the said deft. Pullen was responsible under the 110th and 111th sections of the said Act, for the improper filling in of the earth over the said drain so made by his authority by a contractor under him under the 77th section of the said Act of Parliament.

If the Court shall be of opinion in the affirmative, then the verdict found for the deft. Pullen is to be set aside, and the verdict entered against him; otherwise the verdict found for him is to stand; and in either case there is to be judgment accordingly.

*J. Brown* (Duly with him) for the app.—It is submitted that the deft. Pullen is liable in this case. It may be conceded that Pullen is not liable at common law for the negligence of Hubble, the contractor for the work; but in this case Pullen had no right to interfere with the public highway except under the 18 & 19 Vict. c. 120, s. 77. The privilege was granted to him as owner of the house with the correlative duty of restoring the highway to its proper condition, and he could not by employing a contractor to do the work divest himself of that duty. Sect. 77 enacts that it shall be lawful for any person at his own expense to make or branch any drain into any of the sewers vested in the Metropolitan Board of Works or any vestry or district board under the Act, or authorised to be made by them under this Act, such drain being of such a size and of such conditions, and branched to such sewer in such a manner and form of communication in all respects as the vestry or board shall direct or appoint. And in case any person make or branch any drain into any of the said sewers so vested in the vestry or

board, or authorised to be made by them under this Act, of a larger size or of different conditions, or in a different manner and form of communication than shall be directed or appointed by the vestry or board, every person so offending shall for every such offence forfeit a sum not exceeding 50l. The duty of reinstating the highway is imposed by sects. 110 and 111. Now, although sect. 111 imposes a penalty for neglecting to reinstate the highway, &c., and sect. 204 gives half the penalty to the informer, yet that does not deprive the subject of his right of action for any damages sustained through such neglect: (*Couch v. Steel*, 3 El. & Bl. 402.) Then, does sect. 110 extend to the owner of premises wherefrom a drain is branched into a sewer, and the highway broken up in the course of work? It is submitted that it does. The case of *Hole v. The Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488, applies. There the company was held liable for obstructing the navigation of a river by a defective bridge constructed by authority of an Act of Parliament, although the bridge was unfinished and in the hands of the contractor, and the defect was that from some cause the machinery would not act, and the bridge could not be opened. Pollock, C. B. said that the case did not fall within the rule applicable to those cases where a person has been held exempt because he was not the master of the servant whose negligence or improper conduct produced the mischief; that the maxim *qui facit per alium facit per se* applied; and that where a person is engaged in a work by contract, or by having obtained an Act of Parliament empowering him to do it, he cannot avoid the responsibility by employing somebody else to do the work under the contract. So in *Pickard v. Smith*, 10 C. B., N. S., 480; 4 L. T. Rep. N. S. 470, it was held that the occupier of refreshment-rooms at a railway-station with a cellar underneath, was liable for the negligence of the servants of a coal-dealer in leaving unguarded a trap-door on the railway platform by which the coals were put in the cellar. It may be stated generally, that when a person is under an obligation to do an act for the benefit of the public, he cannot discharge that obligation by employing another. Again, in *Blake v. Thirst*, 8 L. T. Rep. N. S. 251, it was held that a builder who had contracted with commissioners to make a sewer was liable for the negligence of a sub-contractor in not sufficiently guarding and lighting an excavation. [BRAMWELL, B.—Suppose the contractor had gone away and never filled in the drain at all. How would it be then?] Then the employer would clearly be bound. In the judgment of the court below, it seems to have been assumed that, sect. 111 having imposed a penalty for neglect to reinstate the highway, the right of action was taken away. That cannot be so. For these reasons, the judgment of the court below ought to be reversed.

*Henry James* for the resp.—The deft. Pullen is not liable. There is no just ground for distinguishing the case of the duty arising at common law, and the duty created by statute. In *Overton v. Freeman*, 11 C. B. 871, the distinction was taken between a public and a private duty, but unsuccessfully. This is a case of misfeasance. The contractor is employed as having competent skill to do the work properly. If he does it improperly, the employer, it is submitted, is not liable. In *Hole v. The Sittingbourne and Sheerness Railway Company*, the accident happened from the negligence of the sub-contractor. There Wilde, B. said: "As far as I can see, the real distinction is, that where the accident happens by reason of the negligence of the servant of the contractor, so as to cause injury to a third person, that being a matter entirely collateral to that which the contractor had contracted to do, there the liability turns on the relation of master

[Ex. Ch.]

REG. v. THE JUSTICES OF SUSSEX.

[Ex. Ch.]

and servant; but where the thing contracted to be done is the thing that causes the mischief, and the mischief can only be said to arise without the direct authority of the person ordering, because the thing has been imperfectly done; in other words, where the injury arises from the imperfectly doing the thing ordered to be done, there the party giving the order becomes responsible." In the present case the accident was caused by negligence in the performance of the work contracted for, and according to the above dictum of Wilde, B., the deft. Pullen is not liable.

*J. Brown.*—The liability here is not founded on the doctrine of negligence, but upon a breach of duty imposed by a statute.

*Cur. adr. vult.*

*Nov. 29.*—ERLE, C. J.—In this case the plt. declared for damages to his wife from falling into a drain made in the highway by the deft. The deft. justified making the drain under the power given by the Metropolis Local Management Act to make a drain from his premises to a sewer. Upon the trial it appeared that the deft. had lawfully made the drain under that Act; that is to say, a trench across the highway, which was the cause of the damage, and had employed a contractor both to make it and to fill it up properly; and, by the negligence of the contractor, the drain was filled up improperly, and so the damage was caused. At the trial the verdict was entered against the contractor, and for the employer, on the ground that the employer was not responsible for the negligence of the contractor; and so it was decided in the court below, and this is an appeal from that judgment. The app. has contended that a duty was imposed on the deft. Pullen, as the owner of the premises who caused the drain to be made across the highway, to fill up the drain in a proper manner. Sect. 77, authorising the making of the drain, implies that the duty to fill it up was imposed; and sect. 110 commands that the person who makes it shall fill it up properly, and the app. contended that the person making that drain is responsible if the duty imposed on him by the statute is not performed, and damage is caused thereby, and that the complaint is of an omission to perform a duty imposed by statute, not of a wrongful act of commission by a contractor beyond the scope of his employment. He relied on *Hole v. The Sittingbourne Railway Company*, where the duty imposed on the defts. by statute was to make a bridge that would open, and they employed a contractor who made a bridge that did not open as the statute required, and the defts. were held liable on the ground of their omission to perform the duty imposed by statute. There the Chief Baron says, in effect, that a party who undertakes that a work shall be done is not released from liability for breach of his undertaking because he employed a contractor to do it, and the contractor's neglect caused the breach. The obligation imposed by statute is analogous to that created by an undertaking; the omission to perform it is not excused by reason that the party employed a third person as contractor to do it for him, who failed. And he distinguished the case where a contractor in the performance of his contract does a wrongful act, not according to his contract, and causes damage thereby; in that case the employer is not responsible. This distinction is also taken by Williams, J., in *Pickard v. Smith*, deciding that the employer, allowing a coal merchant to make an opening in a way for coal to be shot down, is responsible for the negligence of the coal merchant's men in omitting to close the opening, for the employer was bound to see that the opening should be properly closed, and his duty does not

arise through the omission of the agent whom the deft. had employed to do it for him. For these reasons it appears to us that the deft. Pullen is not excused from liability for the omission to fill up the drain properly, on the ground that he had employed a contractor to do that duty for him, and that the contractor was negligent and left the duty unperformed. We think the duty was implied in the grant of the power to open the drain in the highway in sect. 77, and was expressed in sect. 110; and that this statutable duty is a duty created absolutely, and is not a duty created by sect. 111, imposing a penalty to be enforced solely by enforcing the duty. The penalty imposed by sect. 111, appears to us to be a cumulative remedy. The only question left to us is, whether the verdict should be entered against the deft. Pullen, and we answer the question in the affirmative.

*Judgment reversed.*

*Nov. 28, 1864, and Feb. 3, 1865.*

(Before ERLE, C. J., POLLOCK, C. B., BYLES and KEATING, JJ., CHANNELL and PIGOTT, BB.)

REG. v. THE JUSTICES OF SUSSEX, re AN APPEAL BETWEEN THE PARISH OFFICERS OF THE PARISH OF COLEMORE (apps.) AND THE PARISH OFFICERS OF THE PARISH OF FUNTINGTON (resps.)

*Order of removal—Appeal—Time for giving grounds of appeal—Adjourned sessions—Discretion of justices—4 & 5 Will. 4, c. 76, ss. 69-81—11 & 12 Vict. c. 31, s. 9.*

*If, upon an appeal against an order of removal, there is, by the practice of the quarter sessions, time for giving full notice of appeal (e. g. eight days), though less than fourteen days, the apps. are bound to give their grounds of appeal together with such notice, and they have no right, on the plea of not having such fourteen days time for giving their grounds of appeal, to require the sessions to enter and respite their appeal. (The judgment of the Court of Q. B. upon this point in Reg. v. The Justices of Suffolk, 4 Ad. & Ell. 319, overruled.)*

*Apps. cannot claim, as of right, the full periods of twenty-one and fourteen days mentioned in sect. 9 of the 11 & 12 Vict. c. 31, within which to mature their appeal, and it is for the sessions, upon an application to enter and respite an appeal, to determine whether the apps. have used due diligence in preparing for trial.*

*Where the sessions of a county are, for the convenience of business, held in succession in several divisions, and by the practice of such sessions the appeals arising within each division are to be tried in the divisions in which they arise, an app. is bound to give his notice and grounds of appeal with reference to such division, and if there is time for his notices with reference to such division, he is bound to give them, although such notices would not be in time for the original commencement of the quarter sessions (overruling Rex v. The Justices of Suffolk, 16 L. J. 36, M. C.)*

*An order of removal was served on the 30th Aug., and a copy of the depositions (being applied for) was delivered on the 19th Sept. Notice of intention to commence and enter an appeal at the next quarter sessions for the county of Sussex was sent on the 1st Oct. The Sussex sessions were always held in each of two divisions of the county, namely, for the eastern division on the 15th Oct., and for the western division on the 18th Oct., and by the practice of the sessions appeals were triable in that division in which they arose. The appeal in question would have been triable in the western division. By the rules of the sessions eight days' notice of appeal were required. At the sessions in the western division, on the 18th Oct., application was made to enter and respite the appeal, on the*

ground that the apps. had not fourteen clear days before the commencement of the original sessions to give their grounds of appeal. The sessions refused to permit the appeal to be entered and respited:

*Held (reversing the decision of the court below), that the sessions were right.*

This was a writ of error upon a judgment for the prosecution in the court below upon a demurrer to a return to a *mandamus*. In its judgment, the court below gave the parties leave, in the event of the case going to a court of error, to amend both the *mandamus* and the return by the statement of additional facts, so as to raise more concisely all the questions in dispute. In pursuance of this leave, the *mandamus* and return were amended. The following are the facts there stated: (see *Reg. v. The Justices of Sussex*, 6 L. T. Rep. N. S. 422; 2 B. & S. 664; 31 L. J. 193, M. C.)

It was set out, that on the 18th Aug. 1860, certain justices of Sussex made an order for the removal of John Sandham and his six children from the parish of Funtington in that county, to the parish of Colemore, in the county of Southampton.

The order and grounds of removal were, on the 30th Aug., sent by post to the overseers of Colemore, by whom they were received on the 1st Sept. On the 17th Sept. the churchwardens and overseers of Colemore applied for copies of the depositions, which were sent on the 18th and delivered to them on the 19th Sept. -On Oct. 1 the parish of Colemore gave notice of appeal to the then next Quarter Sessions for Sussex, to be holden on Oct. 13, but no grounds of appeal were then sent. At the said Quarter Sessions the parish of Colemore applied to enter and respite the appeal, which application was refused by the justices. In the following term a *mandamus* to the justices to enter and respite such appeal was obtained by the parish of Colemore, to which the justices returned that, before the holding of their Quarter Sessions, the parish of Colemore had not delivered to the parish of Funtington any grounds of appeal, as required by the statute, but had claimed to enter and respite such appeal as a matter of right, and without showing any cause or assigning any reason for such delay.

The return then proceeded thus:

And whereas there is, for the whole of the said county of Sussex, one commission of the peace only, the justices named in which have jurisdiction over the whole of such county, but act usually in the division in which they reside, and there is for the whole of such county one clerk of the peace who has his office at Lewes only, where the records of the entire county are kept, and no Act of Parliament (save and except the 2 & 3 Will. 4, c. 64, entitled "An Act to settle and describe the divisions of counties and the limits of cities and boroughs in England and Wales, in so far as respects the election of members to serve in Parliament), royal charter or other legal instrument can be found whereby or under the authority whereof the said county of Sussex has been divided into two divisions, although in the statute 48 Geo. 3, c. 107, reference, as will be seen by that statute, is made to there being such divisions; and that, for the purpose of transacting business, quarter sessions for the said county have always been holden in each of two divisions, one called the eastern, and the other the western; and that, in the notices and advertisements issued by the clerk of the peace for the said county of Sussex, relating to the holding of quarter sessions for the said county, the heading of such notices and advertisements is as follows: "Sussex Sessions. I hereby give public notice that the next General Quarter Sessions of the Peace for the county of Sussex will be holden as follows: For the eastern division, at Lewes, on, &c.; for the western division, at Horsham, on, &c." Advertisements are also issued by the clerk of the peace for the said county of Sussex, relating to the holding of quarter sessions for the said county, the heading of which is as follows: "West Sussex Session. I hereby give public notice that the next general quarter sessions of the peace for the western division of the county of Sussex will be holden, &c." And that in the rolls, records, and documents of and relating to the said court of quarter sessions, the heading or caption is as follows: "Sussex. At the general quarter sessions of the peace holden at Lewes in and or the county of Sussex or Sussex. At the general quarter

sessions of the peace, holden at Chichester, in and for the county of Sussex," and that the record of the proceedings of the sessions, held in both of the said divisions, is entered, contained, and kept in one and the same book, and that separate writs of *venire facias* directing the sheriff of the said county to summon a jury have always been issued; one for and in respect of each of the said divisions, and that for each of the said divisions a separate county treasurer has been appointed, and one of the rules and orders for the regulation of the practice of the courts of general quarter sessions of the peace of the county of Sussex, made at the sessions held at Petworth, for the western division thereof, on the 15th April 1828, and at Lewes for the eastern division thereof on the 17th of the same month, is as follows: "Appeals. It is ordered that eight clear days' notice of appeal to a poors rate, order of removal, or other order or proceeding cognisable by these courts in the way of appeal, shall be given (save and except where a certain time is limited and prescribed by Act of Parliament for giving notice of appeal), exclusive of the day of service of such notice, and the first day of the sessions in that division of the county in which such appeal shall be brought forward, and that such notice do extend to any appeal whether entered at the same or respited from a former sessions." Therefore the keepers of Her Majesty's peace and justices of our Lady the Queen assigned to hear and determine divers felonies, trespasses, and other misdemeanors within and for the said county of Sussex, have declined and do decline to receive and enter the appeal of the said churchwardens and overseers of the poor of the parish of Colemore aforesaid, against the order for the removal of the said John Sandham and his six children from the said parish of Funtington to the said parish of Colemore, and to hear and determine the merits of the said appeal as commanded by Her Majesty's writ to the said keepers and justices directed in this behalf and hereto annexed.

Huddleston, Q. C. and Maule now appeared for the resps., and contended that the judgment of the court below was erroneous.

Manisty, Q. C. and T. W. Saunders appeared for the apps., and argued that the judgment was correct.

*Cur. adv. vult.*

(The facts and the cases cited are so fully referred to in the judgment of the court that it is unnecessary to repeat them here.)

*Feb. 3.*—ERLE, C.J.—We think that the judgment of the majority of the court below ought to be reversed, on three grounds: First, because, according to our construction of the 4 & 5 Will. 4, c. 76, s. 81, the delivery of grounds of appeal with a notice of appeal is as valid for all purposes as a delivery fourteen days at least before the sessions begin. Secondly, because, even if the grounds of appeal must be delivered fourteen clear days before the sessions begin, still the justices decide against the adjournment of this appeal according to their discretion, and *mandamus* does not lie to control the exercise of the discretion of the justices upon matters left by law to their discretion. And, thirdly, because even if the fourteen clear days are required, and the matter was not left by law to the discretion of the justices, still the rules of practice for the sessions held for the western division of the county were valid, and the app., according to those rules, might have delivered the grounds of appeal with the notice of appeal fourteen clear days before those sessions began; and so the refusal of the adjournment was right. The first two grounds of reversal may be conveniently considered together, as much that relates to the one throws light upon the other; and we begin with a statement of the dates, as the decision turns thereon. The order of removal, &c. was served on the 30th Aug. A copy of the depositions was applied for, and the copy delivered on the 19th Sept. Notice of intention to commence and enter an appeal at the next sessions was sent on the 1st Oct. The sessions for the eastern division began on the 15th Oct. The sessions for the western division, to which this appeal belonged, began on the 18th Oct. The time for notice of trial of an appeal was, by the practice of the county, eight days. The statutes which govern are the 13 & 14 Car. 2, giving an appeal against an order of removal to the next sessions; and the 9 Geo. 1,

Ex. Ch.]

REG. v. THE JUSTICES OF SUSSEX.

[Ex. Ch.]

c. 7, commanding the sessions to adjourn when they are of opinion that reasonable notice of trial has not been given to the resp.; and the 4 & 5 Will. 4, c. 76, ss. 79 and 81, commanding a delay in the removal of the pauper of twenty-one days after service of the order of removal; and the 11 & 12 Vict. c. 31, barring an appeal unless notice shall have been given within twenty-one days, plus a contingent fourteen days, and after service of the order of removal. The sessions refused the adjournment, on the ground that it was practically possible for the app. to have been ready to try the appeal in fourteen days after service of the order of removal, and that his laches in not being ready did not create a right to demand an adjournment. The majority of the court below, in their judgment on the *mandamus* commanding such adjournment, appeared to have held, first, that the statutes of 4 & 5 Will. 4, c. 76, and the 11 & 12 Vict. c. 31, have authorised the apps. to take twenty-one days with a contingent addition of fourteen days from the service of the order of removal as the minimum time within which it is practically possible to give notice of appeal; and secondly, that if at the expiration of that space of time there are not fourteen clear days before the session begins, the app. has a right to demand an adjournment till the next sessions. So that the matter for present consideration is the effect of the two last-mentioned statutes upon the time allowed for appeals under the statutes of the 13 & 14 Car. 2, c. 12. The power created by that statute is the power under which the app. derives his right to appeal, and that statute governs the rights of the parties now before the court. We propose to consider the effect of that statute, and of those which have followed it in the order of time upon the present case. The 13 & 14 Car. 2, c. 12, s. 2, giving power to appeal to the next sessions, is imperfect both in leaving "next" undefined, and also leaving uncertain the time and manner of commencing an appeal and bringing it to trial. As the next sessions, in the literal sense, was at times an impossible sessions—for example, if the order of removal was served on the nineteenth day of the quarter, and the sessions began on the following day, as in *Rex v. East Riding*, Doug. 192—the supplement wanted was a reference to the sessions which should commence next after an interval (say of eight days or the like) from the service of the order of removal, &c.: (see *Rex v. Devon*, 8 B. & C. 640; and *Rex v. Southampton*, 8 B. & C. 641, for instances where the interval before the next sessions was so short as to justify the app. in passing them over.) As to the other imperfection, relating to the commencing an appeal and bringing it on for trial, the supplement wanted was that the appeal suit should be commenced by an entry (say at the office of the clerk of the peace, or the like), and brought to trial by a notice of trial, say of eight days, or the like. But we are to administer the law as it is, and for the purpose of so doing we would presume that the quarter may be taken to be ninety days; that the order of removal may be served on the first days of the quarter, or any intervening day; that the appeal may be commenced by notice either of appeal alone, or of appeal and trial, on any day after service of the order of removal, and before the commencement of the next sessions; or the appeal may be commenced by entry at the sessions without any notice; and we find that the above-mentioned imperfections have been partially remedied both by the courts and by the Legislature. The courts have held "next sessions" to mean, next practically possible in order that the app. might have the possibility of exercising his right, and, at first, very short intervals were considered as sufficient to make the sessions practically possible for the entry of an appeal. Thus, in *Reg. v. The Justices of Here-*

*fordshire*, 3 Term Rep. 504, two days, and in *Reg. v. The Justices of Wilts*, 2 Bott. 717, four days were held to be sufficient. Afterwards, as the time required varied with the circumstances in each case, the space allowed by the practice for a notice of trial was suggested as a time within which it would, generally speaking, be practically possible to decide on appealing: (see *Rex v. Devon*, 8 B. & C. 640, and *Rex v. Southampton*, 8 B. & C. 641.) The Legislature has required prompt decision both to prevent waste of costs and save the misery of suspense to the pauper; and if notice of appeal gave the resp. no rights to any costs till after notice of trial should have been served, in analogy to the practice at Westminster with respect to the costs of preparing for trial, there would be no hardship in requiring the receiving parish to say (at least, within the time allowed for notice of trial) whether it would receive the pauper or appeal. If the app. chose to give notice of appeal, and afterwards found he had no ground, and gave no notice of trial, the matter would be promptly disposed of, and no expense would be incurred. Although the court gave some relief to the app. by holding "next" to mean "practicable," yet this gave no relief to the resp. if the app. brought on the appeal without reasonable notice to him, and the Legislature remedied this grievance by the 9 Geo. 1, c. 7, enacting that no appeal shall be proceeded upon unless reasonable notice be given to the resp., the reasonableness to be judged of by the sessions; and if it shall appear to them that reasonable time of notice was not given, then they shall adjourn the appeal to the next sessions. This statute imposed a duty to adjourn, in respect of which *mandamus* lies when the sessions find that reasonable time of notice of trial has not been given; and it is the only statute we are aware of giving power to interfere with the discretion of the justices in respect of adjournments of trials of appeals. This statute was obviously intended to give relief to resps. in securing to them reasonable notice of trial; and the sessions of the North Riding gave it that effect, at the same time preventing the app. from gaining delay by his own laches in refusing to respite his appeal where they found that there had been sufficient time after the removal of the pauper (on the 28th Nov.) for the apps. to give notice and to come prepared to try the appeal (at the sessions held on the 13th Jan. following), and in this decision they were supported by the K.B.: (see *Rex v. North Riding*, 3 T.R. 150.) But Lord Ellenborough held the contrary, and it was finally decided that the app., by omitting notice altogether, acquired a right under this statute to demand an adjournment and to enforce his demand by *mandamus*, because, if no notice at all was given, in that case the new notice of the sessions could not find that a reasonable notice had been given: (*Reg. v. Staffordshire*, 7 Ex. 554.) From the time of this decision the app. who gave no notice at all could always obtain a delay of ninety days by entering and respiting, till the Poor Law Amendment Act was passed, whereby some check was given to this delay. That statute, the 4 & 5 Will. 4, c. 76, by s. 79 prohibited the removal of a pauper until twenty-one days after the order had been served, with a further delay of the removal in case notice of appeal should be given, till such appeal should be determined. And sect. 81 required the app. to give the grounds of appeal with the notice of appeal, fourteen days at least before the first day of the sessions at which the appeal was intended to be tried. This statute is to be construed by reference to the evils incidental to pauperism which were to be remedied by it, and as far as the present question is concerned by reference to the evils incidental to litigation concerning removal of paupers as it then existed. There was the evil of delay, because apps., if they chose, had a certainty of delay for one

EX. CH.]

REG. v. THE JUSTICES OF SUSSEX.

[EX. CH.]

quarter and more by entering and respiting the appeal. There was evil to the pauper from the delay, who had to suffer the annoyance of being thrust out and back from parish to parish; and there was evil to the tribunal and to the litigants from the absence of any information on either side of the matter to be tried. The attempted remedies were these: that the paupers should not be removed until after twenty-one days from service of the order of removal, as above stated, unless there was notice of submission to the order. This provision, in its direct terms, relates solely to the protection of the pauper and to the saving of expenses, and has not any connection with the time within which it is practically possible to decide on appealing or submitting to the order. As the order of removal might be served on any of the ninety days of the quarter, the Legislature took twenty-one days as a medium time for staying the removal. Still, if the session began within the twenty-one days, it gave no authority to pass them over as impossible, but during the twenty-one days left the parties as they stood therefore under the statute of the 13 & 14 Car. 2, c. 12. This statute further provided, by sect. 81, that each party should supply to each other information of the matter to be tried, the removing parish by sending the grounds of appeal and the provision requiring the delivery of a statement of the grounds of appeal with the notice of appeal, fourteen days at least before the first day of sessions, and this is the provision which we have to construe in this judgment. In making this construction we take the enactment as it stood before the passing of the 11 & 12 Vict. c. 81, although we consider that the intention of the Legislature in passing the 4 & 5 Will. 4 was not fulfilled till ulterior appeals were barred by sect. 9 of the latter statute. But we postpone for the present the consideration of the latter statute, and proceed to the construction of the 81st section of the 4 & 5 Will. 4, and we consider that it is to be construed according to the plain meaning of the words, so that the apps. may deliver the grounds of appeal either with the notice of appeal or fourteen days before the sessions begin, and our reasons are as follows: As the statute 4 & 5 Will. 4 required the service of a notice of the act of appealing within twenty-one days after service of the order of removal, and as the order of removal might be served in the early part of the quarter, the appeal might frequently be commenced a longer time before the sessions than would be reasonable for a notice of trial, and as the statement of the grounds of appeal might need alteration when the trial was nearer, therefore a power of delivering the statement of the grounds of appeal later than the service of the notice of the act of appeal was given. Moreover, the practice in regard to the time for notice of trial varied in different counties very widely (from twenty-eight days to six days, as it is said), and, as in case of a long notice there might be reason to alter the grounds of appeal after the notice of appeal was served, it is probable that the space of fourteen days was chosen for all sessions as a medium time for the delivery of the grounds of appeal, so that, if the statement should not accompany the notice of appeal, it should be given fourteen clear days before the sessions; also, this alternative of serving a statement of grounds separately might be wanted for the same reason when the notice of appeal should be served long before the beginning of the sessions of trial, by reason of an entry and respite. The grounds of appeal delivered with the notice of appeal would in all cases appear to have been a delivery in a reasonable time for preparing for trial, according to the practice of the sessions where it is made, because before the statute such a notice of appeal at these sessions would have operated as a notice of trial

without any grounds, and if it was a reasonable notice without any grounds, it would, *a fortiori*, be reasonable with the grounds giving definite information of the issue to be tried. If sect. 81 is read with reference to these considerations, all the words have a reasonable meaning in their ordinary sense, and operate with beneficial simplicity; but the construction contended for by the prosecutors has a confused and purposeless complexity, and ill accords with the strength that pervades this statute. This part of the judgment relates to the construction of the clause requiring delivery of the grounds of appeal with notice of appeal, fourteen days at least before the beginning of the sessions, and contains the reasons for the first ground for reversal above stated. It relates also to the point respecting the app.'s right to demand an adjournment, as it shows that the statute 4 & 5 Will. 4, c. 76, had no relation to defining the time after service of the order of removal within which it is practically possible for a receiving parish to decide whether they will appeal or submit to the order, but left that matter as it stood under 13 & 14 Car. 2, c. 12. This brings us to the 11 & 12 Vict. c. 81. One of the evils to be remedied by this statute arose from the decision in *Rex v. Suffolk*, 4 Ad. & E. 319, and *Rex v. Cornwall*, 6 A. & E. 894, namely, that 4 & 5 Will. 4, c. 76, had not required the appeal to be brought within twenty-one days, nor any notice of appeal to be given within twenty-one days, and had not altered the practice as to appealing, except as to removing the pauper within twenty-one days, and had left further power of appeal against the removal itself as a new grievance occasioned thereby. To cure this and to supplement these omissions in the 4 & 5 Will. 5, c. 76, it was enacted by sect. 9 that no appeal should be allowed unless notice of appeal should be served on the resp. within twenty-one days after the service of the order of removal; and if the enactment had stopped there it would have been complete, but it was made subject to a proviso for fourteen days in respect of depositions. This provision was made in consequence of the repeal of the clause, requiring examinations to be sent with the order of removal, and the repeal of that clause was made in order to remedy the evil referred to in the preamble of the statute, namely, expensive and useless litigation upon the point, "whether the caption of an examination showed jurisdiction," in which the merits of the appeal were entirely disregarded. This excrescence in the law was excised by putting an end to the sending of examinations with an order of removal and substituting for them grounds of removal by sects. 1 and 2. Then sect. 4 required that the final decision should not be upon the form of the notices and other documents, and that amendments should be made and adjournments granted, as need might be, for procuring a decision on the substance; and the recital that the grounds were mutually delivered in order that the parties should prepare for trial thereon, meant that the parties should direct their attention to the substance, and that the decision should be thereon rather than on matters of useless form. So far the provisions are salutary; that which follows relates to the fourteen days, and has had a different effect. Sect. 3 provided that the clerk to the justices should send a copy of the depositions to the app. within seven days if he applied and paid for them. Then sect. 9 contained the proviso, that the app. should have fourteen days from the delivery of the depositions, within which time his notice of appeal should be valid. The defect of sect. 3 is that it does not limit the time within which the app. should be obliged to apply for a copy of the depositions; the consequence is that a dilatory app. consumes the twenty-one days given for trying his appeal in making a



[EX. CH.]

REG. V. THE JUSTICES OF SUSSEX.

[EX. CH.]

colourable application for a copy of the depositions, and by that pretence acquiring a right to the further delay, beyond the twenty-one days, of fourteen days after the copy had been delivered. The proviso giving fourteen days after delivery of the depositions was intended to prevent undue delay in that delivery; but the effect has been to enable the apps. again to baffle the intention of the Legislature in respect of bringing appeals against orders of removal to a prompt decision. These are the statutes that govern the decision of the present question. The statute 13 & 14 Car. 2, requiring the appeal to be to the next practicable sessions, has the same operation now as it had when it was passed. The 4 & 5 Will. 4, c. 76, s. 81, supplemented by the 11 & 12 Vict. c. 31, s. 8, as to time, is a statute of limitation, barring all appeal of which no notice has been served within the limited time, and preventing the app. from entering and respiting as a matter of right, as above described. These statutes fix a minimum of delay, after which the appeal is barred, but they have no reference to fixing the maximum of delay after which the sessions next in fact may be passed over as not the next practicable, or after which the app. may demand an adjournment, although the sessions think he has not used due diligence in giving notice of appeal and trial. According to our construction of the statutes, the app. derived no right from them to assume that it is not practically possible to prepare for trial of an appeal in less than twenty-one days, with an addition of fourteen days; and as it is clearly possible to prepare for the trial of an appeal in less than thirty-five days after service of the order of removal, the sessions have a right to find, as the sessions for the North Riding in the case above cited found, that the app. has been guilty of unreasonable delay, and on that account to refuse the adjournment; and if they so found, they had the right to decide on the question of adjournment as they thought right. There is ample authority for saying that an app. cannot, by his negligence or dilatory conduct, make the sessions impracticable which were in fact practicable: (see *Rex v. Sevenoaks*, 7 Q. B. 136; *Rex v. Peterborough*, 7 E. & B. 643; *Rex v. The West Riding*, E. B. & E. 717.) It has been said in some of these cases, that the app. may take all the time—that is, twenty-one days *plus* fourteen days—without losing the right of appeal. This is true, where more than thirty-five days intervene between the service of the order of removal and the beginning of the sessions, but not true according to the statutes above reviewed, where the sessions begin within thirty-one days. Then the question being whether the app. had by any statute a right upon these facts to demand an adjournment? Our answer is in the negative, and it follows that, even if grounds of appeal should be sent fourteen days at least before the first day of sessions, this *mandamus* is bad. In coming to this conclusion we overrule an exposition of the meaning of 4 & 5 Will. 4, c. 76, ss. 79 and 81, which appears to have flowed from the judges in *Rex v. Suffolk*, 4 Ad. & Ell. 819, to some extent extra-judicial certainly, without discussion at the bar, and probably without much consideration on the bench, as the statute was very recent, and the judgments are in part self-contradictory in the manner pointed out by Blackburn, J., in the court below. But that exposition has been considered binding on the court where it was pronounced, and has been repeatedly adopted there. The Legislature interfered to correct this exposition, and gave such remedy as it afforded by the 11 & 12 Vict. c. 31; but that statute has also been the source of further difficulty, and the interpretations of those two statutes have been the source of such constant contention that it is alike impossible either

to apply the legal maxim *communis error facit jus*, or to assert as a fact that the practice has been settled. The matter has now been brought for the first time before a court of error. In this court we are limited to the statutes themselves as a fountain-head, and we are to declare the law as it appears to us to be contained therein, although at the expense of dissenting from several judicial opinions of eminent judges, founded in a great measure upon the case of *Rex v. Suffolk*, 4 Ad. & Ell., from which in the court below, according to usual course, they did not feel themselves at liberty to dissent. We have resorted to the statutes, and endeavoured to declare the law contained in them so far as is relevant to the case before us, and according to the law we think the judgment of the court below should be reversed on the two first grounds on which the apps. have relied. We now proceed to the third ground for reversal above mentioned, namely, that the rules of practice for the sessions held for the western division of the county of Sussex were valid, and that according to these rules the app. might have delivered grounds of appeal with a notice of appeal fourteen clear days before those sessions began, and so the refusal of the adjournment was right. It is not proposed to touch the question, whether the sessions for each division can be maintained to be original sessions as argued by Mr. Huddleston; it is assumed, for the purpose of this judgment, that the sessions for the western division are held by adjournment from the sessions for the eastern division, and although that is assumed for the purpose of this judgment, such assumption cannot prejudice the rights of the county in respect of the claim to two original sessions in each quarter if it should be hereafter renewed. Neither is it proposed to make any alteration in the rule that the next sessions after service of an order of removal having jurisdiction over an appeal against it must be ascertained by reference to the date of the original sessions for the county, and not of any adjournment thereof, as laid down in *Rex v. The Justices of Sussex*, 7 T. R. 107. But when for practical convenience the county is divided into distinct divisions, and in each division a distinct court is held, so that all the questions locally arising within each division can be raised, the practice belonging to that division and all the process for that division is returnable at the court for that division, and that panels of the jurors are made out for that division, and the rules of practice made by the court of each division for the conduct of business in it assume that the day when the court for that division begins its sittings is the first day of the sessions for that division, we see good reason for holding that the conduct of an appeal suit which has been properly commenced, and which belongs to one of those divisions, should be governed by the rules of practice for that division in the same manner as the notices, summonses and proceedings other than those relating to appeals against orders of removal and poor-rates are governed thereby. Much inconvenience would be saved and many failures of justice would be prevented if such were the law, and no advantage has been suggested to arise from holding the contrary, unless it be the danger of confusion between the sessions which have jurisdiction to receive the appeal and the sessions which are to try it. But the danger from that source is much lessened since appellants are required by the 4 & 5 Will. 4, c. 76, and 11 & 12 Vict. c. 31, in almost all cases, to commence their appeal by service of notice of appeal on the resp., which notice would be so construed as to make it valid if the intention of the parties to give a valid notice was apparent. The only authority to the contrary is *Rex v. Suffolk*, 16 L. J. 36, M. C., which was by

C. CAS. R.]

REG. v. JAMES ROWTON.

[C. CAS. R.]

a single judge alone (Erle, J.), founded on *Rex v. Sussex*, in 7 T. R. 107, above cited, from which it ought to have been distinguished on account of the considerations above mentioned, and the overruling of which would be the proper function of a court of appeal, if the decision appeared to be erroneous. The other cases referred to in that case from 19 Vin. and 2 Str., support the judgment in *Rex v. Sussex*, 7 T. R. 107, and are distinguished from the case of *Rex v. Suffolk*, 16 L. J., by reason of those considerations. Then, as the case of *Rex v. Suffolk*, 16 L. J., M. C., is not supported by authority, and as the rule it lays down introduces useless complexity without any compensatory advantage, and as it is expedient that the rules of practice made by the justices should be supported according to their intention, unless there be law to the contrary, we have come to the conclusion that we ought to overrule that case. The 81st section of the 4 & 5 Will. 4, c. 76, directs the fourteen days to be counted before the first day of the sessions at which the appeal is to be tried; that in common understanding would express the session for the division which is to try it. Blackburn, J. suggests that the section might be so construed, and Crompton, J. expresses himself to the same effect. For these reasons we think that the judgment ought to be reversed on this third ground also.

*Judgment reversed.*

#### CROWN CASES RESERVED.

Reported by J. THOMPSON, Esq., Barrister-at-Law.

Jan. 21 and 28, 1865.

Before COCKBURN, C.J., ERLE, C.J., POLLOCK, C.B., WILLIAMS, J., MARTIN, B., WILLES, J., CHANNELL, B., KEATING, BLACKBURN and MELLOH, JJ., PIGOTT, B. and SHEE, J.)

REG. v. JAMES ROWTON.

*Evidence—General good character of prisoner—Evidence to rebut.*

*When a prisoner calls evidence of general good character, the prosecutor may call evidence to rebut it.*

*Evidence to general good character of a prisoner must be in the nature of reputation, and not of the individual opinions of the witnesses as to the disposition of the accused (Erle, C.J. and Willes, J. dissentientibus).*

*Witnesses to character cannot go into particular facts in support of it.*

*A witness called to rebut evidence of general good character of the prisoner, who was charged with committing an indecent assault, said that he knew nothing of the opinion of the neighbourhood as to the prisoner's character, because he was only a boy at school when he knew the prisoner; but his own opinion and that of his brothers who were also pupils of the prisoner was, that his character was that of a man capable of the grossest indecency:*

*Held, that this answer was inadmissible, as it was in the nature of a statement of a particular fact.*

Case reserved for the opinion of the Court of Criminal Appeal by the Deputy-Assistant Judge at the Middlesex Sessions.

The case was argued before Pollock, C.B., Willes, J., Channell, B., Byles and Shee, JJ., on the 19th Nov. 1864, but the Court being divided in opinion the case was directed to be reargued before twelve Judges.

#### CASE.

James Rowton was tried before me, at the Middlesex Sessions, on the 30th Sept. 1864, on an indictment which charged him with having committed an

indecent assault upon George Low, a lad about fourteen years of age.

On the part of the deft., several witnesses were called who had known him at different periods of his life, and they gave him an excellent character as a moral and well-conducted man.

On the part of the prosecution it was proposed to contradict this testimony, and a witness was called for that purpose.

This was objected to by the deft.'s counsel, who contended that no such evidence was receivable, and recited the case of *Reg. v. Burt and others*, 5 Cox's C. C. 284.

I thought the evidence was admissible, and after the witness had stated that he knew the deft., the following question was put to him:

"What is the deft.'s general character for decency and morality of conduct?"

His reply was, "I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality."

It was objected that this was not legal evidence at all of bad moral character.

I considered that it was some evidence, and I left the weight and effect of it as an answer to the evidence of good character, to be determined by the jury.

The deft. was convicted, and is now in prison awaiting the judgment of your Lordships.

The questions upon which I respectfully request your decision are—

1. Whether, when witnesses have given a deft. a good character, any evidence is admissible to contradict.

2. Whether the answer made by the witness in this case was properly left to the jury.

JOSEPH PAYNE, Deputy-Assistant Judge.

Oct. 22, 1864.

*Sleigh for the prisoner.*—This conviction cannot be sustained. First, as to whether evidence can be called on the part of the prosecution to contradict the evidence of general good character given for the prisoner, in the case of *Reg. v. Burt*, 5 Cox C. C. 284, Martin, B., after consulting with Erle, J., ruled that it could not. The question of the prisoner's character forms no part of the record or of the issue, and the earliest case reported in which evidence of character was received (*Rex v. Harris*, 7 St. Tr. 930), seems to put its admissibility in *favorem vitæ* (2 Russ. on Crimes, 784.) In Buller's N. P. 295, it is said: "The prosecutor cannot enter into the deft.'s character unless the deft. enable him so to do by calling witnesses in support of it, and even then the prosecutor cannot examine to particular facts, the general character of the deft. not being put in issue, but coming in collaterally: (*Clark v. Periam*, 2 Atk. 333-337.) Secondly, as to the other question reserved, whether the answer of the witness was properly left to the jury, it is submitted that it was not. No specific fact, or individual opinion of a witness, in support or impeachment of the prisoner's character can be admitted in evidence. The only admissible evidence is that of the reputation which the prisoner has held; not what opinion any one person may have formed of him, and on that ground it is submitted that the individual opinion of any person, no matter the number of years he may have known the prisoner, or what opportunities he may have had of judging of his character, is inadmissible. The learned counsel then referred to the definition of the word "character" given in Johnson's, Webster's and Richardson's Dictionaries, and also to Erskine's

eloquent definition of it in *Hardy's case*, 24 St. Tr. 1079, and cited

- 2 Stark on Evid. 804, 2nd edit.;
- 1 Phil. on Evid. 507 (edit. 1852), *Rez v. Cole* (M. S. S.);
- 3 Bentham, 191-195 (Rationale of Evidence);
- Best on Evid. 326 (edit. 1854);
- Bookwood's case*, 18 St. Tr. 211;
- Rez v. Davison*, 31 St. Tr. 189-190;
- Rez v. Jones*, Ibid. 810;
- Sharp v. Scoging*, Holt N. P. 541;
- Mawson v. Hartsink*, 4 Esp. 102;
- Attorney-General v. Hitchcock*, 11 Jur. 476, Parke, B.

G. Taylor for the prosecution.—(The Court informed him that he need only address his argument to the second question.)—With respect to the answer of the witness that was left to the jury, there is no rule of law by which it can be excluded. The objection is rather one of form than of substance. There is no authority for saying that the witness should have been stopped as soon as he had said that he knew nothing of the neighbourhood's opinion. There is a wide distinction between a witness stating his own opinion, or the judgment he has formed of the prisoner's character, and his going on to state particular facts in support of character. The only limit that ought to be put on evidence as to character is, that the witness must not go into particular facts. In this case the answer of the witness was substantially a general opinion formed by him of the prisoner's character. [COCKBURN, C.J.—In that sense the word character is synonymous with disposition. ERLE, C.J.—The question of character in this case is, what was the disposition of the prisoner with regard to such offences?] The prisoner, by calling witnesses to his character, raised the question, what was the disposition or tendency of his mind in such cases. Evidence of character does not mean evidence of reputation in the same sense as when reputation is applied to cases of right of way, or ancient customs, or matters of that nature. It has relation to the opinion or judgment formed by his fellows of a man's conduct. The only authority for saying that a witness's individual opinion or judgment of a man's character is inadmissible is that of Lord Ellenborough in *Rez v. Jones*. [FOLLOCK, C.B.—A master who can speak to a servant's character for a number of years for honesty and fidelity is surely entitled to do so.] In *Rez v. Jones* no doubt Lord Ellenborough said, on a question of character, that it must be reputation, and not what a man knows of any particular act of the prisoner's. The learned counsel then reviewed the authorities cited on the other side, and submitted to the court that the opinion or judgment formed by a particular witness was admissible as evidence of character, and that the only exclusion was as to the statement of particular facts in support of such general opinion:

- Taylor on Evidence;
- Best on Evidence, 367 (3rd edit.);
- Mawson v. Hartsink*, 4 Esp. 102;
- Penny v. Watts*, 2 De G. & Sm. 528;
- Rez v. Murphy*, 9 St. Tr. 725.

*Seigh* was heard in reply.

COCKBURN, C. J.—The question for the court in this case is, whether an answer is admissible given by a witness called on the part of the prosecution to rebut the general evidence of good character given in favour of the deft., and who was asked this question, "What is the deft.'s general character for decency and morality of conduct?" and to which question the answer was in these terms, "I know nothing of the neighbourhood's opinion because I was only a boy at school when I knew him, but my own opinion and the opinion of my brothers, who were

also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality." The question for the court is, whether that answer was properly received in evidence? I am of opinion that it was not properly received, and that the conviction cannot stand. Two questions have been discussed: the first, whether, when evidence has been given of general good character for the prisoner, evidence of general bad character may be adduced on the part of the prosecution to rebut it. As to that question, I am clearly of opinion that such evidence may be properly received. It is true that no such evidence has been adduced within the recollection of most of us, for evidence of the prisoner's general good character is seldom called when the prisoner's counsel is made aware, as he is generally by the counsel on the other side, that the prisoner's good character is impeached on the part of the prosecution. But when we are called on to answer the question whether such evidence is admissible, it is impossible to come to but one conclusion. The question of the general good character of the prisoner is not a collateral issue in the ordinary sense of the term; it is one of the elements in the case from which the jury are to find their verdict. If the prisoner thinks proper to raise the question of his general good character by giving evidence of it, nothing could be more injurious to the interests of justice than that it should not be allowed to the prosecutor to rebut it, because, if the true character of the prisoner were known to the jury, they would not be likely to be misled in giving their verdict. Assuming then that evidence to rebut the evidence of the prisoner's general good character was properly received, the other question is, whether the answer of the witness given to a legitimate question was an answer which it was proper on the part of the presiding judge to leave for the consideration of the jury. In the first instance, it is necessary to consider what is the meaning of evidence of character. It is laid down in the text-books that the prisoner is entitled to give evidence as to his general good character. Does that mean evidence of the reputation he holds among those who know him, or of the disposition or tendency of his mind in relation to the character of the offence charged? I quite agree that what it is desirable to get at is, the tendency of the prisoner's mind as to his liability to commit the offence charged against him; but the only way allowed by law to get at that is by producing evidence as to the prisoner's general character. That is the sense in which the term is used by all the text-writers. Mr. Roscoe puts the admission of evidence of the prisoner's general good character on the ground that the fact of the prisoner being a person of unblemished reputation leads to the presumption that he is incapable of committing the offence charged, and therefore that it is evidence that he did not commit it. We are not now considering whether the law should be altered. It may be that it would be expedient to import into our law the practice of other countries and to inquire into the antecedents of prisoners, and to show therefrom that they are capable of committing the offences charged against them. But no one would contend that it is competent to enter into particular facts. The truth is, this part of our law is an anomaly. It is not allowable to go into the antecedent bad character of the prisoner, from which you might form a probability as to his guilt, from the desire to administer the criminal law as mercifully as possible. It is true that in practice sometimes, when a witness is called to prove the good character of the prisoner, he gives cogency to his evidence by a statement of circumstances which show that he had a good and abundant opportunity of acquiring information. In practice this is often

C. CAS. R.]

REG. v. JAMES ROWTON.

[C. CAS. R.]

carried beyond what is justifiable. The limit is in my judgment, that evidence is admissible of general reputation of good character, and not of individual opinion. It is clear that if a witness to character is called who knows nothing of the general reputation of the prisoner, but speaks only as to his individual opinion, such evidence, if objected to, is not receivable; he is not allowed to give his individual opinion. The next question is, within what limits must the evidence rebutting general good character be confined? In my opinion it must be evidence of the same kind and be kept within the same line; it must be evidence of the same general description. In the present case the witness at once disclaims all knowledge of the general reputation of the deft., but says that in his opinion the prisoner's disposition is that of a man capable of the grossest indecency and immorality, for in that sense the word character was obviously used. I am strongly of opinion that that answer was not receivable. It is not, however, because an objectionable answer has been given to an unobjectionable question that a verdict can be impeached; and if the presiding judge had told the jury not to take it into their consideration, but to disregard it, I should not have been disposed to disturb the conviction; but here he told them to take it into their consideration, and the evidence became part of the case; therefore, I think the conviction ought not to stand. I rest on the fact that it has been uniformly laid down by text-writers that evidence of general character must be general evidence in the sense of reputation, and that evidence of particular facts to establish the disposition or tendency of the mind of the accused, and to show his capability of committing the offence charged, is inadmissible, and therefore I am of opinion that this conviction must be set aside.

ERLE, C. J.—I concur with the Lord Chief Justice in many parts of his judgment. The admissibility of evidence of good character for a prisoner stands on peculiar grounds. The questions for our opinion to-day are raised now for the first time for solemn adjudication. Our answer thereto ought to be regulated by attending to the important interests of truth. And if a prisoner having a bad character chooses to raise the question of his character by calling evidence to it I am of opinion that the impression likely to be so created ought to be removed by evidence on the part of the prosecution. With reference to the first question, whether evidence is admissible on the part of the prosecution to rebut evidence of general good character on the part of the prisoner, I agree with the Lord Chief Justice, that it is admissible, and that this question ought to be answered in the affirmative. With reference to the second question, I do not agree with him. I agree that individual facts are to be excluded, and I do not stop to inquire whether an answer to a proper question as to character, which includes in it something like individual fact, is receivable, because the main question is of such very general importance that I wish to give my opinion on that. On the general question, what is the principle of admitting character in evidence in criminal cases, I am of opinion that such evidence is admitted for the purpose of showing the disposition of the accused and raising a presumption from it, that the accused did not commit the crime charged. Evidence of character can only be obtained from the opinion of other persons than the accused; that opinion must be formed from the personal experience of the witnesses, or from that of others who have formed an opinion of the character of the accused from their own personal experience. The point at issue now is, whether the court is at liberty to receive evidence of the reputation of

the prisoner, founded on the personal experience of the witnesses called to prove it. I am of opinion that both sources of evidence are admissible, both the general rumour prevalent in the neighbourhood where the accused resides, and, in my opinion also, the personal experience of those who have had abundant opportunity of forming an opinion of the character of the accused. In my experience I never heard a witness to character examined without inquiry as to his own personal experience, and so his evidence has been left to the jury. Now if a witness was called to speak to the character of the accused, who should say, "I have had the accused in my employ twenty years, but I never heard a human being speak of his reputation," upon the rules laid down by the Lord Chief Justice, the presiding judge would be required to say that his evidence was not admissible. That is the point on which I differ from him, and to my mind such a witness is entitled to give in evidence his personal experience of the prisoner's character. What a witness may say he has heard others say of the prisoner's character is slight in comparison with such personal experience. But if general character alone is admissible, it is important to get at it by evidence. General rumour, which is derived from a number of special statements, if strictly examined, will come to be the opinion of a number of persons speaking from their personal experience. The best character is generally the least talked about; the man whose honesty has never been thought to be in question is not talked of, and therefore the value of general rumour is doubtful. I have attempted to give expression to the argument of Mr. Taylor, which carried great weight with it to my mind. And when I look at *Rex v. Davison*, that argument was justified by the mode in which Lord Ellenborough and Mr. Holroyd acted. Eleven witnesses to the character of Davison were called, and five or six out of the eleven gave very considerable evidence of their own personal experience. Lord Moira, the first witness called, spoke generally from his own experience, but when he came to a special transaction, then Lord Ellenborough interfered. He was asked whether he thought Davison capable of committing a fraud. In answer to this question, "From your Lordship's general knowledge of his conduct, is he a person whom your Lordship would think capable of committing a fraud?" he said, "Certainly not. I never had the remotest ground for suspicion. If I had had the slightest ground, I never could have again solicited him to accept the office of Treasurer of the Ordnance under circumstances which never could have made it an object to him from any pecuniary consideration. Shall I state the particulars?" Then Lord Ellenborough interposed: "One is very unwilling to diminish the scope of these inquiries, but the general inquiry is as to the general character." That is confirmatory of my opinion. It is true that in the present case the answer of the scholar that was given was bad, and would have fallen within my principle, that you cannot speak as to a particular fact. But on a great question like this, as to the admissibility of personal experience or character, I do not stop to analyse the particular answer of the witness more fully.

COCKBURN, C. J.—I should not have thought for a moment to reply upon the judgment of the Lord Chief Justice of the Common Pleas, but I am anxious that I should not be thought by anything I have said to convey the idea that the negative experience of a witness to character should be excluded. I quite agree that, when a witness says "I have known the prisoner for a number of years and never heard anything against him," that is cogent evidence of a man's character, and

C. CAS. R.]

JONES v. GOUGH.

[PRIV. CO.]

I did not intend to lay down that it should be excluded.

MARTIN, B.—I concur with the Lord Chief Justice of England that the answer of the witness related to particular facts known to himself and his brothers, and that the judge was wrong in leaving it for the consideration of the jury. With respect to the first point, whether evidence can be called on the part of the prosecution to rebut evidence of general good character given for the prisoner, I should have acted upon the practice that has prevailed for a long time, and had it depended on me I should have taken time to consider my judgment. The doubt on my mind arises from this: the common law of England is made up of practice and precedents; what has been the practice for years is the law of the land; if the practice is bad the Legislature interferes and sets it right. That is the history of the common law. In this case the indictment charged the prisoner with committing an indecent assault. If I were investigating the case for myself, my first inquiry would be, What was the prisoner's character in cases like this? and if I was informed that he was addicted to such practices I should be much influenced by that; but in a court of law that kind of evidence is not admissible: nothing but evidence bearing on the issue is admissible. The law says that the evidence in support of the charge shall be confined to evidence bearing directly on the issue before the jury. But a practice has sprung up that the accused may give evidence of good character, and he may show that he was therefore unlikely to commit an offence of the kind charged against him. That is an anomaly in the law, and the first case in the books in which it appears to have been done occurred nearly 200 years ago. No case can be cited in which evidence to rebut such evidence of good character has been admitted. In the text-books it is stated that such evidence is admissible, but no instance in which it has been done is cited. I rely on the fact that no instance in which such evidence has been admitted is cited, and I think it is better to leave the practice so. I can conceive cases in which it is likely that too much weight may be given to evidence of bad character. However, all my learned brothers are of a different opinion, and no doubt in strict reason the evidence is admissible. For my own part I should have been disposed to act on the course of practice that has been pursued for so long a time.

WILLES, J.—I am of opinion that on both questions the ruling of the presiding judge was right. With respect to the first question, whether evidence was admissible on the part of the prosecution to answer the evidence of general good character given for the prisoner, I own I should have been glad if the court could have come to the conclusion that it should be rejected. But looking to the text-books of Roscoe, Phillips and Starkie, it is clear that such evidence must have been given for years, and the practice have prevailed. The fact that there is no reported case does not operate on my mind. I cannot help thinking that where the practice has been resorted to it has been considered unusual, and been found inconvenient. With respect to the second question, I agree with Erle, C.J. Why is it that evidence of general good character is admissible on the part of a prisoner? I agree that it is a mistake to suppose that the prisoner can raise the question of character collaterally only. Evidence of general good character makes it less probable that the prisoner committed the offence charged. Evidence of bad character is not in the first instance admissible on the part of the prosecution; otherwise, as stated by my brother Martin, we should have the whole life of the prisoner ripped up in the course of the trial, and in

the result the prisoner might be overwhelmed with prejudice instead of being convicted on affirmative evidence. The question of character is relevant to the issue. General evidence of good character does not mean mere evidence of the general opinion among a man's acquaintance, but general evidence of the character of the man. I agree that particular acts must be excluded, because there is no notice to the prisoner that any inquiry is about to be made into the particular acts. What other persons know of the prisoner, and their judgment of him, is, I think, admissible; otherwise a person of a shy or retiring disposition, of whom only his intimates can speak, will suffer; whereas another man of a forward disposition, who may have earned a reputation without deserving it, will profit by the exclusion of the witness's own judgment. For the character of a servant you go to the last master; for the character of a boy to his parents and teachers; for the credit of a man to the man of business with whom he has dealt; and why not in point of law for the character of a prisoner go to the man who knows him, and has had an opportunity of forming a judgment of it? It is said that we are to be guided by the long practice as to the admission of such evidence. The practice as I find it is to call, not merely witnesses from the neighbourhood where the prisoner resides, but also the master at the time of the offence. In point of reason, I think the evidence of character on the part of the prosecution should be as co-extensive as that given for the prisoner. And I cannot help owning that, if I had tried this case, I should have attempted to persuade the counsel for the prosecution not to persevere with the witness; but not succeeding in that I should have fallen into the same mistake as the presiding judge.

The other Judges concurred with Cockburn, C.J.

COCKBURN, C. J. said that Byles, J. (who had heard the argument before the five judges) had requested him to say that he concurred in the view taken by the majority of the Judges in the court below, and in this court.

*Conviction quashed.*

#### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATERSON, Esq., of the Middle Temple,  
Barrister-at-Law.

Thursday, Feb. 2, 1865.

(Present—The Right Hon. Lords CRANWORTH and  
CHELMSFORD, KNIGHT BRUCE, L. J., and  
TURNER, L. J.)

JONES v. GOUGH.

*Church-rate—Ecclesiastical parish—Relinquishment of  
surplice fees—19 & 20 Vict. c. 104, s. 12.*

*Where an ecclesiastical district has been formed out of several parishes, the incumbent of the chapelry in the new district will not be entitled to the fees of marriages, &c. within the meaning of 19 & 20 Vict. c. 104, s. 12, until after the next avoidance, or the relinquishment of fees by the incumbents of all the parishes out of which the chapelry has been formed.*

*The chapelry of L. had an ecclesiastical district annexed to it by Order of Council, such district being formed out of parishes A., B. and C. The Order in Council said nothing about fees, but the incumbents of A., B. and C. never claimed such fees, though they were also not clearly aware of their right to them. The incumbent of L. had taken the fees for his own benefit:*

*Held (affirming the judgment of the Court of Arches),*

Priv. Co.]

JONES v. GOUGH.

[Priv. Co.]

*that the facts were evidence from which a voluntary relinquishment of the fees by the incumbents of A., B. and C. might be inferred, and therefore that L. was now an ecclesiastical parish within 19 & 20 Vict. c. 104, s. 14.*

This was an appeal from the Arches Court of Canterbury, in a cause of subtraction of church-rate, promoted by Edward Gough and others, churchwardens of the parish of St. Mary, Shrewsbury, in the county of Salop, against John Jones, a parishioner and inhabitant of that parish, by virtue of letters of request from the chancellor of the diocese of Lichfield, to recover 16s. 1½d., the amount of church-rate assessed against the said John Jones.

The libel set forth that the churchwardens of the parish of St. Mary, Shrewsbury, exclusive of the districts of St. Michael, Leaton, Astley, Clive and Albrighton, made the rate in question, and John Jones the deft. was duly rated in the above sum.

The libel further set forth that St. Michael, Leaton, Astley, Clive and Albrighton have each one a district assigned to it, with power to each incumbent thereof respectively to publish banns of matrimony, to solemnise marriages, churchings, baptisms and burials, and also to receive, for his own use and benefit, the entire fees arising from the performance of the said offices, without any reservation thereof, and which said powers each of such incumbents exercises. That, in consequence thereof, each of the said districts became, by virtue and operation of the Act of Parliament intituled "The New Parishes Act 1856," sects. 14 and 15, and is, a separate and distinct parish for all ecclesiastical purposes, and is not liable for the repairs or other expenses of St. Mary, Shrewsbury, the mother church, to wit, St. Michael, on and after the 29th July 1856, in virtue of two previous orders of Her Majesty in Council, published respectively in the *London Gazette* bearing date the 28th May 1852, and 19th May 1854; and Leaton, Astley, Clive and Albrighton, in virtue of an order of Her Majesty in Council, published in the *London Gazette* in each case respectively, bearing date as to Leaton on the 31st March 1860, as to Astley on the 28th Aug. 1860, and as to Clive and Albrighton, 30th Oct. 1860. And all the fees aforesaid in respect of Leaton were voluntarily relinquished to the incumbent thereof immediately after its consolidated chapelry was formed, to wit, on the 31st March 1860.

In answer to the libel, the deft. set forth, among other things, that the consolidated chapelry of Leaton was created by an Order in Council, published in the *London Gazette* of March 3, 1860. That such consolidated chapelry is composed of part of the parish of St. Mary, Shrewsbury, part of the parish of Fitz, and part of the parish of Preston Gubbalds. That such consolidated chapelry had not, at or prior to the making the rate in question, become a separate and distinct parish for ecclesiastical purposes. That such part of the said consolidated chapelry as was taken from the said parish of St. Mary, Shrewsbury, contains property legally assessable to a church-rate.

The question raised by the above issue was, whether the district of Leaton had become a separate parish within the meaning of 19 & 20 Vict. c. 104, s. 14, when that Act passed, and whether the incumbent thereof was entitled to the fees of marriages, churchings and baptisms.

The incumbent of Leaton Church on the subject of fees stated as follows:

I am the incumbent of the perpetual curacy of Leaton aforesaid. I have been so since the consecration of the church there in Oct. 1858, a few months prior to the issuing of the Order in Council by which the district was assigned to the church. The district was formed by severance from three parishes, Saint Mary, Shrewsbury, Fitz and Preston Gubbalds. Since such the formation of the said district I have received for my own use and benefit the entire fees arising from the

publication of banns, the solemnisation of marriages, churchings and burials within the district without any reservation thereof. I have never had any claim made by the incumbent of either of the three parishes severed to form my district for or in respect of such fees or any part of them, nor have I rendered to either of them any account thereof, or been asked to do so. I do not know that there has ever been any formal relinquishment of the fees on the part of the said incumbents. I can only say that I remember that previous to my being appointed to the church while the thing was about, I was informed by Mr. Lloyd, the patron of the living, that he was happy to say that the fees had been relinquished in my favour, and that I would take them to my own use, and I have done so exclusively throughout my incumbency. I may mention that within two months past I have seen in the possession of the said Mr. Lloyd, the patron of Leaton, a letter in the handwriting of the Rev. Thomas Bucknall Lloyd, the incumbent of St. Mary's, Shrewsbury, purporting to have been addressed to the said Mr. Lloyd at or about the time of my appointment to Leaton Church, in which letter it was stated by the said Rev. Mr. Lloyd that he had relinquished the fees in my favour, but since that time I have been informed and believe that the letter is missing, having been in some way lost or destroyed, and that it cannot now be found. I have no knowledge of any legal abandonment by the incumbents of St. Mary, Shrewsbury, Fitz and Preston Gubbalds of the fees for banns, churchings, marriages, and burials performed by me as incumbent of the consolidated chapelry of Leaton in respect of persons resident in those parts of Leaton which were taken out of their parishes. I know no more respecting that than appears in my deposition. I was not aware that I was by law bound to keep an account of such fees for the performance of such offices, and every year account to the incumbents of St. Mary, Fitz and Preston Gubbalds for the same. On the contrary, considering that they had voluntarily relinquished their right to the fees, there was no necessity for my doing so. I do not know that the incumbents of St. Mary, Fitz, or Preston Gubbalds have either of them by any legal instrument in writing relinquished the right to such fees or any of them.

The incumbents of the other parishes from which Leaton district was constructed said they had executed no formal relinquishment of the fees received at Leaton Church, but had understood that they were not legally entitled to these fees, and had never claimed them.

There were other objections to the rate which are not material.

The learned judge, Dr. Lushington, held, that though the Order in Council constituting the consolidated chapelry of Leaton made no mention of fees, yet, as the incumbents of the other parishes interested had not *de facto* claimed them, and as the incumbent of Leaton had *de facto* received them for his own use, it must be taken that those incumbents had voluntarily relinquished those fees, and therefore that Leaton being a separate parish, the rate had properly omitted the parishioners of St. Mary resident in that part of the parish now forming part of Leaton district: (see 9 L. T. Rep. N. S. 610).

The present appeal was now brought to Her Majesty in Council.

*Lush, Q. C., Deane, Q. C., and Wills*, for the appa., contended that under the circumstances it could not be taken that the incumbents of the neighbouring parishes had voluntarily relinquished these fees, and so that Leaton was still part of St. Mary's, and ought to have been included in the rate, which rate was, by reason of such omission, void.

*Powell, Q. C. and Robertson* for the resps.

*On adv. vult.*

**LORD CRANWORTH.**—The sole question in this case is, whether or not Leaton, or any part of it, remains a portion of the parish of St. Mary's, Shrewsbury. No doubt a part of it once did belong to that parish, and the question therefore is, whether it has ceased to belong to it. From 58 Geo. 3, c. 45, downwards, there have been passed a number of Acts of Parliament authorising commissioners to create new ecclesiastical districts. The earliest authority given to them was, that where parishes were populous and large they might take out of those populous and large parishes a district, and form it into a separate

PRIV. CO.]

FRY v. TREASURE.

[PRIV. CO.]

ecclesiastical district. It was soon found that this power did not meet the whole evil it was meant to remedy. It might be inconvenient or impossible to take a district out of one parish and make a separate parish of it, but there might be several parishes lapping into one another, out of all of which a new district might conveniently be taken. Powers for this purpose were given by the 59 Geo. 3, c. 134, and the new district so formed is in the Act called a consolidated chapelry. The regulations by which these new districts, when formed, were to be governed, must have been intended to be the same, whether they came out of one parish or out of several parishes, and whether they are designated as districts or chapelries. That being so, their Lordships will now state what the enactment is on which it is contended that this district of Leaton has become a separate parish. In 19 & 20 Vict. c. 104, s. 14, it is enacted, "That whenever the solemnisation of marriages, churchings and baptisms according to the laws and canons in force in this realm are authorised to be published and performed in any consecrated church or chapel to which a district shall belong." We must here pause to say that, by an Order in Council in 1860, a district taken out of the parish of St. Mary's, Shrewsbury, and several adjoining parishes, was annexed to a consecrated chapel. There was undoubtedly, therefore, a district to which a consecrated chapel belonged. Then the section proceeds, "Such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices, without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes." And by the next section it is provided that, not only shall the new parish become a separate parish for all ecclesiastical purposes, but the inhabitants of that parish are to be, for ecclesiastical purposes, parishioners of that parish, and of no other parish, and all the laws relating to ecclesiastical matters as to that parish are to apply to that parish and to no other. The question therefore is, whether the incumbent of this new consolidated chapelry has become entitled, under such authority as mentioned in the Act, to the fees arising from the performance of the ecclesiastical offices therein mentioned. There are two questions. Has he become entitled to these fees? and, if so, has he become so entitled "by virtue of such authority," within the true meaning of those words as they are found in the 14th clause of the Act? The question whether he has become entitled to these fees depends upon this: he was not entitled simply by the constitution of the ecclesiastical district, i. e., the consolidated chapelry, because, by laws in force previously to the 19 & 20 Vict. c. 104, with reference to the constitution of such district, the incumbent of the old parish continued to be entitled to them, unless some other arrangement is made. But by this new Act a considerable change is made. The enactment on this subject is to be found in the 12th section of the Act, which enacts that from and after the next avoidance, or the relinquishment of such fees, by such incumbent, i. e., the incumbent of the original parish, then the fees shall belong to the incumbent of the new district. We are clearly of opinion that in the case of a consolidated chapelry the words "such incumbent" must mean the incumbents of all the parishes out of which the chapelry has been formed. The question therefore is, have the fees belonging to St. Mary's, Shrewsbury, and the other two parishes, or have they not, been relinquished? That was a question of fact which the learned judge below had to decide. There is no doubt it is

a question of some nicety. Of the three incumbents, one of them says, "I did expressly give them up;" the other two in substance say, "I made no formal resignation, but when I gave up the right to the parish which I was asked to give up, and did give up, I considered that I gave up everything." Three years after this happened they are examined, and they do not pretend to say that they have been otherwise advised since. What takes place after the institution of the suit is of course no otherwise important than as affording evidence of what the witnesses meant to do at the time when the district was formed. But we think the learned judge came to a reasonable conclusion; and even if there were no more doubt about it than there is, it is a principle of every court of appeal, upon a question of fact, that if a matter has been fully and fairly considered in the court below, unless the Court of Appeal is able to say that the decision of the fact was clearly wrong, it should not be disturbed. Therefore, upon the question of fact, we concur with the learned judge below. Then it was said, that what was to be proved was not merely that the incumbent had become entitled for his own benefit to the fees, but that he had become so entitled "by such authority" referred to in the 14th section. All these Acts are, unfortunately, very loosely worded; but when we come to look at the clause, we see that what must have been meant was the whole authority under which the district was constituted, including the 12th section of the Act; and by that section it was expressly provided that the relinquishment of fees by the incumbent of the old parish should be one mode in which the incumbent of the new district should become entitled to them. We think, therefore, that the judgment of the court below must be affirmed, and the appeal dismissed with costs.

*Judgment affirmed with costs.*

Apprs.' proctor, *E. W. Crosse.*

Resps.' proctors, *Nelson and Son.*

*Saturday, Feb. 11, 1865.*

(Present—The Right Hon. Lords CRANWORTH and CHELMSFORD, KNIGHT BRUCE, L.J., and TURNER, L.J.)

FRY v. TREASURE.

*Churchwarden—Suit for subtraction of church-rate—Right of one to sue in name of both—Practice of Ecclesiastical Court.*

*One of two churchwardens has no right, without the other's consent, to use the latter's name as co-plt. in a suit against a parishioner for subtraction of church-rate, and there is no implied authority in such circumstances, the proper remedy, if any, being the removal of the obstinate churchwarden for misconduct.*

*Where a case comes before the Court of Arches by letters of request, the suit does not commence in the court below, but in the Court of Arches, the letters forming no part of the cause.*

This was a cause of subtraction of church-rate, and was instituted by the apprs. Bruges Fry and Robert Greata, then churchwardens of the parish of Cheddar, in the county of Somerset and diocese of Bath and Wells, and province of Canterbury, against the resp. Levi Treasure, of the said parish of Cheddar, a ratepayer and inhabitant thereof.

The suit was commenced in the Arches Court of Canterbury by virtue of letters of request, issued at the instance of both the apprs., and under the hand and seal of the worshipful Charles Walter Bagot, Clerk, Master of Arts, Vicar-General of the Right Hon. and Right Rev. Father in God Robert John Baron



PRIV. CO.]

FRY v. TREASURE.

[PRIV. CO.]

Auckland, by Divine permission Lord Bishop of Bath and Wells.

The decree of the Arches Court of Canterbury, citing the deft. in the court below to appear in the suit, was returned by the proctor for the apps., the plts. in the court below, and the said proctor then exhibited proxy, under the hand and seal of the plt. Robert Greata, and alleged that the plt. Bruges Fry proceeded no further in the suit. The said Bruges Fry was not, however, dismissed from the suit, and all the subsequent proceedings had been had in the cause as originally entitled.

The deft. appeared in the suit, but under protest to the constitution of the cause, and an act on petition was on his behalf filed, extending the said protest. Both parties wrote to the said act, the proceedings upon which were subsequently concluded; and the proctor for the said plts. brought in further proxy under the hand and seal of the plt. Robert Greata, as acting on behalf of himself and the plt. Bruges Fry.

The questions raised by the act on petition having been argued, the Court, after deliberation, pronounced for the protest, and condemned the plt., Robert Greata, in costs: (see 10 L. T. Rep. N. S. 889.)

Against this sentence the present appeal was brought.

The further proxy of Mr. Greata on the 5th June was as follows:

Whereas there is now depending undetermined in judgment in the Arches Court of Canterbury, by virtue of letters of request from the Worshipful Charles Walter Bagot, Clerk, Master of Arts, Vicar-General of the Right Honourable and Right Reverend Father in God Robert John Baron Auckland, by Divine permission Lord Bishop of Bath and Wells, and Official Principal of the Consistorial Episcopal Court of Wells, lawfully constituted, a certain cause or business of subtraction of church-rate promoted and brought by Bruges Fry and Robert Greata, the churchwardens duly appointed of the parish of Cheddar, in the county of Somerset, diocese of Bath and Wells, and province of Canterbury, against Levi Treasure, a ratepayer and inhabitant of the said parish. Now know all men by these presents that I, the said Robert Greata (for divers good causes and considerations me therunto moving), have nominated, constituted and appointed, and do hereby nominate, constitute and appoint, William Tarn Pritchard, notary public, and Alfred John Pritchard, two of the procurators exercent in the Arches Court of Canterbury, or in their absence any other proctor of the said court for them, to be jointly and severally the true and lawful proctors of myself and the said Bruges Fry, for and in the names of myself and the said Bruges Fry, to appear before the Right Honourable Stephen Lushington, Doctor of Laws, Official Principal of the said Arches Court of Canterbury, lawfully constituted his surrogate, or other competent judge, in this behalf, to exhibit this proxy, and to pray and procure the same, and the appointment herein contained, to be admitted and enacted, and generally, for and in the names of myself and the said Bruges Fry, and on behalf of myself and the said Bruges Fry, to do and perform all such other acts, matters and things as shall be necessary to be done on the part and behalf of myself and the said Bruges Fry, in and about the premises, hereby promising to ratify, allow and confirm, as firm and valid, all and whatsoever the said proctors, or either of them, or their or either of their substitute or substitutes, shall so lawfully do or cause to be done by virtue hereof in and about the premises. And I hereby give and grant to my said proctors, or either of them, full power and authority to appoint one or more substitute or substitutes in their or his place of stead, as often as occasion shall require, and the same at pleasure to revoke and appoint anew. In witness whereof I, the said Robert Greata, have hereunto set my hand and seal this 5th day of June, in the year of our Lord 1864.

ROBERT GREATA. (L. S.)

Signed, sealed and delivered by the said Robert Greata, in the presence of us

Alfd. J. Ham, of Axbridge, Somt., clerk to Mr. Greata.

Arthur Bowden, of Cheddar, Somerset, clerk to Mr. Greata.

The Queen's Advocate (Phillimore), *Milward* and *R. A. Pritchard*, for the app., referred to  
Com. Dig. tit. "Abatement," E. 8, 9, 10;  
*Starkey v. Berton*, Cro. Jac. 234.

Dr. Deane, Q. C. and *Swabey* for the resp.

Cur. adv. vult.

LORD CRANWORTH.—The question raised in this case was, as to the right of one of two church-

wardens to use the name of his co-churchwarden in a suit against a parishioner for subtraction of church-rate. The case came before the Court of Arches by letters of request from the diocese of Bath and Wells, purporting to have been issued at the special instance and desire of Bruges Fry and Robert Greata, the churchwardens of the parish of Cheddar, in that diocese. The decree of the Court of Arches, citing the deft. Levi Treasure, a parishioner of Cheddar, to appear and answer a charge of subtraction of church-rate, issued pursuant to these letters of request, which purported to have been accepted on the petition of the proctors of the said Fry and Greata. This decree bears date the 16th Feb. 1864. On the 18th April 1864, the decree was returned by the proctor of Greata, who then exhibited a proxy under the hand and seal of Greata only, alleging that Fry, whom he described as the other of his parties, proceeded no further in the cause. On the same day Treasure, the deft., appeared by his proctor under protest, alleging that the suit was improperly constituted, inasmuch as it was the suit of Greata alone, and not, as it ought to have been, of Fry and Greata jointly. At this stage of the proceedings the suit was clearly a suit by one churchwarden only. It was indeed contended at the bar that Fry was a party in obtaining the letters of request, and must, therefore, be treated as a party in the cause, until discharged by some order dismissing him, and we were referred to several cases, in which it has been laid down that a party in a cause does not cease to be a party by merely alleging in the court that he proceeds no further. Of the soundness of these decisions we entertain no doubt. A person who embarks in litigation incurs liabilities in its progress by the consequences of which, prospective as well as retrospective, he must be bound until discharged by the court. But in order to make this doctrine applicable, it was incumbent on the app. Greata to show that Fry was, some time before the 18th April 1864, a party in the cause. And this he failed to do. It was contended that Fry, by joining in the letters of request, had become a party in the cause, but this is a mistake. It does not appear, except as may be inferred from the letters of request themselves, that Fry was a party to the obtaining of them. But, even if he was, they form no part of the cause. Letters of request are issued, not in a pending cause, but on an allegation that the parties applying for them intend to enter into litigation, and wish to go to the Superior Court at once *per saltum*. And when the Superior Court accepts the letters of request, and issues its decree citing the party complained of to appear, they are cited in the decree only for the purpose of showing how the Superior Court has acquired original jurisdiction. The cause originates to all intents and purposes in the Superior Court. The letters of request, when accepted, enable the Superior Court to authorise the persons who have obtained them to institute a suit, but they do no more; and till a suit is instituted in the Superior Court, litigation has not begun. But it was further argued that, even independently of the letters of request, Fry must be taken to have been a party in the cause up to the 18th April 1864, for that on that day the proctor alleged, not that Fry had never been a party, but that he would proceed no further. These latter words, it was said, contained in themselves a negative pregnant, and showed that up to that time he had been a party proceeding in the cause. But, even if this were a reasonable inference, still it must be shown that they were the words of a person to whom Fry had given authority to speak or act for him; and as no proxy from Fry had been exhibited, the words are inoperative against him, and he has a right to treat them as the words of a mere stranger. On the first

PRIV. CO.]

Re THE HACKNEY CHARITIES.

[CHAN.]

appearance of the deft. in obedience to the decree, he in substance objected that he was called on to answer a charge purporting to be made by Fry and Greata, but which was really made by Greata alone. The only answer as matter of fact to such an objection would have been the production of a proxy from Fry; and as no such proxy was or could be produced, the only question was one of law, whether the concurrence of Fry was necessary, *i.e.* whether one churchwarden alone could sustain such a suit. We need not discuss this question; the case is too plain for argument, and was hardly contended for at the bar. In enforcing a demand in which two persons are jointly interested, whether beneficially or as trustees, each must, either as plt. or deft., be before the court, and the circumstance that the persons interested are churchwardens cannot make any difference. It was, no doubt, from feeling that the law on this point was against him, that Greata, after the deft. had appeared under protest, endeavoured to cure the defect insisted on, by exhibiting a further proxy, which, though under the hand and seal of Greata only, yet purported to appoint proctors to appear for Fry as well as for himself. And the second point urged for the appa. was, that this second proxy cured the defect insisted on. The general rule of the Ecclesiastical Court requires every proxy to be signed by the party himself, or by one duly authorised to sign for him. Neither of these requisites has been complied with here. No proxy was exhibited under the hand and seal of Fry, or of any person authorised to act for him. But necessity, it was urged, requires that, in the case of two churchwardens, each should be deemed to be invested with an implied authority to use the name of the other in suits for the benefit of the parish, or, at all events, in suits for subtraction of church-rate, for that otherwise it might be impossible to collect the rate. There is, however, nothing to warrant such an argument. It was endeavoured to show that such a power might be considered to exist by analogy to what is done in the courts of common law where a plt. has taken on himself to join as a co-plt. the name of another person who stands in the position of a trustee for him as to the subject-matter of action. There the court will in general permit the plt., who alone is the party substantially interested, to go on using the name of the other plt. whose name is introduced for conformity, on the terms of full indemnity against costs being given to the party whose name is thus used. But this is only done when a special case has been made showing that substantial justice requires such a course to be taken, and is never done in the case of two persons jointly interested beneficially in the subject-matter of the action. In the case now before us, no special circumstances are stated, and the course pursued can only be justified on the assumption that, in every suit for subtraction of church-rate, one churchwarden may always use the name of his co-churchwarden as a co-plt., without any authority from him. For such a proposition there is no warrant either in principle or authority. It was argued that the result of this decision will be to prevent the possibility of recovering church-rates if an obstinate churchwarden refuses to concur in a suit. Perhaps, if such concurrence were corruptly, or even vexatiously, refused, there might be good ground for removing the churchwarden from his office. But that question is not now before us. There is nothing to show that the non-concurrence of Fry has arisen from motives either corrupt or vexatious. This refusal to concur may have been the result of an honest desire to save the money of the parishioners. He may have been satisfied, for instance, that the rate is invalid, or that the person sued is insolvent. The

contention of Greata allows no exception for such cases. On these grounds we have no hesitation in expressing our concurrence in the conclusion at which the learned Dean of the Arches have arrived, and we shall report to Her Majesty that, in our opinion, this appeal ought to be dismissed with costs.

*Sentence affirmed with costs.*

Appa.' proctors, *Pritchard and Sons.*

Resps.' proctor, *E. W. Crosse.*

### COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON,  
Esqrs., Barristers-at-Law.

Jan. 13, 14 and 31, 1865.

(Before the LORDS JUSTICES.)

Re THE HACKNEY CHARITIES.

(POOLE'S AND WHITE'S CHARITIES.)

*Charity Commissioners — Appeal from — Charitable Trusts Act 1860—Sect. 8—Right to appeal.*

*Under sect. 8 of the Charitable Trusts Act 1860, two private inhabitants of the parish in which the income of the charity is applicable cannot, when the yearly income is less than 50*l.*, appeal against the order of the Commissioners. And although two charities, the income of which together exceeds 50*l.*, may be dealt with by one and the same order of the commissioners, the Court will consider the case as if the incomes of the two had been dealt with separately.*

*The Court deals with such a case according to the income actually produced, and not according to the possible or probable income.*

This was an appeal by the Attorney-General against an order of the M. L., the hearing before whom is reported (*ante*, p. 33) so fully as to render any further statement of the facts unnecessary.

Their Lordships, it will be seen, decided the case upon the construction of the 8th section of the Charitable Trusts Acts 1860 (23 & 24 Vict. c. 136), which confers the right of appeal against orders of the board of Charity Commissioners, and enacts that the Attorney-General, or any person authorised by him or by the said board in the case of any charity, whatever may be the yearly income of its endowments, and any trustee or person acting in the administration of or interested in any charity of which the gross yearly income, to be calculated in manner aforesaid, shall exceed 50*l.*; or any two inhabitants of any parish or district in which the same shall be specially applicable, may, within three calendar months after the definitive publication of any order of the said board appointing or removing a trustee or trustees, or for or relating to the assurance, transfer, payment, or vesting of any real or personal estate, or establishing a scheme for the administration of the charity, present a petition to the High Court of Ch. in a summary way, appealing against such order, and praying such relief as the case may require.

The 4th section of the Act provides how the income of the charity is to be calculated.

The Attorney-General, *Holthouse*, Q. C. and *T. H. Terrell* supported the appeal, and contended that where the annual income of a charity was below 50*l.* it was not competent to two private inhabitants to appeal, but that the right was in the Attorney-General, or any person authorised by him, or in the commissioners themselves. That the value of the land might be speedily increased was immaterial; its present value was the thing to be regarded. The

[CHAN.]

Re THE HACKNEY CHARITIES.

[CHAN.]

legal estate was not in the churchwardens and overseers under the Act 59 Geo. 3, c. 12, s. 17, and the case was therefore not within the Act 16 & 17 Vict. c. 137. His Honour had been influenced by the consideration that this was a contentious case under the 5th section of the Act of 1860, which denied the commissioners jurisdiction in such cases; but by that section they were the only judges whether a case was contentious or not.

*Selwyn, Q.C. and Prendergast* for the resps.—The annual value of the land was in reality much more than 50*l.*, for it was shown that the ground was most desirable for building purposes, and a large increase of profits could be at once obtained. But the order of the board had dealt with the two charities as one, and together, even at the present moment, they exceeded 50*l.* in annual value. This was a gift for the poor of the parish, and parish property belonged to churchwardens and overseers as a corporation. The petition was really presented on behalf of the vestry, and not merely by the two gentlemen whose names appeared as petitioners. Even if the commissioners were in the first instance sole judges of what cases were contentious or not, there must be an appeal from their decision, and therefore to appeal to this court was no recognition of their original jurisdiction. The authorities cited were

*Doe dem. Jackson v. Hiley*, 10 B. & C. 885;  
*Smith v. Adkins*, 8 M. & W. 862;  
*Ex parte Annealey*, 2 Y. & Coll. Ex. 850;  
*Doe dem. Higgs v. Terry*, 4 Ad. & Ell. 274;  
*Doe dem. Hobbs v. Cockell*, Ib. 478;  
*The Attorney-General v. Levin*, 8 Sim. 366;  
*Re The Paddington Charities*, Ib. 629;  
*Allason v. Stark*, 9 Ad. & Ell. 255;  
*Rumball v. Munt*, 8 Q. B. 382;  
*The Churchwardens, &c., of St. Nicholas, Deptford, v. Sketchley*, Ib. 394;  
*The Attorney-General v. Calvert*, 23 Beav. 248;  
*Rec v. The Inhabitants of Halenecorth*, 8 B. & Ad. 717;  
*Reg. v. The Archdeacon of Exeter*, 11 W. R. 262;  
*Magdalen College, Oxford, v. The Attorney-General*, 6 H. of L. Cas. 189.

The *Attorney-General* having replied, judgment was reserved until the 31st Jan., when

Lord Justice KNIGHT BRUCE said, that, subject to one question, and to one question only, the order of the Board of Charity Commissioners made on the 10th Nov. 1863 was reasonable and convenient, and consistent with the merits of the case, and that it ought to be supported. That question was, whether the commissioners had jurisdiction by law to make the order. If they had, there was nothing of importance that could be said against it, but even if the commissioners had no jurisdiction he thought that the court ought not on the application now before it to discharge their order. The two petitioners against it were two private inhabitants of the parish of Hackney, respectable gentlemen no doubt, but, he repeated, merely two private inhabitants. Their petition had no authority or sanction of the Attorney-General; it was opposed by him, and he was desirous that the order of the board should stand. The trustees appointed by the commissioners were willing to act, and in such a state of things the course most consistent with the well-being of the charity was to decline to interfere, and to leave the order standing. With deference to the M. R., his opinion therefore was that, whether the order of the commissioners was perfectly regular, or not, his Honour's order should be discharged, and the petition dismissed. For on the petition presented he thought that, even if the order had been made without jurisdiction (which he did not

assert), this court had been under no judicial necessity to discharge or interfere with the order which the board had made.

Lord Justice TURNER said:—The principal question in this case, and the only question on which, in my judgment, it is necessary or would be right for us to give any opinion, is this, whether it was competent to the two inhabitants, upon whose petition the order under appeal was made, to appeal to the M. R. from the order made by the Board of Charity Commissioners; and, upon the best consideration which I have been able to give to the case, my opinion is that it was not competent for them to do so. The jurisdiction of the Charity Commissioners is wholly statutory, and the right to appeal from orders pronounced by them must be measured and is limited by the statutes on which their jurisdiction is founded. In this case it depends upon the construction to be put upon the 8th section of 23 & 24 Vict. c. 26. The M. R. has construed this section as consisting of and divisible into three distinct parts, giving three different and independent rights of appeal:—First, to the Attorney-General, or any person authorised by him, or by the Board of Charity Commissioners, whatever may be the yearly income of the charity; secondly, to any trustee or person interested in any charity, of which the gross yearly income exceeds 50*l.*; and thirdly, to any two inhabitants of any parish or district in which the charity or its income may be specially applicable, whatever the amount of the income may be; but, with all deference and respect to his Honour's opinion, I cannot agree in this construction of the section. It seems to me that, according to the true construction of the section, it consists of and is divisible into two parts only, the first giving the right of appeal to the Attorney-General, or to any person appointed by him, or by the board, whatever may be the yearly income of the charity, and whether it does or does not exceed 50*l.*; and the second giving the right of appeal to the trustees or persons interested, or to the two inhabitants of the parish or district where the gross yearly income of the charity exceeds 50*l.* This construction appears to me to be more consistent with the collocation, the terms and the spirit of the section, and with the scheme of the Act and the course of legislation upon the subject, than the construction which his Honour has adopted. Looking to the collocation of the section, it is difficult, I think, to imagine that the intention could have been to give an unlimited right of appeal to the two inhabitants, for in that case the section would have given, first, an unlimited, then a limited, and then again an unlimited, right of appeal. Had it been intended to give the two inhabitants an unlimited right of appeal, they ought, it should seem, to have been classed with the Attorney-General, or the person appointed by him, or by the board. Then, as to the language of the section, the right of appeal is given to any two inhabitants of the parish or district in which, to use the terms of the Act, "the same" is specially applicable. To what do these words, "the same," refer? They may refer to the charity, or to the income of the charity; but whether they refer to the one or to the other, the ordinary rule of construction, as I apprehend, is that relative words are to be referred to the last antecedent, and these words, therefore, ought, as I think, to be taken to refer to the charity or income last before mentioned, a charity or income exceeding 50*l.* per annum, and not to relate back to the charity or income first mentioned in the section, which is unlimited as to amount. The two inhabitants, therefore, to whom the right of appeal is given must, if this view be correct, be inhabitants of a parish or district in which a charity

Q. B.]

REG. v. PEDLER.

[Q. B.]

having a gross yearly income of 50*l.* is applicable. Then again, as to the spirit of the section and the scheme of the Act. The section clearly points to a distinction between charities the income of which is above, and charities the income of which is below, 50*l.* per annum. Why is this distinction made? Clearly, as I apprehend, for the purpose of preventing the funds of the smaller charities being exhausted by litigation, as they too frequently were before the appointment of the Charity Commissioners, and surely it is not unreasonable to suppose that the Legislature may well have intended with this view to limit the right of appeal on the part of inhabitants to cases in which the annual value of the charity exceeded 50*l.*, more especially having regard to this consideration, that the smaller charities would still have the protection of the Attorney-General and of the board of commissioners under the first part of the section. Passing then from the provisions of this particular section to the course of legislation upon this subject, it is obvious, from the provisions of the earlier Acts, that the policy of the Legislature has throughout been to protect the smaller charities from the exhaustion by litigation to which they were formerly subject, and there is nothing, therefore, to lead us to believe that it could be intended by this section that the right of appeal given to the two inhabitants should extend to cases in which the income was below the prescribed amount of 50*l.* Some attempt has been made on the part of the resps. to show that the income in this case was above that amount; but the resps.' evidence on this subject points only to the income which might be made of the property, and not to the income which it actually produces, and it was not disputed that the actual income of each of these charities was less than the prescribed amount. The case, I think, must be dealt with according to the actual income only, and I do not think that the fact of the two charities being embraced in the same order makes any difference. This suggestion on the part of the resps. therefore fails. I have said nothing as to the other points which were raised in the argument, because, if the conclusion at which I have arrived as to the right of appeal is well founded, these are points which, as it seems to me, must rest with the Attorney-General or the board of commissioners, and not with us. I think that the order of the M. R. should be discharged, and that an order dismissing the petition presented by the resps., with costs, should be substituted for it, but that there should be no costs of the appeal.

Solicitors for the apps., *Fearon and Co.*

Solicitor for the original petitioners, *R. Ellis.*

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SANDERS, ESQs.,  
Barristers-at-Law.

Saturday, Nov. 19, 1865.

REG. v. PEDLER.

*Church-rates—Bona fides of objection—Jurisdiction of justices.*

*Some disputes having arisen in the parish by reason of the refusal of the incumbent to bury the child of a Baptist in consecrated ground, some of the inhabitants determined to contest the church-rate. The deft. was summoned for nonpayment of his rate, and appeared by his solicitor, who stated that he contested the validity of the rate. But the justices, believing that the dispute about the burial of the child was the real cause of the refusal to pay, and that the*

*legal objection was not made bona fide, held that their jurisdiction was not ousted, and made an order for payment of the rate.*

*Upon certiorari to quash this order, it was*

*Held, that to entitle the justices to assume jurisdiction in such case, they must have very strong evidence of mala fides, and that the facts disclosed by the affidavits were not sufficient ground for such a conclusion.*

*The duty of justices, where an objection is made to the validity of a church-rate, considered.*

This case came before the court on *certiorari* to quash an order made by the justices of Wellington, Somerset, for the payment of 2*l.* 15*s.* church-rates, and 4*s.* 6*d.* costs. The app. was summoned, with others, before the justices for the nonpayment of the church-rate made on the 24th July 1863, when Mr. John Bennett, solicitor, of Serjeants'-inn, Fleet-street, attended on their behalf before the magistrates and took the following objections to the rate, as set forth in his affidavit:—First, that there was an item of 264*l.* for the repairs of the pinnacles of the tower of the said church, whilst there was a sum of between 50*l.* and 80*l.* in the hands of the churchwardens raised by the church-rate of Nov. 1861, for the repair of one of the pinnacles, which had not been expended, and that consequently the rate was excessive; and, secondly, that the assessment upon which the rate was made was unequal and unfair. The magistrates accordingly held, after hearing evidence, that the objections to the rate were *bona fide*, and dismissed the summonses, on the ground that the objections were *bona fide*, and they had no jurisdiction, leaving the parties to the remedy of the Ecclesiastical Court. On the 7th Jan. 1864, the parties were again summoned before the justices, when the same objections were taken by Mr. Bennett, but the magistrates, without consulting their clerk, took an entirely new course; whilst treating the objections as *bona fide*, they decided that the deft.'s professional man had no power to raise any objections to the validity of the rate, and that if he wished to do it it must be done by appeal to the quarter sessions, the chairman declaring that it was not fair to throw the onus of proving the validity of the said rate on the churchwardens, and they accordingly made orders for the payment of the rate. The affidavits of the churchwardens, Messrs. Burridge and Edwards, stated that, at the making of the rate, no objection was taken to the item for the repairs of the pinnacles, and it was moved and seconded and agreed to that a rate of 6*d.* in the pound should be granted for defraying the expenses of the churchwardens for the current year, as shown in the estimate, and at that meeting two of the defts. were present and took part. They also state "that three months and upwards had elapsed after the said vestry meeting had been held and the said rate granted before any opposition whatever had been made to the payment of the said rate, and that considerably over two-thirds had then, or has since, been collected and paid over to the collector of the rates of the said parish. We say that about this time application was made to the vicar of the parish to bury and have the Church service performed over the body of an unbaptised child of pauper parents of the Baptist denomination, who were said to be too poor to pay for the funeral expenses at their usual place of burying, viz., the Baptist burying-yard, and which the vicar declined to do; and I, the said William Burridge, say that, very shortly afterwards, viz., on the 13th Nov. last, I met William Day Horsey, a leading and influential member of that denomination, who complained to me of the vicar's conduct in having refused to bury the said child, and he then informed

Q. B.]

REG. v. PEDLER.

[Q. B.]

me that, although there had been hitherto no opposition to the church-rate, he feared that I should find there would be opposition in future, and by reason, as he, the said William Day Horsey, alleged, of the said vicar's refusing the burying of the said pauper Baptist child; and we, the said W. Burridge and J. Edwards, say, that we verily believe that the opposition which has since been got up against the said rate has been in consequence, as alleged by the said William Day Horsey, of such refusal on the part of the vicar to bury such child, and not by reason of any real non-liability on the part of such objectors to pay the same, or invalidity in law of the said rate itself." The sum handed over to them by their predecessors was 9l. 18s. 5½d., and there was no minute in the vestry-book of any sum of from 50l. to 80l., or any other sum, having been obtained by a church-rate made in Nov. 1861, or by any rate, for the repairs of the pinnacles. The church-wardens further stated that the rate was made upon an assessment of the poor-rate which had been used for twenty years and upwards without ever having been appealed against on the ground of its being unequal and unfair. There were other affidavits denying many of the allegations contained in those of the opponents of the rate, and the belief of the justices that the rate bore on it the stamp of legality, and that the objections were not *bonâ fide*. With regard to Sherry's case, it appeared that it had been heard and dismissed in Dec. 1863; and yet, that the magistrates insisted on hearing it again on the 7th Jan. 1864, denying that they had heard it before, and they made an order to pay.

Karslake, Q. C. and Dowdeswell showed cause against the rule for quashing the order.

Karslake read Mr. Bennett's affidavit setting out the facts, and before he had finished the Chief Justice asked him what answer he had to it, and he referred to his own affidavit in reply.

COCKBURN, C. J.—The affidavits seem to be all one way; there is no attempt to deny that the magistrates referred the debts to the quarter sessions, nor that they said it was not fair to throw the onus of proving the goodness of the rate on the church-wardens.

Karslake then contended there was no valid objection to the rate. It had been in force for some months, and a large amount of it had been collected, and it was not until after the unfortunate circumstance of the burial of the pauper child that anything was said or urged against its validity. The justices, with a full knowledge of the circumstances, came to a right decision in considering the objections frivolous and vexatious, and with regard to Sherry's case, they say they did not hear it the first time.

CROMPTON, J.—I do not think it is a fair way of putting it for the magistrates to say they had not tried it, when they put this note on the minutes, "Jurisdiction ousted."

Karslake again urged that the debts had never objected to this rate until after the refusal of the vicar to bury the child, and they were called on to pay.

COCKBURN, C. J.—And was not that time enough? Why should they object before they were called on to pay?

Karslake then urged that the grounds of objection relied on by the debts were not sufficient.

COCKBURN, C. J.—You are arguing as if the magistrates had to try the merits, with which they

had nothing to do; but if the validity of a rate was disputed, and notice was given to the justices, their jurisdiction was gone. All they had to decide was, whether the objection appeared to be *bonâ fide*.

Browne, in support of the rule for quashing the order, was not called upon.

COCKBURN, C. J.—I think we need not trouble you, Mr. Browne, as we are of opinion that this rule ought certainly to be made absolute. The statute expressly says that, if the validity of the church-rate is disputed, the party disputing is to give notice to the justices, and the justices shall forbear giving judgment thereon. The effect of that provision is stated in the judgment of this court in the case of *Ricketts v. Bodenham*, in 4 Ad. & El., in these words: "The effect of the proviso is that in every such case the moment it appears that the question is not one merely of enforcing payment, but touching the validity of the rate, the summary jurisdiction is at an end, and that of the Ecclesiastical Court attaches." On the other hand, the courts have laid it down, and I think most properly, that the right which is thus secured to a party against whom an order for payment by magistrates is sought to be obtained, and thus stopped, where he disputes the validity of the rate, must not be abused. Consequently, if the right so given is sought to be abused by a party stating that he disputes the validity of the rate, when in point of fact he does not really dispute it, and does not intend to raise the question as to its validity before the proper tribunal and within the proper time, but merely puts forth that statement fraudulently, in fraud of the statute, the justices, to prevent that, may say it is not a dispute of the validity of the rate, or a notice to which any value should be attached. But it is perfectly clear that we cannot allow magistrates to take on themselves, simply because on the merits they may be of opinion that eventually any attempt to dispute the validity can only end in the signal defeat of the party raising the dispute, to determine that the notice is not *bonâ fide*, and that it is not given with an intention of disputing the validity. And when a professional gentleman attends for the parties against whom the order is asked, and gives notice that, on various grounds, he intends to dispute the validity of the rating, I, for one, should not have doubted, from his statement, especially when he cross-examined witnesses with a view to establish the propositions on which his objections are to be founded, and calls a witness for the same purpose, even although he might fail in establishing that there really were *bonâ fide* grounds for disputing the validity, but I should have come to the conclusion that I ought to have required some strong evidence to satisfy me that all this was done with *mala fides*. It is said there is something showing *mala fides*—that this notice to dispute was given after a difference had arisen between the vicar and certain of the parishioners who did not belong to the Established Church. It very often happens that the harmony which would otherwise subsist between all parties, and which would lead to a willing acquiescence in the rate necessary to maintain the church, is disturbed by a course of conduct on the part of the authorities which could only lead to quarrel. That may have been the case here. We have nothing to do with that. It may be that certain persons in the parish, thinking they had grounds of complaint against the vicar, may have objected to the church-rate, which they might not otherwise have questioned. We have nothing to do with that. The simple question is, whether they really were in earnest in saying that they intended to dispute the validity of the church-rate? Upon all the affidavits,

Q. B.]

OVERSEERS OF CALVERLEY v. OVERSEERS OF BRADFORD.

[Q. B.]

and all the facts, I cannot entertain a doubt that that they really did intend to dispute the validity of the rating; and if it had gone, as it might have gone, to the Ecclesiastical Court, there they would have sought to substantiate the objection which they have taken. As to the hasty conclusion at which the magistrates arrived, I cannot allow, in my judgment, that the proviso of the statute that saves the right of the party having an objection to a church-rate, should be defeated by the magistrates finding there was no *bonâ fide* objection.

CROMPTON, J.—I am entirely of the same opinion. Upon reading the affidavit, my impression is very strong that there are no circumstances here from which the magistrates could fairly say that this was *malâ fides*. Now, in construing the Act of Parliament there are two difficulties, which arise from time to time, and which would lead to great mischief if a particular course were taken by the parties and they could do so successfully. On the one hand, if one party could come and abuse the Act of Parliament by making an utterly frivolous objection, I think that would be a great mischief, because the consequence would be that in every case it must go to the Ecclesiastical Court and not to the magistrates. On the other hand, an extreme inconvenience would be if the magistrates might say, "This is not *bonâ fide*; we are the judges of that, and we give ourselves jurisdiction by saying that it is *malâ fide*." Therefore, I think this court has met the difficulty by establishing a very proper rule; that it will see that there is evidence that may fairly enable the magistrates to say that the transaction is not *bonâ fide*. When they have decided on evidence, the court will not disturb that. We ought always to look carefully to see that there was sufficient ground on which the magistrates might say that there was no jurisdiction. I think this is a case where there was no such fair ground. The principle is a right one, that we ought to see whether the magistrates had grounds before them to be able to say that the matter was not *bonâ fide*. I quite admit that such a ludicrous or absurd ground might be put forth as strongly to weigh on the minds of the magistrates. To apply this. According to the affidavits, there is a motive for these parties objecting or wishing to object. Those motives we have nothing to do with. But I will assume that they were trying to find a valid objection. Supposing they had said, "We will not pay the church-rate, because you have acted illegally in not burying our child." Nobody could accept that as a ground for disputing the payment of the church-rate, because it was a collateral matter which had nothing to do with it. If the case had been such, I think the absurdity of it, when put forward, might strongly weigh on the minds of the magistrates and govern their judgment. Upon the whole, after reading the affidavits, and still more upon hearing them discussed at the bar, I think that the magistrates, for the reasons given by all of us in the course of the argument, were wrong in the second conclusion which they came to, and that these parties appear to have been bringing forward an objection on which they had succeeded before, and which they had a right to expect to be allowed to raise again.

MELLOR, J.—I am of the same opinion. When the object of this Act of Parliament is considered, I think it is clear what should be the construction to be put upon it. Formerly (before the statute), if the churchwardens intended to enforce payment of a church-rate, they were obliged to go to the Ecclesiastical Courts. That was found to be a great hardship, both on the churchwardens and the parties who had to pay the rate, and the result was, that in case there was no real dispute as to the

validity of the rate, it was thought proper, within certain limits, to give jurisdiction to the justices. But it was not intended to take away from parties the right to question the validity of the rate, if they were so disposed. Then it is said, it is laid down in several cases in this court, that it was sufficient to go before the magistrates, and say that they object to the validity of the rate, in order to oust jurisdiction. What Lord Tenterden said was this: "The justices stopped too soon; they ought to have gone further and inquired whether the objection had *bonâ fides*, and a foundation for it or not." The justices are to inquire to this extent: is this a rate upon which there is a *bonâ fide* dispute? What is the evidence as to that? The party comes before them and says, "I do dispute it;" and then he puts forward the grounds of such dispute. The magistrates are not to decide upon those grounds except so far as whether they appear to be absurd or frivolous. In such case the magistrates may say: "The absurdity of the objection is an element which we have a right to take into our consideration in determining that there is no real dispute," and that it was a fraudulent attempt to evade the Act of Parliament. It must be a strong case to enable the magistrates to do that, and I think we ought, in all cases where the magistrates can by one decision give themselves jurisdiction, and where by another decision their jurisdiction is ousted, most carefully to see, when they do give themselves jurisdiction, that they do so upon reasonable grounds.

SHEE, J.—I am afraid the course which the justices have taken in this case has been occasioned by a misapprehension of the use, by this court, of the expression *bonâ fide* in considering the proviso of this statute. A considerable proportion of the affidavits that have been brought before us, and of the arguments upon them, have been directed to convince us that the ground upon which this rate was objected to was a ground which had its origin in a religious irritation in the parish, and that therefore it was not a *bonâ fide* objection. It is just possible that the distinction, as pointed out by my brother Mellor to Mr. Karslake, and afterwards observed upon by my Lord, may have escaped the attention of the justices, and that they may have thought this objection was an objection not *bonâ fide*, upon the grounds on which it has been sought to-day to convince us it was not *bonâ fide*. If so, they made a mistake, and it is right they should know it.

*Rule absolute to quash the order of payment.*

There were four other cases, in which a similar judgment was given, and the rules in each case were made absolute.

Friday, Feb. 3, 1865.

OVERSEERS OF CALVERLEY (apps.) v. THE OVERSEERS OF BRADFORD (resps.)

*Poor—Settlement by estate—Grant of lease to a squatter by lord of the manor—Consideration.*

*The husband of the pauper having encroached on the waste land of a manor, and built three houses thereon, which were let out to tenants, the lord of the manor, after the husband's death, required an acknowledgment from the pauper, the widow, in respect of the land, and thereupon, in consideration of the yearly rent of 25s. and the covenants and services, granted to the widow a lease for 999 years. The pauper resided and slept in one of the cottages nearly twelve months, and was rated as owner. The value of the cottages was 130l., and of the annual rent upwards of 10l.:*

*Held, that it was competent to look beyond the indenture to ascertain the annual value, and that the pauper is*

Q. B.]

HARTLEY v. BOWLZER.

[Q. B.]

*this case gained a settlement by estate, though the annual rent reserved by the lease was only 25s.*

Case stated by justices on an appeal to the West Riding Christmas Quarter Sessions 1864, held at Wakefield, against an order for the removal of Mary Riley from the township of Bradford to the township of Calverley-with-Farsley, when the said order was confirmed, subject to the opinion of the court on the following case:—

The resps.' case, as set forth in the grounds of removal and established by evidence, was, that the pauper Mary Riley was the widow of one Benjamin Riley, who died in 1850, and that B. Riley gained a settlement in the apps.' township by renting a separate dwelling-house, in which he resided and slept, at a rent of 16l. per annum, for which he paid the rent and all poor-rates and taxes for many years prior and up to his death.

The apps. relied on the following ground of appeal: that the said Mary Riley acquired a settlement in her own right during her widowhood in the township of Bradford, for that in or about the 16th Nov. 1855 she the said M. Riley became lawfully possessed of or entitled to another estate consisting of a plot, piece, or parcel of land, and three cottages or dwelling-houses and other buildings thereon erected, situated at Bradford-moor, in the township of Bradford, of the annual value of 10l. and upwards, and now occupied by Samuel Riley for a term of 999 years, created by an indenture of lease made the 16th Nov. 1855, between Mary Rawson and Elizabeth Rawson, therein described as ladies of the manor of Bradford, of the one part, and the said Mary Riley of the other part, at a yearly reserved rent of 25s., and that in or about the years 1857 and 1858 respectively, and whilst so possessed of or entitled to the said estate lastly described, she the said M. Riley inhabited, resided and slept in and upon the said leasehold estate for forty days and upwards, to wit, for the period of one year and upwards.

The evidence given by the apps. in support of this ground of appeal was, that Mary Riley, the pauper, a widow, was occupying during the years 1854 and 1855, by her tenants, three cottages in Daniel-street, Bradford-moor, in the township of Bradford, which had been built about fourteen years before by her late husband, by encroaching on the waste lands of the moor belonging to the ladies of the manor; and that in 1855 the ladies of the manor, as such owners of the waste land on which the said cottages were built, required an acknowledgment from Mary Riley in respect of the said land, and that thereupon the said ladies of the manor, by an indenture dated 16th Nov. 1855, in consideration of the yearly rent, covenants, payments and services thereafter reserved, granted, and the said Mary Riley accepted, a lease for 999 years of the said cottages and lands; and by this indenture a yearly rent of 25s. is reserved to be paid by the said Mary Riley, her executors, administrators, or assigns, to the ladies of the manor, and covenants are also therein contained on the part of the said Mary Riley for payment of the said reserved rent, and to perform suit and service at the court baron of the said ladies of the manor and their appointees. A copy of the said lease, the due execution of which was proved, is annexed to this case.

In 1857 and 1858 Mary Riley removed to one of these cottages, and resided and slept in it for nearly twelve months. She paid all rates for the cottages, and was rated as owner under the Small Tenements Act by the resps.' township, in which the said cottages are situated, and she had paid the rent reserved by the lease.

After 1858 the pauper went to reside at different places, but had never resided ten miles from the resps.' township, and had never subsequently gained

any settlement before she came again to reside in the resps.' township, and became chargeable to it by reason of poverty and sickness. The present value of the three cottages was proved to be 190l., and their annual rent to be upwards of 10l.

The question for the opinion of the court was, whether on these facts the lease of 1855, coupled with the subsequent residence of the pauper in the resps.' township of more than forty days, conferred a settlement on her by estate in the resps.' township.

*Maule and West* in support of the order of sessions.—This case is like that of *Rex v. Hornchurch*, 2 B. & Ald. 189, where the father of the pauper obtained from the lord of the manor a grant of a piece of land whereon he built three cottages, and it was held that the lord of the manor, in the absence of a custom to that effect, cannot make a new grant of copyhold, and if he does the grantee acquires thereby no settlement by estate. And it was also there held that the consideration stated in the grant governed the case, and here, that being the rent of 25s. per year only, no settlement was acquired. *Rex v. Warblington*, 1 T. R. 498, is to the same effect.

*T. Campbell Foster*, for the apps., was not called upon.

*CROMPTON, J.*—It is well settled in such cases that you may look beyond the deed, and see whether the transaction was a gift or a purchase. Here part of the consideration was undoubtedly to get quit of the trouble and anxiety of the ladies of the manor ejecting a squatter on the manor, by having an acknowledgment of title and giving a lease. As the real value of the estate was more than sufficient, judgment must be given for the apps.

BLACKBURN and MELLOR, JJ. concurred.

#### HARTLEY (app.) v. BOWLZER (resp.)

*Turnpike—Evasion of toll—Taking horses from one team and adding to another—3 Geo. 4, c. 126, s. 41.*

*Two one-horsed carts went through a turnpike-gate and returned again. The horses were then unyoked and put to another vehicle of the same owner, from which the horses that had drawn it some distance on the turnpike-road were removed before reaching the gate. The driver on passing the gate with the second vehicle paid only a smaller toll, contending that he was not liable to pay in respect of the two horses so yoked to the second vehicle, as they had paid toll and were allowed to pass through the gate four times per day, on the payment of one toll, under the Local Turnpike Act:*

*Held, that there was evidence on which a justice might find that this was done to evade the payment of toll, and on which he might convict under the 3 Geo. 4, c. 126, s. 41.*

Case stated by a justice under the 20 & 21 Vict. c. 43.

Complaint was made before a justice of the peace for the county of Derby, by William Bowlzer, the resp., the collector of the tolls under the Derby, Duffield, Wirksworth and Sheffield Roads Act 1851, at a turnpike-gate called the Stone Gravels turnpike, in the said county, charging that the app., on the 16th Oct. 1864, at the township of Newbold, in the said county, being then and there the driver of a certain carriage, to wit a drag, upon a certain turnpike-road there situate, called the Derby and Sheffield turnpike-road, did unlawfully, wilfully and fraudulently evade the payment of 1s., being the toll then and there lawfully due and payable at a certain tollgate, called the Stone Gravels gate, upon the said road, in respect of two horses drawing the



Q. B.]

HARTLEY v. BOWLZER.

[Q. B.]

said drag, by leaving the said drag upon the said road, and taking off the horses drawing the same before coming to the said turnpike-gate, and afterwards drawing the said drag through the said gate with other horses having before passed through the said gate and paid thereat, whereby the said sum of 1s. was evaded as aforesaid, contrary to the 3 Geo. 4, c. 126, s. 41.

The complaint was heard on the 10th Nov. 1864, when the resp. in person, and the app. in person and by his attorney, appeared, and witnesses were sworn and examined.

The app., in answer to the complaint, contended that he was lawfully entitled to pass through the said turnpike-gate with the drag drawn by two horses, on the occasion and under the circumstances hereinafter stated, without paying toll for the horses, and that he had not evaded or attempted to evade payment of tolls within the meaning of the 3 Geo. 4, c. 126, s. 41.

Under the Derby, Duffield, Wirksworth and Sheffield Turnpike Road Act 1851 (s. 8), hereinafter referred to as the said Local Turnpike Act, the following toll is imposed:

For each horse or beast of draught drawing a waggon, wain, cart, or other such carriage having the sole or bottom of the felles of the wheels of a less breadth than six inches, the sum of sixpence.

By the said Local Turnpike Act there are other tolls, not material to this case, imposed on horses drawing other descriptions of carriages, and on horses, beasts and cattle not drawing any carriage, but no toll is imposed upon any carriages drawn or propelled by steam or other power other than animal power, on which the toll payable is 1s. per wheel.

By the 9th section of the said Local Turnpike Act, it is enacted

That no more than three full tolls shall be demanded or taken in one day for or in respect of the same horses, beasts, cattle, or carriages travelling between Chesterfield and Sheffield, provided that no person shall on the same day be permitted to pass through any one tollgate between Chesterfield and Sheffield, with any cart or carriage more than four times laden or unladen for one toll, that is to say, twice when going and twice when returning, and every person who shall have paid a second toll on the same day at any one tollgate as aforesaid shall and may afterwards pass and repass any number of times at the same gate on the same day with the same horse, beast, cattle and carriages, without paying or being liable to pay any further or additional toll.

The Stone Gravels turnpike-gate is situate on the part of the said turnpike-road lying between Chesterfield and Sheffield.

The turnpike-gate is lawfully established under the provisions of the said Local Turnpike Act, and the aforesaid tolls thereby authorised to be levied are payable at the said turnpike-gate, and the said resp. is the duly authorised collector of tolls at such gate.

The app. is the servant of Wm. Lee, who is the owner of stone quarries at Ashover in the county of Derby, and is also a carrier of timber.

On the morning of Saturday, 15th Oct. 1864, there started from the premises of the said Wm. Lee, at Ashover, a laden timber-drag belonging to the said Wm. Lee, and drawn by three of his horses under the care of a man not the app. The timber was to be delivered to Messrs. Fowler at their works at Sheepbridge in the parish of Whittington, in the said county. On the same morning there also started from the said Wm. Lee's place at Ashover two carts laden with stone, each drawn by one horse and in the care of the app. The carts and horses belonged to the said Wm. Lee, and the stone in the carts was to be delivered to Mr. Coates at another and less distant part of Whittington aforesaid. In passing from Ashover to Sheepbridge, or from Ashover to Mr. Coates's place at Whittington, a person would travel the first six miles along roads not affected by the said Local Turnpike Act until

he entered the borough of Chesterfield. He would then pass through the borough of Chesterfield, and at the northward boundary of the borough he would first enter upon the Sheffield and Chesterfield turnpike-road, to which the said Local Turnpike Act does apply.

The Stone Gravels turnpike-gate is situate in the township of Newbold, about half-a-mile beyond the northward boundary of the borough of Chesterfield; and in going from Chesterfield either to Mr. Fowler's works at Sheepbridge or to Mr. Coates's premises at Whittington, a person would have to pass through the Stone Gravels turnpike-gate. Mr. Coates's premises are situate about half-a-mile north of the Stone Gravels turnpike-gate, and Messrs. Fowler's works at Sheepbridge about one mile still further northwards.

On the 15th Oct. last the man who drove the timber-drag from Ashover stopped with his drag and horses at the Hare and Hounds public-house at Stone Gravels, situate about 120 yards south, that is, on the Chesterfield side of the Stone Gravels turnpike-gate. He put one of his horses in the inn stable, and left his drag and the other two horses standing on the road near the inn. The app. continued onwards with his two one-horse carts from Ashover through the Stone Gravels turnpike-gate, and on passing through the gate paid the toll of 1s., being the proper toll on two horses, each drawing one of the two carts. The app. then proceeded onwards with his two horses and carts, and unloaded the stone from his carts on Mr. Coates's premises at Whittington. The app. then came back with the two horses and two empty carts through the same turnpike-gate to the Hare and Hounds Inn at Stone Gravels, without a second toll being demanded or paid.

The app. and the man up to that time in charge of the timber-drag then changed horses opposite or near to the Hare and Hounds Inn. The two horses which remained in the drag being taken out and put into the carts and sent back to Ashover, and the two cart-horses being taken from the carts and harnessed to the timber-drag, and driven on by the app. from the Hare and Hounds Inn through the said turnpike-gate to Messrs. Fowler's works at Sheepbridge.

The resp. demanded toll of the app., and he passed through the said turnpike-gate on the last-mentioned occasion with his two horses drawing the timber-drag. The app. thereupon refused to pay toll, and on the hearing of his complaint contended that he was not liable to toll, as that was the third time only of his passing through the said turnpike-gate with the same horses on the same day, and he had already paid one full toll on two horses, when they first passed through the said turnpike-gate that day in going to Mr. Coates's premises with the two carts.

The toll payable at the said turnpike-gate in respect of the said two horses, if they were liable to toll, would be the same whether they each drew one of the said carts, or both drew the said timber-drag. There was no further evidence of an actual or intended evasion of toll than might be drawn from the facts above stated.

The justice decided that app. was guilty of evading the payment of toll at the said turnpike-gate, as complained of by the resp., and convicted the app. in the penalty of 1l. and costs for the said offence; and the ground of his determination was, that he considered the facts showed that the app. had evaded the tolls payable in respect of all or one of the three horses drawing the said timber-drag from Ashover along the said turnpike as far as the Hare and Hounds Inn aforesaid.

*Harington* for the resp.—The conviction was right. The point turns on the General Turnpike Act (3 Geo. 4, c. 126), s. 8, whereby (*inter alia*), if any person

Q. B.]

POPE v. WHALLEY.

[Q. B.]

shall leave upon the said road any horse, &c., by reason whereof the payment of any tolls or duties shall be avoided or lessened, or shall take off, or cause to be taken off, any horse, &c., either before or after having passed through any tollgate, whereby the payment of all or any of the tolls shall or may be evaded, every such person shall for every such offence forfeit and pay any sum not exceeding 5*l*. The facts brought the app. within that section. The plt. evaded the toll by leaving the horses of the timber-drag behind, putting his own horses to it, and so passing through the gate. It was for the magistrate to say whether this was done for evading the toll. He has found that it was, and his finding is supported by the evidence.

*Raymond* for the app.—The app. had a right to act as he did. The horses in the timber-drag had come far, and those in the stone carts were comparatively fresh.

BLACKBURN, J.—But still the magistrate finds that the intent was to evade the toll.

CROMPTON, J.—Clearly the object was to lessen the toll that would otherwise have been payable, and is not that within the 3 Geo. 4, c. 126, s. 41?

*Raymond*—The effect is to defeat the privilege of exemption, if horses may not pass through the gate four times per day, unless they are drawing the same vehicle.

By the COURT.—

*Conviction affirmed.*

*Saturday, Feb. 4, 1865.*

POPE (app.) v. WHALLEY (resp.)

*Markets and Fairs Act—Shop—Stall—10 & 11 Vict. c. 14, s. 18.*

*The app. exposed laces, tapes, buttons and combs for sale in a structure within a borough, but not within the limits of the market, as fixed by the bye-laws, but within a yard appurtenant to a public-house. The main supports of the structure consisted of poles or pieces of wood (formerly used as a stall in the market-place) let into the ground in the public-house yard. The structure consisted of the upright posts fixed in the ground, of cross pieces of wood, on which the counter-boards were supported, and a wooden roof projecting a considerable distance beyond the counter-boards on each side so as to shelter the seller on one side and the customers on the other. The sellers were protected behind by a wooden frame-work. The stall was fitted with a door, which might be locked, and a window-frame, and it had shelves. The structure was of a slight character, and not weather-proof. It was let by the week, and was not rated.*

*Justices having, on an information under the Markets and Fairs Act, s. 18, decided that this structure was not a shop within the meaning of that section, and convicted the app.:*

*Held, per Blackburn and Mellor, JJ., that the conviction was right.*

Case stated by justices under 20 & 21 Vict. c. 43, on a conviction under the 10 & 11 Vict. c. 14, s. 18, the Markets and Fairs Clauses Act 1847.

The case stated that Wigan is an ancient borough, having an ancient market and market-place, and that the mayor, aldermen and burgesses of the borough are the owners of the tolls, picage and stallage of such market. That there is a local board of health constituted for such borough under the Public Health Act 1848, and within the borough.

The Local Government Act and the Market and Fairs Act, so far as relates to markets, have been adopted and applied. The ancient market-days are Monday and Friday in each week, but under the bye-laws Tuesday and Saturday, as well as Monday and Friday in each week, have been constituted market-days.

By the bye-laws it is ordered, that the market shall be held in the Market-place, Standish-gate-street, Wallgate, and Dicconson-street within the borough.

On and prior to the 16th Sept. the resp. was the lessee of the market tolls, picage and stallage under the corporation of the borough. A market was held within the borough on Friday the 16th Sept. 1864, and on the said 16th Sept. the app. exposed laces, tapes, buttons and combs for sale within the borough, but not within the limits of the market as fixed by the bye-laws, but within a yard at the back of and appurtenant to the Crofters' Arms public-house. The place where the said articles were exposed for sale was composed as follows: The main supports consisted of poles or pieces of wood which had formerly been used as a stall in the Wigan market-place, but which had been let into the ground of the Crofters' Arms-yard, and used as a stall there. The stall so used consisted of the upright posts fixed in the ground; of cross pieces of wood, on which the counter-boards were supported, and a wooden roof projecting a considerable distance beyond the counter-boards on each side, so as to shelter the seller on one side and the customers on the other. The sellers were protected behind a wooden frame-work. Subsequent to the conviction of John Beesley, under a similar charge, for exposing goods for sale on a similar stall, the app.'s stall, along with others, had undergone the following alterations, viz., from the floor up to the level of the counter-boards at one end slabs of wood, or undressed board, have been nailed to the posts. From these boards up to the square of the structure a loose window-frame has been placed at one end, and a fixed window-frame from that up to the roof adjoining the window and slabs. There is a moveable shutter or door giving access to the back of the counter-boards where the seller stands. The other end of the structure and the side behind where the seller stands are entirely boarded up. In front, from the counter-boards to the ground, slabs or boards are nailed to the upright posts, and from the counter-boards to the roof there is a loose shutter extending the whole length (except the breadth of a door) at one end, which is removed during business hours. The door at the end of the loose shutters is upon hinges, and has a lock upon it, and can be locked or unlocked at the outside. The place inside where the seller stands is about 2ft. 6in. broad. There is in that breadth a floor made of boards where the seller stands, but under the counter-boards and in front where the buyer stands the surface of the ground is bare and uncovered, save by the counter-boards and roof. The structures of the app. and others are placed side by side in a row, and are set back to back, so that the fronts of the stalls face each other, affording a double space for buyers, sheltered in some measure from wet by the projecting roofs meeting each other. The moveable glass window and the loose shutters have no hinges, but are so made that they can be taken down, and when put up again fastened inside. The dimensions of these structures are as follows: the height from the ground to the square is 6ft. 6in., and from the ground to the centre of the roof 9ft. 6in., the window frame at the end is nearly 4ft. wide, the breadth of the structure is 6ft. 10½in., including the projection over the roof on each side of the counter-boards where the seller and buyer stands. The length of the structure is

Q. B.]

POPE v. WHALLEY.

[Q. B.]

about 13ft., the space between two stalls fronting each other is entirely open at all times and is common to the customers of both stalls. There were shelves in the app.'s structure, and it was proved that some of the structures of the same kind and in the same yard were papered, but no evidence of being papered was given as regarded that of the app. The structures do not adjoin, neither are they in any manner connected with any house or other building of a substantial character. They are of a slight and unsubstantial character, and are not proof against the weather. The cost of the structure is from 4l. to 5l., and it was made at the expense of the landlady of the public-house, who lets each stall by the week, the app. having taken the stall from the landlady of the public-house by the week at the rent of 2s. per week. The other occupiers of these structures are not and never have been rated to the poor and highway rates in respect of the structures.

As regards the use of the structure, the app. and other holders of similar structures have access to them whenever they think fit. They expose goods for sale there every day in the week. The customers as a rule stand in front and outside the structure when they make purchases, but evidence was given that customers could go into the narrow space of 2ft. 6in., where sellers stand, if they choose.

The stall-holders generally removed their goods at night, though some evidence was given that in some instances goods were left there all night, though the witnesses would not state that the structures were such as would render it safe to leave anything valuable all night.

As regards the app. it was not proved that any person went inside her structure to purchase, or that she ever left goods on the premises all night, neither was the contrary proved.

It was contended on the part of the deft., the app. in this appeal, that the place mentioned in the evidence and in the facts before stated was the app.'s own shop within the meaning of the exception in the 13th section of the Markets and Fairs Clauses Act 1847.

The justices were of opinion, that in point of law and fact the structure where the app. exposed goods for sale was not, either in its nature, construction, or use, such as to constitute it a shop within the meaning of the exception in the said section:

1. Because of its want of a stable and substantial character.

2. Because it was a mere alteration of what had undoubtedly been a stall, in order to evade the provisions of the Markets and Fairs Act.

3. Because, although it is possible for a customer to go inside, for the purpose of buying, yet it is obvious, from the very narrow space behind the counter-boards (about 30 inches in breadth), and from the fact of the shutter in front being regularly removed for the purpose of selling goods, that such was never intended, and in practice could not be the case, and that the user of this structure must necessarily be the same as of a stall where the seller stands inside and the buyer outside.

4. Because the structure is not of such a nature as either to protect goods against rain, or render it safe to have goods of value on the premises during the night without being otherwise protected.

And it also appearing to us that the evidence given before us brought the case within the operation of the 13th section of the Markets and Fairs Clauses Act 1847, we gave our determination against the app. in the manner before stated.

*D. D. Keane (Cottingham with him) for the app.*—It is submitted that the place in question was the app.'s own shop, within sect. 13 of the Markets and Fairs Act 1847 (10 & 11 Vict. c. 14), on which the

case depends. That section enacts that, "After the market-place is open for public use, every person other than a licensed hawk who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorised to be taken, shall for every such offence be liable to a penalty not exceeding 40s."

*Field, Q. C. (Le Breton with him) for the resp.*

The following cases were cited:

*Rea v. Caversham*, 4 B. & C. 683;

*Reg. v. Hill*, 2 Moo. & Rob. 458;

*Mayor of Yarmouth v. Groom*, 1 H. & C. 112;

*Reg. v. Carter*, 1 C. & K. 173;

*Reg. v. Sanders*, 9 Oar. & P. 79;

*Watson v. Cotton*, 17 L. J. 68, C. P.;

*Mayor of Macclesfield v. Chapman*, 22 M. & W. 78;

Com. Dig. "Market," F.;

*Wiltshire v. Willett*, 81 L. J. 8, M. C.; 5 L. T. Rep. N. S. 355;

*Wiltshire v. Baker*, 11 C. B., N. S., 287; 5 L. T. Rep. N. S. 355;

*Llandaff Market Company v. Lyndon*, 80 L. J. 105, M. C.; 2 L. T. Rep. N. S. 771.

BLACKBURN, J.—I think that the judgment of the magistrates should be affirmed. The question turns entirely on the construction of sect. 13 of the Markets and Fairs Clauses Act 1847, which says, "That after the market-place is open for public use every person other than a licensed hawk who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings." The first question is, what is meant by the word "shop," in which the seller may sell so as to avoid the penalty imposed by that section? The object of the Act was to protect the interests of the market, and the intention of the Act in reference to such an object may be inferred by considering what was the law before the passing of this Act as to a grant of a market. *The Mayor of Macclesfield v. Chapman* shows that it was the better opinion that an ordinary grant of a market did not of itself confer the right to restrain persons from selling in their own shops within the limits of the franchise on market days; such a right could exist only by immemorial custom, and it was not an incident to a grant by charter. In *Mosley v. Walker*, 7 B. & C. 53, it was said by Bayley, J., that in *Mosley v. Chadwick* it was decided "that the lord having a right of market in a particular place, a stranger could not lawfully set up what in reality was a different market in that place." That was the test where the Crown granted a right of franchise by modern charter. If some one set up what was really a different market within the limits of the franchise, then the person setting it up was liable to an action for the injury which he thereby caused to the grantee. Now the substantial meaning of sect. 13 is that whenever it appears the seller sells in a shop which is private and permanent, he is to be within the exception, just as before the Act he would not have been liable to an action. But whenever a man does not sell in his private shop, but sets up a private market of his own, and so would have been liable before the Act to an action at common law, in that case the section imposes a penalty. In the present case what the justices had to consider was, was the seller's place his permanent and real private shop? If it was, it was within the exception; but if what the seller did amounted to setting up a private market, it is not within the exception. Now there is no one element in the case which is conclusive of

C. P.]

EATWELL v. RICHMOND.

[C. P.]

the character of the place, but its nature is well summed up in the reasons which the justices give for their decision. Those reasons were, first, because it was not of a stable and substantial character; secondly, because it was a mere alteration to evade the Act; thirdly, because it was unusual and inconvenient for the customer to go inside; and, fourthly, because there was no adequate protection against rain or thieves at night. The short terms for which these places were let would also be an element to be considered, and, in my opinion, the justices have come to the right conclusion; and if I had to come to a conclusion on the facts, I should be of the same opinion as they were.

MELLOR, J.—I think everything that could be said against the decision of the justices has been urged, but I am bound to say that, in my opinion, if we look at the object of the Act, the intention was plainly to introduce into local Acts certain clauses (just as was done in the Railways Clauses Consolidation Act), drawn up in the form of a general Act, which should be adapted to almost all circumstances. The object of this Act was to establish fairs and markets, and as that is for the benefit of the district, this enactment is to prevent the infringement of the privileges, and to secure that benefit. It is very reasonable, when the Legislature said that, after the market is opened, none but licensed hawkers should sell within the prescribed limits, that it should desire to protect *bona fide* sales by persons in their own dwelling-places or shops. I agree with my brother Blackburn that each of the reasons given by the justices is not conclusive by itself, but I think they rightly considered that these all taken together were important elements for their decision; and I think they came to a right conclusion. As to the true definition of the word "shop," I think it means something more than the mere place of sale, and that it implies that there should be room for storing goods according to the nature of the business carried on, for storing linen and woollen goods, for instance, if it is a draper's business. At the same time the absence of this is not decisive against a place being a shop in all cases, because a fishmonger's place may be undoubtedly a shop, though from the perishable nature of the articles it may not be necessary to have room to store them. However that may be (and it is not necessary to decide that here), I think the justices have come to the right conclusion, and that the conviction should be affirmed.

*Conviction affirmed.*

#### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Wednesday, Jan. 25, 1865.

EATWELL (app.) v. RICHMOND (resp.)

*Local Turnpike Act, 10 Geo. 4, c. cx.—Construction—Liability to subsequent tolls on same day—Licence to carry goods with modified licence to carry passengers—16 & 17 Vict. c. 90, schedule D.*

A local Turnpike Act imposed certain tolls on four classes of things: (1.) Every horse or other beast drawing any coach, &c., or other such light carriage (except stage-coaches), 4d. (2.) Every horse or beast drawing any stage-coach licensed to carry in the whole inside and outside not more than sixteen passengers, 5d.; and licensed to carry more than sixteen passengers, 6½d. (3.) Every horse or beast drawing any van or other carriage for the conveyance of goods for hire or pay, 6½d. (4.) Every horse or other beast drawing any

caravan, tilted waggon, tilted cart, or other such carriage (licensed to carry passengers for hire), at the same rate as stage-coaches carrying the same number of passengers. No second toll was in general to be paid for passing a second time through the same gate on the same day; but by a subsequent section tolls were to be paid for every time of passing and repassing on the same day of a "stage-coach, stage-waggon, van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, or reward."

*Held, that the sections must be read together, and that although the latter section contained the words "for the conveyance of passengers" without the word "licensed," yet that it did not apply to any carriage not in fact "licensed to carry passengers."*

The app. drove a spring van on four wheels from A. to B. regularly on four days in the week, returning from B. to A. on the same day. The van was licensed under 16 & 17 Vict. c. 90 as a carriage principally and *bona fide* used for the conveyance of goods, and occasionally only used for the conveyance of passengers. The app. on one day was charged a toll of 6½d. on passing through the turnpike-gate from A. to B., and a second toll of 6½d. on his return on the same day from B. to A. He had one passenger on his first passage through the gate, and the same passenger on returning. He thereupon preferred an information against the tollgate-keeper for demanding greater tolls than he was authorised to do:

*Held, that the van was not "licensed to carry passengers" within the toll-imposing section of the Act, and therefore did not come within the proviso empowering the tollgate-keeper to impose second tolls upon it as being "for the conveyance of passengers."*

*Held, further, that the app.'s van fell within the third clause of the toll-imposing section as being "for the conveyance of goods," and that it was liable to a toll of 6½d.*

This was a case stated by justices under 20 & 21 Vict. c. 43, and the material facts were as follows:

On the 18th June 1864 an information was preferred by George Eatwell, the app., who was the owner and driver of a spring van on four wheels, which travelled from Chippenham into Bath and back four times a week, against Andrew Richmond, the resp., the collector or keeper of the London turnpike-gate, for demanding and taking, on the 6th June 1864, a greater toll than he was authorised to do. The justices dismissed the information and, upon the application of the app., stated a case for the opinion of the Court of C. P., setting out the evidence given before them, and the clauses of the Local Act of Parliament under which the tolls had been demanded and taken.

The app. stated before the justices that he was a common carrier living at Chippenham, and travelling to Bath and back four days in each week, with a light caravan on four wheels drawn by one horse. The caravan had moveable seats which could be put up and down, and the app. carried goods occasionally and passengers occasionally, sometimes one and sometimes the other, and sometimes both, always for payment. He deposited passengers at their own doors occasionally when they requested it, and he universally delivered goods at their destination as directed. He further said that he did not travel over four miles an hour. On the 6th June he passed through the resp.'s gate on his way to Bath, having in his van one passenger and a bundle belonging to the passenger, and on returning he passed through with the same passenger and a parcel going to Chippenham. The resp. demanded a toll of 6½d. on each occasion, and the app. paid it under protest.

The app. was not licensed, but paid a duty of

C. P.]

MOUNSEY v. ISMAT.

[Ex.

2l. 6s. 8d. under schedule D. of 16 & 17 Vict. c. 90 (the Assessed Duty Act), which enacts that duties shall be paid

For every carriage used by any common carrier principally and *bona fide* for and in the carrying of goods, wares, or merchandise, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any licence by the Commissioners of Inland Revenue: where such last-mentioned carriage shall have four wheels, 2l. 6s. 8d.; and where the same shall have less than four wheels, 1l. 6s. 8d.

The tolls imposed by the local Turnpike Act, 10 Geo. 4, c. cx., s. 6, under which the resp. acted, were as follows:

For every horse or other beast, drawing any coach, barouche, sociable, berlin, chariot, landau, chaise, phaeton, curriculo, gig, caravan, cart upon springs, hearse, litter, or other such light carriage (except stage-coaches), any sum not exceeding fourpence.

For every horse or beast drawing any stage-coach licensed to carry in the whole, inside and outside, not more than sixteen passengers, any sum not exceeding fivepence; and licensed to carry more than sixteen passengers, any sum not exceeding sixpence halfpenny.

For every horse or other beast, drawing any van, or other such carriage, for the conveyance of goods for hire or pay, any sum not exceeding sixpence halfpenny.

For every horse or other beast, drawing any caravan, tilted cart, or other such carriage (licensed to carry passengers for hire), at the same rate as stage-coaches carrying the same number of passengers.

Sects. 7 and 9 contained the following provisos respectively:—Sect. 7:

Provided always, and be it further enacted, that it shall not be lawful for the said trustees, or their collector or collectors, lessee or lessees, to demand or take more than the respective numbers of tolls in the whole hereinafter mentioned, for and in respect of the same horses, cattle, and carriages, for passing and repassing in any one day to be computed from twelve of the clock in one night, to twelve of the clock in the next succeeding night, along the whole line or lines of the said several roads as hereinafter mentioned (except as hereinafter mentioned); that is to say, on the said road which is called the London-road (forming part of the aforesaid first district), not more than one full toll, &c.

Sect. 9:

Provided always, and be it further enacted, that for or in respect of the horses, or other cattle or beasts, drawing any stage-coach, stage-waggon, van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, or reward, for which toll shall have been paid and which shall return on the same day through the same turnpike-gate or bar, the tolls hereby made payable shall be paid for every time of passing and repassing through every such gate or bar in like manner as if no toll had been before paid thereat.

The app. contended, first, that as a second toll could only be charged under the proviso in which the word "stage" apparently governed all the other expressions, and as it was not clear that this was a stage-van or a stage-caravan, a second toll could not be levied upon it. Secondly, that as the van was not licensed to carry passengers, it did not come within the fourth clause so as to be liable to the same rate as stage-coaches. And thirdly, that although the resp. might have elected to have charged the app. 4d. under the first clause, or 6½d., as conveying goods for hire under the third clause, yet having elected to treat it as a goods-conveying van, and charged the higher toll, he had no power to demand such toll again under sect. 9, which extends only to conveyances carrying passengers, and not to conveyances carrying goods.

Kingdon appeared for the app.

Karslake, Q. C. for the resp.

ERLE, C. J.—The first question in this case is, whether or not the tollgate-keeper had a right to demand a second toll. The app. passes backwards and forwards from Bath to Chippenham, and from Chippenham to Bath; and his carriage is licensed under 16 & 17 Vict. c. 90, as being principally and *bona fide* used for the carrying of goods, and occa-

sionally used in conveying passengers, but not liable to pay stage-carriage duty. The carriage is not licensed for the conveyance of passengers, but for the carriage of goods. It is a modification of the licence that the carrier is entitled to take up passengers occasionally. Then is this a carriage on which a second toll is imposed by sect. 9 of the local Turnpike Act? Sect. 6 imposes tolls on a variety of carriages. The app.'s carriage was certainly not a stage-coach within the meaning of that section; and if it falls within any of the classes of carriages described in sect. 6, it must be the fourth class, and then, as it does not carry more than sixteen passengers, the toll should be 5d. per horse. But is it in fact, in the words of that paragraph of the section, a "caravan, tilted cart, or other such carriage (licensed to carry passengers for hire)?" The app. is licensed to carry goods, with a modified licence to carry passengers; and I think that his van does not fall within the description as being licensed to carry passengers. Now sect. 9 must be taken as to be read with sect. 6, and by sect. 6 the rate of toll is to be settled by the licence of the driver, and therefore, although sect. 9 does not contain the word "licensed," yet I think that it must be taken to include only such stage-coaches and other vehicles as are licensed to "carry passengers for hire." If that is the fair construction of sect. 9, the app.'s carriage does not fall within it. The construction put upon sect. 9 by the resp. is, that the allusion to the licence is purposely left out, and that the tollgate-keeper has a right to look at every carriage passing through the gate, and ask, *Quo intuitu* did you make this journey, for goods or for passengers? But it is very clear that the statute imposes toll on the habit of the carriages, and it would be most pernicious that the tollgate-keeper should have the right of asking what was the driver's object on each particular journey. I think that the Legislature intended the tollgate-keeper to be satisfied with the licence as showing what the habit of the carriage is. If the Excise authorities are satisfied to let people have a licence to carry goods with a modified licence to carry passengers, the tollgate-keeper ought to be satisfied also. It would not do to have a shifting liability at the discretion of the tollgate-keeper. It was said by Mr. Karslake that the usage, when the Act was passed, when there were no railways, must govern the construction of the Act, but the statute must be taken to contemplate future times, and it contemplates a licence *de anno in annum*. As to the toll which ought to be charged upon the app.'s carriage, I think that it comes within the third clause of sect. 6, and is liable to a toll of 6½d. The case must be sent back to the justices with an intimation of our opinion that the app.'s carriage was liable to a toll of 6½d., but to no return toll.

WILLIAMS, WILLES and KEATING, JJ. concurred.

*Judgment for the app. without costs.*

Attorneys, E. Doyle, Whitakers and Woolbert.

#### COURT OF EXCHEQUER.

Reported by F. BAILLY and H. LEIGH, Esqrs., Barristers-at-Law

Wednesday, Jan. 18 and 25, 1865.

MOUNSEY v. ISMAT.

*Custom—Horse-racing—Entry on land for purposes of horse-racing on Ascension-day—Not an easement—Prescription Act, 2 Will. 4, c. 71, s. 2.*

*A custom for the freemen or citizens of Carhale upon Ascension-day to enter upon another man's land for the purpose of holding horse-races there, is a good*

[Ex.]

MOUNSEY v. ISMAY.

[Ex.]

custom (see *Mounsey v. Ismay*, 7 L. T. Rep. N. S. 717); but it is not an easement within the 2nd section of the Prescription Act, 2 Will. 4, c. 71.

*This custom is not, in fact, an easement at all.*

Declaration in trespass for breaking and entering a close of the plt., pulling down a bank and tearing up thorns, &c.

Fifth plea:

That for the full period of twenty years next before this suit on a certain day in each and every year, to wit, on Ascension-day, commonly called Holy Thursday, horse-races have been, and of right or title have been, and still ought to be holden on a piece of land in the extra-parochial hamlet of Kingemoor, in the said county (being in the neighbourhood of the said city of Carlisle), and for the full period of twenty years next before this suit, the freemen of the said city of Carlisle, on the day aforesaid, in each and every year, have, during all the time aforesaid, of right and without interruption, enjoyed and claim to enjoy as a custom a certain reasonable and laudable right and privilege; that is to say, that the freemen of the said city of Carlisle on the day aforesaid in each and every year should enter into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon, and the said freemen of the said city of Carlisle on the day aforesaid in each and every year without interruption have during all the time aforesaid been used and accustomed to enter and of right have entered and ought to have entered, and still of right ought to enter into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon.

Averment:

That the close, &c., at the time when, &c. was parcel of the said piece of land in the hamlet, wherefore the deft. being one of the freeman of the said city broke and entered the said piece of land and the said close in the declaration mentioned on Ascension Day 1882 for the purpose of holding the said horse-races, and because the plt. a short time before the time when, &c. had wrongfully placed and erected fences, posts and rails, and a bank and thorns upon the said land and the part of the said land where the said horse-races were accustomed to be held as aforesaid, and continued to keep the same there placed and erected until the same time when, &c., inasmuch that the said freemen were unable to hold the said horse-races as they were accustomed and of right entitled to do, wherefore the deft., being one of the freemen of the said city, for the purpose of enabling the said horse-races to be held as aforesaid, did on the second day remove the said fences, posts and rails, and the said bank and thorns, doing no more damage than was necessary for the purpose aforesaid, which are the trespasses alleged in the declaration.

Sixth plea, alleged the right and custom to have existed for forty years.

Seventh and eighth pleas, laid the right, &c., of the citizens of Carlisle for twenty and forty years respectively.

The 9th, 10th, 11th and 12th pleas, claimed a right to enter the land before Ascension-day for the purpose of preparing for the races, and justified accordingly.

Demurrer thereto; and replication that at the commencement of the twenty and forty years before this suit there was a vested or legal custom as mentioned in the pleas.

Joinder in demurrer and demurrer to the replication.

*C. Hutton*, for plt., argued first, that the freemen of Carlisle or the citizens were not a class of persons capable of enjoying by grant such a right as claimed by the pleas. Secondly, that the right or custom claimed was not one which was included under the 2 & 3 Will. 4, c. 71, s. 2.

*Crompton*, contra, for the deft.

*Cur. adv. vult.*

Jan. 25. — *MARTIN*, B. delivered judgment. — This case was argued before Pollock, C. B., my brother Channell and myself. We were of opinion that the pleas were bad, but as my brother Pigott had a doubt about it, we took time to consider, in order to prepare a written judgment, which has been done. I am authorised to state that my brother Pigott has bestowed considerable attention upon the matter since, and is now satisfied that the view we took was the correct one. This is a

demurrer to pleas. The declaration is trespass, for breaking and entering a close and breaking down the fences, &c. There are several pleas which are demurred to, all grounded upon the Prescription Act, 2 & 3 Will. 4, c. 71. The first alleged that for the full period of twenty years next before the suit on a certain day in every year, namely, Ascension-day, or Holy Thursday, horse-races have been of right, &c. held on a certain piece of land, whereof the close in which, &c. was parcel; and for the same full period of twenty years the freemen of the city of Carlisle had of right, and without interruption, enjoyed a custom that they should enter upon the said piece of land for the purpose of holding horse-races thereon, and the said freemen had, during all that time, used, &c. The pleas proceeded to justify the trespass by virtue of the custom in the usual manner. The next plea was the same, the user of the custom for forty years. The next plea was similar to the first demurred to, save that the right was alleged to be in the citizens of Carlisle. The next was similar to the last save that the user was alleged to be for forty years. The four pleas following were substantially the same as the preceding, and one objection only was made to all of them, namely, that the custom alleged was not within the Prescription Act. Some short time ago this custom was the subject matter of discussion before us. It was then pleaded as a custom at common law, and we are of opinion that it was a good custom. The case is reported in 1 H. & C. 729 (and also 7 L. T. Rep. N. S. 717). The present pleas have been added since. It is perfectly clear that such a right as is here set up can only exist by custom. A grant of such right to the freemen of Carlisle or the citizens of Carlisle would be void, such indeterminate bodies as the freemen of a city or the citizens of a city, not being themselves a corporation, are incapable of being grantees; and there is probably another objection to it as not being the legal subject of grant, but only of a licence. The question, therefore, really comes to this: Assuming that the owner of this close had forty-one years before the commencement of the suit, by parol, granted to or conferred upon the freemen of Carlisle or the citizens of Carlisle this right, and that they had during the forty years preceding the suit in fact exercised it as of right and without interruption, would the operation of the 2nd section of the statute render it absolute and indefeasible, notwithstanding that the origin of it could be clearly and satisfactorily proved, and that it began shortly before the commencement of the period of the forty years. It had been long established that the enjoyment of an easement, as of right, for twenty years, was practically conclusive of a right from the reign of Richard I.; or, in other words, of a right by prescription, except proof was given of an impossibility of the existence of the right from that period. A very common mode of defeating such a right was proof of unity of possession since the time of legal memory. To meet this the grant by lost deed was invented, but in progress of time a difficulty arose in requiring a jury to find, upon their oaths, that a deed had been executed which every one knew never existed. Hence the Prescription Act. The 1st section of the Act relates to *profits à prendre*, and the respective periods therein mentioned as thirty years and sixty years. The present case is not alleged to be within that. The pleas are all grounded upon the 2nd section, which enacts "that no claim shall be lawfully made at common law by custom, prescription, or grant, to any way or easement, or to any watercourse, or the use of any water to be enjoyed upon any land, &c., and such way or other matter shall have been actually enjoyed by any person claiming right thereto, without interruption for twenty years, shall be defeated or destroyed by showing only that such way or other matter was

[Ex.]

LONGLAND v. ANDREWS. LONGLAND v. DOLING.

[Ex.]

first enjoyed at any time prior to such period of twenty years; and when such way or other matter should have been so enjoyed for the period of forty years, the right thereto should be deemed absolute and indefeasible, unless it shall appear that it was enjoyed by consent or agreement by deed or in writing." The question which has been argued before us, and which is the true one, is, whether a custom for the freemen or citizens of Carlisle, upon Ascension-day, to enter upon another man's land for the purpose of holding horse-races there, is an easement within the 2nd section. To be so, it must be within the words "custom, prescription, or grant, to a way or other easement, or to a water-course, or the use of any water to be enjoyed upon the land of another," and we think it is not. In the first place we do not think this custom is an easement at all. One of the earliest definitions of an easement with which we are acquainted is in the "Termes de la Ley," and it is "a privilege that one neighbour hath of another by writing or prescription, without profit, as a way or sink through his land." In this definition custom is not mentioned; prescription is, and that therefore seems to point to a privilege belonging to an individual, not a custom which appertains to many as a class. Again, in Mr. Gale's book on Easements, p. 5, an easement is defined; a very great number of authorities are collected, and it is stated in the most explicit terms, that to constitute an easement there must be two tenements, the dominant one to which the right belongs, and the servient one upon which the obligation is imposed. We further think that the 2nd section itself points to a right belonging to an individual in respect of his land, not to a class, such as freemen or citizens claiming a right in gross, wholly irrespective of land, for to obtain the benefit conferred by the 2nd section, it must be enjoyed by a person claiming right thereto for the full period of twenty years or forty years. We are not aware of any case or expression of opinion by any judge contrary to this view. But the 5th section of the Act has been relied on as establishing it. This section relates to pleadings and enacts that in all pleadings to actions of trespass and other pleadings, wherein before the passing of the Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupier of a tenement in respect whereof the same is claimed, &c. It has been said, that this shows that an easement within the protection of the statute must be an easement belonging to a dominant tenement. We think it affords an argument and illustration as to what the Legislature contemplated, but after what fell from this court in *Welcome v. Upton*, 5 M. & W. 398, and in the same case 6 M. & W. 536, and the note of the late Mr. Henry Willes in p. 152 of the edition of "Gale on Easements" edited by him, we are not prepared to say that the statute may not extend to easements in gross; although it is to be observed that all which Lord Wensleydale says in the last report of the case is, "We might be disposed to think that the present case (an alleged easement in gross) is within the equity of the statute." And he goes on to add that the question was there immaterial. But however this may be, we are of opinion that to bring the right within the term "easement," in the 2nd section, it must be one analogous to that of a right of way which precedes it, and a right of watercourse which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement. In our opinion, therefore, the present alleged right is not within the language or meaning of the Prescription Act, and we are satisfied that it was never in the contemplation of the Legislature who

framed it (Lord Wensleydale, 5 M. & W. 409) to include within the Act such customary rights as entering land to enjoy rural sports, as in *Millechamp v. Johnson*, Willes Rep. 202, or to dance upon a green, as in *Abbott v. Weekly*, 1 Levintz, 176; by analogy to which we hold this alleged customary right to run horse races a lawful one at common law. What we think contemplated were incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment, not custom for mere pleasure. In our opinion, therefore, the pleas demurred to are bad, and our judgment is for the plt.

PIGOTT, B.—At the time of the argument I thought easements in gross were within the 2nd section, and at that time I thought this was an easement in gross. On further consideration I agree with the rest of the court that this case is not within the 2nd section.

POLLOCK, C.B.—I have only to add to the judgment of my brother Martin a reference to the case of *Hevlin v. Shippam*, 5 B. & C. 221. Bayley, J., in giving the judgment of the whole court, says: "The 'Termes de la Ley,' a book of great antiquity and accuracy, defines an easement to be a privilege that one neighbour hath of another by charter or prescription without profit, and it instances 'as a way or sink through his land, or such like.'" It appears to me that the opinion of the whole court at that time was, that though there may be what, for want of a better expression, you may call an easement in gross—as, for instance, a right of common without land to a man and his heirs—yet, properly speaking, that is a right and not an easement; but an easement, according to the legal notion of it, necessarily requires a servient and a dominant tenement; there must be a claim in order to be an easement. There would be a claim in respect of some tenement. You find in Kent's Commentaries on the American Law a long note of what is to be found collected on the civil law of several of the American States, the Spanish law, the French law, and the law of some other European nations; but they all hold that a right of that sort must be connected apparently with some tenement; and though it may be not properly called an easement, it expresses what the thing is which is contained in the name and the substance, and you call that an easement which is not attached to a tenement, though claimed by one neighbour from another.

Judgment for the plt.

Plt.'s attorney, G. Capes, Gray's-inn.

Def't's attorneys, Mounsey and Gray, 9, Staple-inn.

Nov. 7 and Feb. 10, 1865.

LONGLAND v. ANDREWS.

LONGLAND v. DOLING.

*Northam Bridge and Roads Act* (36 Geo. 3, c. 94), sects. 2, 9, 46, 53—Exemption of county police from turnpike toll—*Proprietary bridge and road*—Definition of "turnpike road and bridge"—*General Turnpike Act* (3 Geo. 4, c. 126)—*County Police Amendment Act* (3 & 4 Vict. c. 88), s. 1.

The words, "any turnpike road or bridge," in sect. 1 of 3 & 4 Vict. c. 88, are not limited to a "turnpike trust road or bridge," or to a road or bridge where tolls are authorised to be taken in respect of "horses and carriages only," and therefore the exemption, in that section, of the county police from toll applies to the tolls which "the Northam Bridge and Roads Company," are by their Act (36 Geo. 3, c. 94) authorised to demand and take from persons passing, on foot or with



[Ex.]

LONGLAND v. ANDREWS. LONGLAND v. DOLING.

[Ex.]

*horses or carriages, &c., over the bridge built by the said company across the river Itchen, at Northam, in the county of Southampton, or through the tollgates erected by the said company on the roads made and maintained by them leading to the bridge.*

These were two actions brought by the plt. against the respective defts. to recover back toll demanded of and paid by the plt. to each of the above-named defts., and from which he claimed to be exempt under the following circumstances set forth in the case stated by judge's order for the opinion of the Court of Ex. without pleadings, and which case stated in substance as follows:—The plt. is a constable and superintendent of the Southampton county police, established under the Police Acts after mentioned; and the deft. in the first of the above-named actions is a toll-keeper in the service of a company called "The Company of Proprietors of Northam Bridge and Roads," and appointed to take toll from persons passing along the bridge hereinafter mentioned; and the deft. in the other of the above actions is a toll-keeper in the service of the said company, and appointed to take tolls from persons passing along the road hereinafter mentioned.

In 1796 certain persons (incorporated by the above name) obtained an Act of Parliament (36 Geo. 3, c. 94), enabling them to build and maintain a bridge over the river Itchen, at or near Northam, and to make and maintain a certain road, with a footway by the side thereof from Southampton to the end of the said bridge, and a certain other road from the end of the said bridge on the opposite shore.

By sect. 2, the company are directed to build, or cause to be built, a good and substantial bridge at, near, or from Northam, over and across the river Itchen to the opposite shore; and that after the said bridge should be built and completed, the same should for ever be and remain a public bridge, and all persons, horses, cattle and carriages should have free liberty, upon payment of the respective tolls thereunder mentioned and granted, to pass over the same without any hindrance or interruption of or by any person or persons whomsoever.

By sect. 46 certain tolls therein mentioned may be demanded and taken at the several gates, toll-houses and tollbars to be erected under and by virtue of the Act. And by sect. 53, the roads thereby directed to be made were to be deemed and taken to be *turnpike-roads* within the intent and meaning of the 13 Geo. 3, c. 84 (the then General Turnpike Act), and of the several Acts explaining, amending, or repealing the same or some part or parts thereof, and that all clauses, &c. contained in 13 Geo. 3, c. 84, subject to the provisions of the said other Acts (except where otherwise altered by this Act), should be in force with regard to the roads included in this Act as fully and effectually to all intents and purposes as if this Act (36 Geo. 3, c. 94) had been passed previous to the 13 Geo. 3, c. 84.

By 3 & 4 Vict. c. 88 (County and District Constables Act Amendment Act), after reciting the said County Constables Act (2 & 3 Vict. c. 93), it was enacted by sect. 1 that no toll should be demanded or taken on any *turnpike-road or bridge* for any horse or police van, carriage, or cart passing along such road or bridge in the service of the police established under the provisions of the said Act (2 & 3 Vict. c. 93), provided that the constable in charge of such horse, van, carriage, or cart, if not the chief constable, should produce an order in writing under the hand of the chief constable, or should leave his address according to the regulations of the police force at the time of claiming the exemption.

After the passing of 36 Geo. 3, c. 94, the com-

pany duly built the said bridge and made the said roads authorised to be made by them, and also erected a tollhouse, with a gate for the collection of tolls at the Southampton end of the said bridge, and a tollhouse and bar at the other extremity of the said road.

On the 1st Jan. 1863, plt. so being a constable, and in charge of horse and police cart, and in the service of the said police, and having his dress according to the regulations of the said police force, requiring to pass along the said bridge, claimed from deft. the right to pass along the bridge and through the gate without payment of any toll, but deft. demanded 7½d. as such toll, which plt. paid under protest, and this action was brought to recover it back.

The case contained a similar statement of a demand and taking by deft. Doling of a toll of 3d. from plt. (after a like claim of exemption) on the same day, on passing along the road leading from the end of the said bridge, near Bitterne, and leading to Botley turnpike-gate, and through the said Hedge-end gate, with the said horse and police cart, &c.

It is admitted by plt. that the amount of toll demanded and paid in each case is the proper and legal toll to be paid in respect of the said horse and cart under 36 Geo. 3, c. 94, if plt. is not entitled to the exemption claimed.

The question for the opinion of the court is, whether plt., so being such constable as aforesaid, and having his dress and being in charge of the said horse and police cart in the service of the police as aforesaid, was exempt from paying the said toll in passing along the said bridge, and also in passing along the said road and through the said gate?

*Coleridge, Q. C.* (with whom was *Poulsen*) for the plt. in both actions.—The two cases raised the question of liability of the county police to toll on passing over the bridge and over the road respectively mentioned in the case, and might be argued together. (He here read and commented on sects. 2, 8, 9, 21, 46 and 48 of the Act of 36 Geo. 3, c. 94, incorporating the Northam Bridge and Roads Company, and then proceeded as follows:—) By sect. 53 of the Act the roads to be made under the Act were "to be deemed and taken to be *turnpike-roads* within the meaning of the then General Turnpike Act, 13 Geo. 3, c. 84, and of the Acts explaining, amending, or repealing the same;" and by sect. 1 of 3 & 4 Vict. c. 88 (the County Police Amendment Act), "no toll was to be demanded or taken on any *turnpike-road or bridge* for any horse, or police van, carriage, or cart in the service of the police established under the provisions of the County Constables Act, 2 & 3 Vict. c. 93, provided," &c., as was set forth in the case. Therefore every carriage, or horse in the service of the police passing over either this bridge or road was exempt from toll. The *ratio decidendi* of the Barons of the Ex. in *The Northam Bridge and Roads Company v. The London and South-Western Railway Company*, 6 M. & W. 428; 9 L. J., N. S., 165, Ex., applied strictly here, and the matter was *res judicata*. As was there said, "A turnpike-road was a road on or across which there were turnpike-gates;" and though the bridge only was before the court in that case, the same reasoning applied exactly to the road.

*Lush, Q. C.* (with him *C. Pollock*), contra, for the defts.—The case cited from 6 M. & W. decided only that the Northam-road was a "*turnpike road*" within the meaning of the London and South-Western Railway Act. But the expression "*turnpike road*" admitted of various meanings. In the present case it was used in the sense given to it in the general Turnpike Acts, which was another and different one from that in which it was used in the

[Ex.]

IBBOTSON v. PEAT.

[Ex.]

Railway Acts in the case in 6 M. & W. This was a *proprietary* bridge and road, made by a joint-stock company out of private funds, and all the profits went into their own pockets, and were not received in trust for the benefit of the public. The 13 Geo. 3, c. 84, was repealed by 3 Geo. 4, c. 126, which contained a list of exemptions clearly not applying to this road, because the 4 Geo. 4, c. 95 (explaining and amending the general Act of 3 Geo. 4, c. 126), in sect. 90, said that nothing in the 3 Geo. 4, c. 126 should extend "to any road not under the care and management of trustees or commissioners." Now, this road was not a "trust" road, and so the exemption claimed did not apply to it. The exemption of the police must be ranked with the general exemptions in the general Turnpike Act. Had the Legislature meant it to apply to roads not operated on by the general Act, it would have been made complete. Now here, a policeman going on foot with a prisoner must pay. So also, if the van were drawn by an ass or mule, the exemption applying only to going on horseback, or with a van drawn by horses. Under the general Act (3 Geo. 4, c. 126), a constable taking a prisoner under a warrant to gaol, or returning therefrom, was exempt, but was not so in going to fetch a prisoner, and that omission was remedied by the Police Act, 3 & 4 Vict. c. 88, which extended the exemption only, and not the roads, or the area over which exemption was to be claimed. Again the company's Act contained no clause freeing persons for twenty-four hours after once paying, as in the Turnpike Acts, which was another distinction operating on the question of exemption. In a similar case of *Ex parte Fraser, Reg. v. Thornbury and others* (see L. T. Agenda, Jan. 18, 1862, and s. c. nom. *Hornby v. Fraser*, Feb. 22), in which toll was taken for a police van passing over Gainsborough-bridge, the Q. B. adopted the view here urged, and held that the 3 & 4 Vict. c. 88 did not apply. [CHANNELL, B. referred to *Rex v. Trustees of the Great Dover-Street road*, 5 A. & E. 662; 6 L. J., N. S., 83, Q. B.]

Cur. adv. vult.

Feb. 10.—CHANNELL, B. now delivered the considered judgment of the Court (Pollock, C.B., Bramwell, Channell and Pigott, BB.).—The question in this case is whether, under the circumstances stated, and having regard to the sections of the Act of Parliament set out in the case, the plt. was liable to pay toll for passing over Northain-bridge, the bridge mentioned in the special case. The toll was demanded under the provisions of the 36 Geo. 3, c. 94, and would be payable by the deft., unless he is exempted by the 1st section of the 3 & 4 Vict. c. 88. The case seems to us to turn on the question whether the bridge mentioned in the case was a "turnpike bridge" within the meaning of the 1st section of the Act last referred to. If so, the plt., under the circumstances stated in the case, comes sufficiently within the other provisions of that section, and is entitled to the exemption claimed. It was argued, on the part of the deft., that the words "turnpike bridge" apply only to a "turnpike trust bridge," and that Northain-bridge is not a trust bridge; that the company of proprietors are owners of property in their own right, bound indeed to allow the public to pass over the bridge on payment of toll, where not entitled to exemption, but that the company in no case receive the tolls as in trust for the public. It was further argued that the words referred to, namely, "turnpike bridge," apply only to a bridge where tolls are taken in respect of horses and carriages only. We see no reason for so limiting the construction to be placed on the words of that section. It is clear, we think, from the 2nd, 7th, 9th, and 46th sections of the 36 Geo. 3, that a toll is authorised to be taken

at the bridge, and though the 53rd section of that Act only in terms applies to roads (for the purpose of bringing roads within the operation of the General Turnpike Act), we think the bridge erected by the company of proprietors of the Northain-bridge roads, at which the company are entitled to take toll, subject to such exemption as may be provided for, is a "turnpike bridge" within the 1st section of 3 & 4 Vict. c. 88. We see no ground for limiting the very general words of that which speaks of any "turnpike bridge," to a "turnpike trust bridge," as contended for in the argument, or to a bridge at which tolls are authorised to be taken in respect of horses and carriages only, and not, as by the 46th section of the 36 Geo. 3, for persons as well as for a horse or carriage. So to limit the operation of the 1st section of the 3 & 4 Vict. c. 88, would be, we think, to do violence to the plain language of the Act of Parliament. Our judgment must be for the plt. to enter a verdict for him for 40s. and costs of suit.

Judgment for plt.

LONGLAND v. DOLING.

The question in this case is substantially the same as in the last. The toll claimed is for passing through a tollgate on the road, and not over the bridge. We think that the exemption equally applies here, and we give judgment for the plt.

Judgment for plt.

Attorney for plt. (in both actions), T. Westall, 3, Gray's-inn-square.

Attorneys for defts., Rickards and Walker, 29, Lincoln's-inn-fields.

Monday, May 1, 1865.

IBBOTSON v. PEAT.

Game—Adjoining proprietors—Action by one proprietor against the other for frightening away his game—Alluring game from another's land—Pleading—Demurrer.

A person is not justified in firing off rockets and making other noises upon his own land, adjoining and close to the land of another, with intent to drive and frighten away the game from off that other's land, but is liable to an action for so doing.

And in an action by A. for damage by reason of his grouse and other game having been so frightened and driven away by B., a plea to the effect that A., in the first instance, "fraudulently and wrongfully, and with intent to lure and entice the said grouse from B.'s land on to his own, laid and placed on his own land near to the land of B. quantities of corn and other substances on which grouse feed, and thereby lured and enticed the said grouse from B.'s land on to his own, and was about so to lure and entice other grouse from B.'s land and to shoot them; wherefore B., in order to prevent A. from shooting the grouse so lured, &c., and from luring, &c. other grouse, committed the said grievances, &c., doing no more, &c.," is a bad plea and no defence to the action:

So held, on demurrer, by the Court of Ex. (Pollock, C. B., Martin, Bramwell and Pigott, BB.)

By Martin, B.—That the principle of *Carrington v. Taylor*, 11 East, 571, decided the present case.

By Bramwell, B.—That, without any reference to propriety or neighbourly conduct, there was nothing in point of law to prevent A. from doing that which the plea said he had done.

Declaration—First count:

That before and at the time of committing the grievances, &c., plt. was and still is possessed of certain land at, &c., yet

[Ex.]

IBBOTSON v. PEAT.

[Ex.]

deft. well knowing the premises, on divers days, &c., unlawfully and with intent to drive and frighten away grouse and other game then lawfully being in and upon the said land of plt. from and off and away from the said land of plt. to certain other lands, and to prevent plt. from hunting, shooting, killing and taking the said game on his said land, fired, exploded and projected, and caused to be fired, &c., certain offensive and injurious, noxious, terrifying and dangerous rockets, fireworks, missiles, projectiles and combustibles, and made and caused to be made divers loud, jarring, annoying and disturbing noises close to and over the said land of plt. so as to be, and the same were, a nuisance and a grievous disturbance to plt. in his lawful and quiet occupation and enjoyment thereof. And thereby also plt.'s horses and cattle, which were then lawfully in and upon the said land of plt., were then greatly alarmed, terrified and rendered wild, unmanageable and furious, and impelled to run and rush violently in and about and over the said land of plt. and into certain bogs and quagmires therein and against and over the walls, banks and fences of the said land of plt., and to break down and destroy such walls, banks and fences of plt., and to escape out of the said land of plt., and to go at large, and by reason of the premises the said horses and cattle sustained great injury and damage, and became and were rendered wild, dangerous and unmanageable, and thereby also divers large numbers of grouse and other game, then lawfully being in and upon the said land, were scared, frightened and driven off and away from the said land of plt., which otherwise plt. might and would have shot, hunted, killed and taken, and plt. was otherwise also greatly disturbed and damaged in the lawful occupation of his said land.

#### Plea 2:

To so much of the first count as relates to the said grouse, that before and at, &c., his grace the Duke of Rutland was seized in fee of certain lands abutting on and next adjoining to the said land of plt. in the first count mentioned, and was entitled to the exclusive right of shooting, killing and taking grouse on his said lands, and the said duke before, &c., had gone to great expense in getting up and preserving great numbers of grouse on his said lands, as plt. well knew, and that just before the committing of the said supposed grievances plt. fraudulently and wrongfully, and with intent to lure and entice the said grouse away from the said lands of the said duke on to the said land of plt., and to obtain for himself the benefit of the said expense so incurred by the said duke as aforesaid, laid and placed on the said land of plt. near to the lands of the said duke, quantities of corn and other substances on which grouse feed, and thereby then lured and enticed the said grouse in the first count mentioned, and was about to lure and entice other grouse away from and out of the said lands of the said duke on to the said land of plt., and was then and there about to shoot and kill the said grouse, wherefore the deft., as the servant of the said duke, and by his command, in order to prevent plt. from shooting and killing the said grouse so lured and enticed as aforesaid, and from luring and enticing the said other grouse as aforesaid, committed the said grievances in this plea pleaded to, doing no more than was necessary for the purpose aforesaid.

#### Demurrer and joinder in demurrer to plea 2.

Plt.'s points:—1. That while the grouse were on plt.'s land plt. had an interest therein, and deft. none, and deft. had no right to drive them off plt.'s land, and thereby to prevent other grouse from coming on. 2. That plt. had a right to entice grouse to his land; and whether he had or not, such act of plt. would not justify deft. in driving grouse off plt.'s land and preventing other grouse from coming on. 3. That the facts disclosed in plea 2 show no right or title in the deft. to commit the grievances complained of.

Deft.'s points:—1. That the first count does not show any cause of action. 2. That plt. by the demurrer admitting that he had had recourse to unfair means for the purpose of enticing the grouse from off the land of the Duke of Rutland, deft. was justified in resorting to the measures complained of. 3. That the demurrer admits that the matters complained of were done for the purpose, amongst other things, of preventing plt. from enticing grouse from the duke's lands, and that no more was done than was necessary for that purpose, and that deft. was justified in taking measures to prevent grouse leaving the duke's lands by plt.'s procurement, notwithstanding that the effect of such measures was to drive off grouse from the plt.'s land.

*Baylis*, for plt., in support of the demurrer.—This case raised the question whether A., having a qualified property in game on his own land, another man B. had a right to disturb and frighten away that

game by discharging rockets and other projectiles on his own land adjoining that of A. The plea afforded no answer or justification. It was pleaded to so much only of the declaration as related to the grouse. The acts done by deft. caused certain damage to plt. [BRAMWELL, B.—The merely sending up a rocket is not actionable, it is the consequential damage.] Just so; plt. had a qualified property in the grouse whilst they were on his land. [MARTIN, B.—Did not the plt. allure the grouse from the deft.'s land in the first instance?] That was a lawful act. Every one who sets up a preserve does so. [POLLOCK, C. B.—It may be lawful, but decidedly it is an unneighbourly act. MARTIN, B.—What is the distinction between that and frightening them away?] The two things were very distinguishable. Take the case of rival schools: to entice scholars from the one school to the other by cakes and sugarplums, would be lawful; but to prevent them from going to school by firing a gun would be unlawful: (see *Holt, C. J., Keeble v. Hickeringill*, Holt's Rep. 14-19; 3 Salk. 9; 11 East, 572, note a.) Apart from the question of property or neighbourly conduct, it was a perfectly lawful act, and not prohibited by any statute, to allure grouse from other lands to one's own, but deft. had no right to frighten them away from the plt.'s land as he had done. *Keeble v. Hickeringill* (*ubi sup.*), and *Carrington v. Taylor*, 11 East, 571, which were very similar to the present case, showed that an action on the case lay for discharging guns near a decoy pond, with design to damage the owner by frightening away the wildfowl resorting thereto. [BRAMWELL, B.—What the deft. did here was not done in order to get the game back again. He should do that, or prevent them from migrating to plt.'s land by feeding them better, and by adding to the attractions and allurements on his own land.] There was no distinction between the present case and *Read v. Edwards*, 11 L. T. Rep. N. S. 311; 36 L. J. 81, C. P.; 17 C. B., N. S. 245, where a man was held liable for damage done by his dog to game in plt.'s preserve, deft. knowing the dog's propensity to hunt on his own account, and allowing it to go at large, and here, where deft. deliberately made noises to frighten away the game. The moment the grouse left the duke's lands he ceased to have any property, right, or interest in them. It was needless to go into all the cases showing a man's qualified possessory property in game whilst it was on his own land—a right recognised by the Legislature. The following would be sufficient:

*Sutton v. Moody*, 1 Ld. Raym. 250;

*Rigg v. Lord Lonsdale*, 11 Ex. 654; 25 L. J. 73.

Ex.: s. c. in error, 1 H. & N. 923; 26 L. J. 196, Ex.;

*Blades v. Higgs*, 5 L. T. Rep. N. S. 752; 31 L. J.

151, C. P.; 12 C. B., N. S., 501; s. c. in error,

7 L. T. Rep. N. S. 798 and 834; 32 L. J. 182,

C. P.; 18 C. B., N. S., 844.

[POLLOCK, C. J. refers to *Reg. v. Pratt*, 4 E. & B. 860; 24 L. J. 113, M. C.] His three points were, first, plt.'s qualified possessory property in the grouse; secondly, deft.'s unlawful act done with intent to frighten the grouse away; thirdly, that there was nothing unlawful in plt.'s alluring the grouse to his own land.

*Wills* (with whom was *Lush, Q. C.*), for deft. in support of the plea, would adopt great part of the argument contra, because it was his own. It was a new case. The more successfully plt. showed that game was a valuable property, the clearer was it that plt. was himself in the wrong in taking the means to obtain it which the plea showed he had done. Means, lawful in themselves, did not remain so when taken with intent to injure and annoy a neighbour. *Holt, C. J.*, in the case cited, said: "Suppose

[Ex.]

TOMLINS v. NUISANCE REMOVAL COMMITTEE OF GREAT STANMORE.

[Q. B.]

deft. had shot on his own ground: if he had occasion to shoot, that would be one thing; but to shoot on purpose to damage the plt. is another thing, and a wrong." (11 East, 574.) So here, putting the corn, &c., and thereby enticing away deft.'s game, was a wrong and damage to deft. The words, "in order to prevent plt. from shooting the said grouse," &c., were sufficient to save the plea. In order to prevent plt.'s attack on deft.'s possessory property, and to protect that possessory property, deft. fired off guns, &c., on his own land, as he had a right to do. The firing on the highway to frighten the schoolboys would be a nuisance, and was distinguishable. Plt. was the first wrong-doer, for he must be taken to have done what he did, as stated in the plea, with express intent to injure and annoy his neighbour, which falls within the dictum of Holt, C. J. (11 East, 574.) He thereby attacked and injured deft.'s possessory rights, and so deft. was justified in protecting his own rights from injury, and preventing the grouse on his land from passing across the boundary between it and plt.'s land. [MARTIN, B.—On the pleadings, it must be admitted that deft.'s intent was to frighten and drive away the grouse which were already on the plt.'s land. But, in truth, the case cannot be distinguished from *Carrington v. Taylor*.] There it was alleged to be an injury to the plt.'s trade. There was no such allegation here, which was necessary before that case could apply.

POLLOCK, C. B.—We are all of opinion that in this case the declaration is good, and that the plea is bad. The declaration complains of an act being done which is apparently injurious, and done for the purpose which is attributed to the deft. in the declaration; and supposing there had been no plea pleaded, the declaration would be good. But then the deft. by his plea says, "You have done me some wrong, and I have been endeavouring to redress that wrong by doing some wrong to you." I think, generally speaking (if there is such a thing as a general proposition), it may be laid down that you cannot do that. If a man attacks you by force, you may defend yourself by force; but you cannot commit some other wrong of a totally different character, by way of repairing or avoiding the consequences of the wrong that has been done to you. You must seek redress for that wrong in a lawful and proper way. As my brother Bramwell suggests, if a man horsewhips you, you cannot libel him; or if he libels you, you cannot justify the horsewhipping him to prevent him doing it again. On these grounds it appears to me that, the declaration being good and the plea bad, the plt. is entitled to our judgment.

MARTIN, B.—I think the principle of the case of *Carrington v. Taylor*, 11 East, 571, decides this case.

BRAMWELL, B.—I also am of opinion that the plt. is entitled to our judgment. The declaration appears to me to be clearly good. It alleges that the plt., being the owner of certain land, the deft., "well knowing the premises, on divers days and times," and so forth, "unlawfully and with intent to drive and frighten away the grouse and other game then lawfully being on and upon the said land of the plt. from and off and away from the said land of the plt. to certain other lands, and to prevent the plt. from hunting, shooting," and so on, "fired rockets and made a noise, &c." The deft. pleads a plea which admits the declaration to be true, and then sets up the right to do the thing complained of for the purpose which the declaration attributes to the deft., that is, to do the act for the purpose of

frightening away the game. What is the reason given? The reason given is this, "That the game which I frightened away was game which you, wholly or partially, got from off the Duke of Rutland's land—say the deft.'s land—he having attracted it there by providing food for it, or taking care of it, and then you improperly attempted to get it on your land by putting some grain there. Then, in order that you may not shoot the game which you have so attracted, and in order that you may have no inducement to go on with such conduct"—for that is the only meaning, for preventing him from "alluring the grouse aforesaid,"—"in order that you should be without inducement for such acts as that, I did the thing complained of." It appears to me clearly that that is a bad plea, because I see nothing in point of law to prevent the plt. from doing that which the plea says he has done. I say, in point of law, if there is anything wrong in it, that will be the subject-matter of an action; but, if there is no wrong, how can there be a justification? No one can pretend for a moment that any action would lie at the suit of the duke against the plt. The truth is this, without saying anything as to the propriety of such conduct as this between gentlemen and neighbours, about which I say nothing, because I do not know what the facts are—without saying anything about that—the true remedy, I take it, where a person knows game is attracted away from his land, is to offer them stronger inducements to remain where they are. It is really like the case I mentioned in the course of the argument, of *Chesmore v. Richards* (Ex. Ch., 2 H. & N. 168; 26 L. J. 393, Ex.; s. c. in the H. of L. 7 H. of L. Cas. 349; 29 L. J. 81, Ex.), where, if a man has the misfortune to lose his spring by another's digging a well, the proper remedy is for him to dig a still deeper well.

FIGOTT, B.—I am of the same opinion.

*Judgment for plt.*

Plt.'s attorneys, *Burt and Stevens*, 10, South-square, Gray's-inn.

Deft.'s attorneys, *Eyre and Lawson*, 1, John-street, Bedford-row.

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Friday, Feb. 8, 1865.

TOMLINS (app.) v. NUISANCE REMOVAL COMMITTEE OF GREAT STANMORE (resps.)

*Nuisance Removal Act—Owner not abating nuisance pursuant to order of justices—18 & 19 Vict. c. 121, ss. 13, 14.*

*An order to abate a nuisance by removing offensive privies, &c., was directed to "the owner or to the Nuisance Removal Committee" the owner being directed to remove the same within seven days, and if such order were not complied with, the committee were authorised and required to enter and remove it. The seven days elapsed, and neither the owner nor committee removed the nuisance:*

*Held, that the justices had power to fine the owner, under sect. 14, for disobedience of the order, notwithstanding that it was addressed to the nuisance committee as well as to the owner.*

This is a case stated for the opinion of the Court of Q. B., pursuant to the provisions of the Act 20 & 21 Vict. c. 43, entitled, "An Act to improve the Administration of the Law as respects Summary Proceedings."

The app. is the owner of a plot of land at Great

Q. B.]

TOMLINS v. NUISANCE REMOVAL COMMITTEE OF GREAT STANMORE.

[Q. B.]

Stanmore, Middlesex, on which he has erected twenty-two cottages, and for the accommodation of the occupiers of them has erected seven privies, so constructed that the soil is intended to be conveyed into a drain which passes under the premises and enters the adjoining close of land belonging to other owners.

The Nuisance Removal Committee appointed under the Nuisance Removal Acts 1855 and 1860, on the 9th Aug. last, gave the app. notice that there existed the following nuisance, namely :

Seven privies erected close together in the rear of the cottages, being distant only five yards from them; that two of the privies were locked up; that they are over an open ditch or sewer, and are overflowing with soil; the smell arising from the same is of the most offensive kind and likely to create fever, there being upwards of ninety individuals inhabiting the cottages, and no dust-bin for their use. And further, that after the expiration of seven days the committee would cause the truth of the said complaint to be ascertained by an inspection, and if the nuisance should be still existing, or, if removed or discontinued, be likely to be repeated, proceedings would be adopted against him under the Act.

On the 24th Aug. last the app. appeared before two of Her Majesty's justices of the peace for the said county, to answer the complaint of the said nuisance committee, who, after hearing the evidence of a medical man and proof being given of the app. having erected seven of these cottages within the last two years, now occupied by forty-one people, without providing sufficient accommodation for them or for the other cottages which had been built some years, as also other witnesses, made an order of which the following is a copy :

To the owners of the several cottages occupied by, &c., and of one unoccupied situate at the bottom of Stanmore-hill, in the parish of Great Stanmore, in the county of Middlesex, or, to the nuisance removal committee chosen by the vestry, and for the said parish, being the local authority for executing the Nuisance Removal Acts 1855 and 1860, or to their servants and agents, and to all whom it may concern.

County of Middlesex.—Whereas, on the 18th Aug. inst., complaint was made before David Begg, Esq., one of Her Majesty's justices of the peace, acting in and for the county stated in the margin, by Robert Wilkie on behalf of the Nuisance Removal Committee of the said parish of Great Stanmore, that in or upon certain premises, situate at the bottom of Stanmore-hill, in the parish aforesaid, and in the county aforesaid, and in the district under the Nuisance Removal Acts 1855 and 1860, of the complaints above named, the following nuisances then existed, viz., seven privies near to the cottages occupied as aforesaid, placed over an open ditch and an accumulation of offensive matter, and that the said nuisance was caused by the act or default of the owner of the said premises. And whereas Silvester Tomlins, the owner of the said premises within the meaning of the said Nuisance Removal Acts 1855 and 1860, hath this day appeared before us justices, being two of Her Majesty's justices in and for the county aforesaid, sitting in petty sessions at our usual place of meeting to consider the matter of the said complaint. And whereas it hath been proved to us, upon oath, that the said nuisance doth exist upon the aforesaid premises, and that by reason thereof the cottages now occupied by, &c., and the one unoccupied, are rendered unfit for human habitation, and that the same is caused by the act or default of the owner of the said premises. We, the said justices, in pursuance of the said Acts, do order the said S. Tomlins, the owner of the said premises, within seven days from the service of this order, or a true copy thereof, according to the said Acts, to take down and remove the said offensive privies, to remove the offensive matter, and to restore and reconstruct the drain under the said privies so as the same shall no longer be injurious to health as aforesaid. And we, the said justices, being satisfied that the nuisances proved to us this day to exist on the said premises as aforesaid, are such as to render the cottages occupied by, &c., and the one unoccupied, unfit for human habitation, do hereby prohibit the using of the said cottages, or any of them, for human habitation until they are rendered fit for that purpose in the judgment of us, the said justices. And if the above order for prohibition be infringed, then we do authorise and require you, the said nuisance removal committee of the said parish of Great Stanmore, your servants and agents, from time to time, to enter upon the said premises, and do all such works, matters and things as may be necessary for carrying this order into full execution according to the Acts aforesaid. Given under the hands and seals, &c.,

S. P. KENNARD [L. S.]  
D. BEGG [L. S.]

This order was duly served upon the app., and no

appeal was made against that part of the order which had reference to the prohibition. The app. neglecting to obey the said order, an information was laid against him, of which the following is a copy :

Middlesex to wit.—The information and complaint of R. Wilkie, Inspector of Nuisances on behalf of the Nuisance Removal Committee of the parish of Great Stanmore in the said county, made before one of Her Majesty's justices of the peace in and for the said county, the 28th Sept. 1864.

Who saith: That by an order made under the authority of the Nuisance Removal Act, 1855 and 1860, at the Petty Sessions holden in and for the hundred of Gora, in the said county, on the 24th Aug. 1864, by two of Her Majesty's justices of the peace in and for the said county, acting for the said hundred then and there assembled, S. Tomlins, the owner of the several cottages occupied by, &c., and of one unoccupied, situate at the bottom of Stanmore-hill, in the parish of Great Stanmore, in the said county, was thereby ordered within seven days from the service of the said order, or a true copy according to the said Acts, to take down and remove certain offensive privies, and to remove the offensive matter, to reconstruct a drain on the same premises so that the same should no longer be injurious to health. And further, the said justices, by the said order, did prohibit the using of the said cottages for human habitation until they were rendered fit for that purpose in the judgment of the said justices making the said order. And further, that the said S. Tomlins hath had due notice of the said order, and the same having been personally served upon him on the 2nd Sept. 1864, and that he hath disobeyed the said order, and hath not taken down or removed the said privies, that he hath not removed the offensive matter from the said premises, that he hath not constructed a drain upon the said premises, nor hath he prevented the said cottages from being used for human habitation, and by such wilful neglect and default hath disobeyed the said order, and rendered himself liable to a penalty of 10s. per day during such his default. This informant therefore prays justice in the premises, and that the S. Tomlins may be summoned before two justices of the peace for the said county for the said penalties.

ROBERT WILKIE.

Exhibited before me at Edgware in the said county.

E. W. COX.

The app. appeared before us, the undersigned two of Her Majesty's justices for the county of Middlesex, on the 19th Oct. 1864, to answer the said information. It was then proved to our satisfaction that the app. had not obeyed the said order. The app. also failed to satisfy us that he had used all due diligence to carry out such order. It was also proved to our satisfaction, that the said nuisances still continued unabated, and were dangerous to health, that none of the tenants of the said cottages had been removed as directed by the said order, and that the said cottages were still, as before the said order, in our judgment, unfit for human habitation.

It was contended by the app. that, inasmuch as the order for the removal of the said nuisances was addressed to the Nuisance Removal Committee as well as to the owner of the said premises, requiring them, in the event of the owner not obeying the order to enter upon the premises, and do all such works as might be necessary for carrying the said order into execution, we had no jurisdiction to enforce the penalty of 10s. a day imposed by the 14th section of the Nuisance Removal Act 1855.

The resp. submitted and proved to our satisfaction, that the app. had within the last twelve months erected seventeen cottages, which were now occupied by forty-one persons, without giving them sufficient accommodation. It was contended by the resp., and proved to our satisfaction, that they were unable to execute the said order so far as related to them, inasmuch as they had no legal power to remove the said tenants, and also because, in their judgment, there was no fit place upon the said premises on which to erect sufficient privy accommodation for ninety persons who occupy the premises.

We, the said justices, thereupon convicted the app. in the sum of 8l. 10s., being at the rate of 10s. per day for seventeen days' default, and in 3l. 7s. for costs.

The question of law for the opinion of the Court is, whether we, the said justices, could legally convict the said app. under the circumstances above stated.

Q. B.]

PEW v. THE METROPOLITAN BOARD OF WORKS.

[Q. B.]

the said order for the removal of the nuisances in question being directed to the nuisances committee as well as to the app., and they having failed, as well as the app., to obey the said order for the reasons above stated.

Whereupon the opinion of the Court of Q. B. is requested, 1st. Upon the said question of law, whether we, the said justices, were correct in our determination as aforesaid. 2nd. What further should be done or ordered by the said justices in the premises.

E. W. COX.

G. T. HARRIS.

*Bradt* for the resps.—The justices had power to convict. It is immaterial that the order to abate the nuisance was addressed to the Nuisance Removal Committee as well as the owner of the premises. It was not the less the duty of the owner to comply with it on that ground; the order was made on him, and he having failed to obey it, the justices had power to convict him. (He was then stopped by the Court.)

*Clark* for the app.—The order appealed against is bad. The order to remove the nuisance was operative on the owner for seven days; after that, the Nuisance Removal Committee were authorised to do the work. The committee are the parties now in default: (18 & 19 Vict. c. 121, ss. 13 and 14.) [BLACKBURN, J.—If the committee have also incurred a penalty how does that discharge the app. from his default to obey the order to abate?]

By the COURT.

Conviction affirmed.

Saturday, Feb. 25, 1865.

PEW (app.) v. THE METROPOLITAN BOARD OF WORKS (resps.)

Metropolis Local Management Act—Sewers rate—Separate sewerage district.

*The Metropolitan Commissioners of Sewers, under the 11 & 12 Vict. c. 112, borrowed 200,000*l.* on the security of the rates, and expended 67,000*l.* thereof upon the A. district, of which parish C. formed part; but the actual amount expended in parish C. was only 1074*l.* That liability still existed when the commissioners were superseded by the Metropolitan Board of Works and the Metropolis Local Management Act came into operation. The Board of Works, under sects. 180-1 of the 18 & 19 Vict. c. 120, assessed the 67,000*l.* on the A. district, and apportioned the quota to be paid by parish C. on the rateable portion of its property to the entire district, and not to the amount expended in the parish:*

*Held, that a rate (sect. 168) assessed on that principle was valid.*

Case stated by order of Blackburn, J., after notice of appeal against a rate made by the resps. on the parish of St. Giles, Camberwell, dated May 3, 1861.

From the passing of the 11 & 12 Vict. c. 112, until the expiration of that Act, the Metropolitan Commission of Sewers included within its limits separate sewerage districts or levels, some of which contained and consisted of distinct parishes, whilst others contained and consisted of distinct parishes and parts of parishes; and the practice of the commissioners was to make all assessments and rates for sewerage works upon each separate district or level on the rateable value of the property therein, and not upon the individual parishes within such district or level.

In 1854 the commissioners, by virtue of the statutes 11 & 12 Vict. c. 112, and 16 & 17 Vict. c.

125, borrowed from the Rock Life Insurance Company the sum of 200,000*l.*, and for securing the repayment thereof assigned to the trustees of the said society all the moneys arising and to arise from the several district rates in and for the whole of the separate sewerage districts within the limits of their commission.

The said sum of 200,000*l.* was borrowed for the purpose of the main drainage of the Metropolis, but instead of applying the same to that purpose the commissioners expended it in the local drainage of certain parishes within the limits of their commission.

The parish of St. Giles, Camberwell, prior to and until the passing of the Metropolis Local Management Act 1855, formed part of one of the said sewerage districts or levels within the limits of the Metropolitan Commission of Sewers called the Surrey and Kent Sewerage District, which comprised the following parishes and parts of parishes: St. Giles, Camberwell (part); St. Mary, Lambeth; St. Mary, Newington; Wandsworth (part); Clapham; Battersea (part); Bermondsey; St. George the Martyr; St. Saviour's; Christ Church; Rotherhithe; St. John, Horsleydown; St. Olaves; St. Thomas; Streatham (part); Tooting Graveney (part); St. Paul's, Deptford (part); Croydon (part); St. Nicholas, Deptford.

Prior to the Metropolis Local Management Act 1855 there had been expended by the Metropolitan Commissioners of Sewers, for local drainage in the said parishes and parts of parishes comprised in the Surrey and Kent sewerage districts, 67,000*l.* part of the said sum of 200,000*l.* Of this sum of 67,000*l.*, only 519*l.* was expended in the parish of St. Giles, Camberwell, and the residue of the 67,000*l.* was expended in other parishes forming part of the said Surrey and Kent sewerage districts, and the said parish of St. Giles, Camberwell, did not nor will receive any benefit from such expenditure, or from any part of the 200,000*l.* beyond the said sum of 519*l.*, except in so far as it receives benefit (as stated in the thirteenth paragraph of this case) from the generally improved drainage of the Surrey and Kent sewerage district, consequent on the expenditure of the said sum of 67,000*l.*

The Metropolitan Board of Works did not apportion the whole of the said sum of 200,000*l.* among all the said parishes within the limits of the Metropolitan Commission of Sewers, but did apportion the said sum of 67,000*l.* among the several parishes comprised in the Surrey and Kent sewerage district, according to the rateable value of the property in such parishes respectively, and not according to the proportion of such sum of 67,000*l.* expended in such parishes respectively, or to the benefit derived by such parishes respectively from such expenditure. The amount charged by such apportionment upon the parish of St. Giles, Camberwell (including the said sum of 519*l.*), was 9000*l.* and interest thereon, to be paid by twenty yearly instalments of 790*l.*

At a meeting of the Metropolitan Board of Works, held on the 3rd Dec. 1858, it was resolved that the board should, in the then ensuing session of Parliament, apply for statutory powers to reapportion among the several parishes concerned the debt in respect of the said sum of 200,000*l.* according to the actual benefit derived by each parish from the expenditure thereof, and that it should be referred to a committee of the said board to consider and frame a proper apportionment on that basis, and that the same should be submitted for the approval of the said board.

On the 1st July 1859 the board approved and adopted the apportionment made by the said committee on the basis aforesaid, and it was resolved by the said board that in the Bill which was then about

Q. B.]

PEW V. THE METROPOLITAN BOARD OF WORKS.

[Q. B.]

to be brought into Parliament by them for amending the Metropolis Local Management Act 1855, the said sum of 200,000*l.* should be charged on the several parishes and districts in the proportions therein mentioned, and the sum of 1074*l.* 6*s.* 10*d.* (including the said sum of 519*l.*) was therein charged on and apportioned to the said parish of St. Giles, Camberwell, as the amount chargeable thereon in respect of the benefit derived by the said parish from the expenditure of the said sum of 200,000*l.* The said Bill for amending the Metropolis Local Management Act 1855 was afterwards brought into Parliament by the said board for the purpose (among others) of charging the said sum of 200,000*l.* on the several parishes and districts in the proportions last aforesaid, and of charging the aforesaid sum of 1074*l.* 6*s.* 10*d.* on the said parish of St. Giles, Camberwell, and in the schedule to the said Bill the sum of 1074*l.* was inserted against the said parish as the sum to be charged thereon; but the clauses in the said Bill for the reapportionment of the said debt never passed into law.

For the purpose of this case and the said rate the said sum of 1074*l.* 6*s.* 10*d.* may be taken to represent the whole benefit received, directly and indirectly, by the said parish of St. Giles, Camberwell, from the expenditure of the said sum of 200,000*l.*

In consequence of the vestry of St. Giles, Camberwell, refusing to obey the precept of the Metropolitan Board of Works requiring them to pay the amount assessed upon them, the said board did, on the 3rd May 1861, appoint the said resps. Samuel Collins and Thomas Howell to make, and they accordingly made, a rate upon the said parish of St. Giles, Camberwell, for the said sum or instalment of 790*l.*, which is the rate appealed against.

The apps. contend that the said board ought either to have apportioned and charged the whole of the said sum of 200,000*l.* amongst all the parishes comprised within the limits of the Metropolitan Commission of Sewers at the time of the expiration of the 11 & 12 Vict. c. 112, according to the rateable value of the property in such parishes respectively; or, if the said Surrey and Kent sewerage district was chargeable with and liable to pay the said sum of 67,000*l.* charged by the said board on the said district, that the said board, in apportioning the amount of the said sum of 67,000*l.* amongst the respective parishes comprised in the said district, had power under sects. 170 and 181 of the Metropolis Local Management Act to apportion, and ought to have apportioned, the amount not only according to the rateable value of the property in the respective parishes comprised in the said district, but also to the benefit received by the respective parishes from the expenditure of the said sum of 67,000*l.*

The questions for the court are:

1. Whether the rate so made is, under the circumstances, a valid rate.

2. Whether, assuming it to be a valid rate, the board had the power to apportion, or now have the power to re-apportion, the said amount of 67,000*l.* among the parishes comprised in the said Surrey and Kent sewerage district, according to the benefit received by the said respective parishes from the expenditure of that sum, or to apportion or re-apportion the said sum of 200,000*l.* among all the said parishes which at the time of the expiration of the 11 & 12 Vict. c. 112 were within the limits of the Metropolitan Commission of Sewers, according to the rateable value of the property in such parishes respectively.

Jan. 13.—*Lush*, Q. C. *Raymond* with him, in support of the rate.—The rate is valid. By the 11 & 12 Vict. c. 112, s. 34, the Commissioners of Sewers for

the Metropolis had power to form separate sewerage districts, and by sect. 106 to borrow money on mortgage of the rates for the expenses to be incurred in the execution of the Act. By sect. 76 the commissioners were empowered to levy on each separate sewerage district a separate rate for the expenses incurred for the especial benefit of each separate sewerage district, and that was to be a uniform rate on the net annual value of all the rateable property in each district. Then came the Metropolis Local Management Act, the 18 & 19 Vict. c. 120, and the commissioners were superseded by the Metropolitan Board of Works. Sect. 180 enacts that the debts and liabilities charged upon or payable out of any rates authorised to be levied under the old Sewers Act shall be charged upon the rates to be raised under the new Act. Now, under the 11 & 12 Vict. c. 112, the sums borrowed were charged on the entire rates of the sewerage district; and by sect. 180 of the 18 & 19 Vict. c. 120, the Board of Works had no power to charge it on any particular parish, but could only regard the sewerage district. Accordingly, the Board of Works has charged on the district in question the amount expended in the district: sect. 170 (repealed and re-enacted with a slight modification by 25 & 26 Vict. c. 102, s. 5). To repay the 67,000*l.* expended on the district, every inhabitant of the district was bound to contribute to an equal pound rate without regard to the amount expended in each particular parish of the district. This principle has already been decided in *Reg. v. Head and The Metropolitan Board of Works*, 82 L. J. 115, M. C.

*Bovill*, Q. C. (*Holl* with him) for the app.—The rate is bad. The Board of Works ought to have apportioned the debt according to the amount expended in each particular parish. Under the old sewers law the rating was decided to be not by an equal rate on the whole district, but by a separate rate on each level or division of the district according to the benefit derived from the drainage: (*Rex v. The Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517.) The proviso in sect. 76 of 11 & 12 Vict. c. 112, is important:

Provided always, that the district sewers rate shall not exceed in any one year the sum of 1*s.* in the pound of the net annual value of the property rateable thereto, such value being ascertained as herein mentioned. Provided also, that where in any separate sewerage district any property is by law or by the practice of the existing commissions or commissioners of sewers entitled to exemption, wholly or partially, from or to any reduction or allowance in respect of the sewers rate, the commissioners shall, in making the district sewers rate, observe and allow such exemption, reduction, or allowance.

In the *Metropolitan Board of Works v. The Vauxhall-Bridge Company*, 26 L. J. 253, Q. B.; 7 E. & B. 964, Lord Campbell, C.J., in delivering the judgment of the Court, says: "The plt.'s counsel then relied upon sect. 76 of 11 & 12 Vict. c. 112, which regulates the mode of rating. But having regard to the whole of this clause we think that it carefully preserves the ancient principle of rating for sewers; and the last proviso, instead of sanctioning a uniform rate over the whole district, anxiously directs 'that where in any separate sewerage district any property is by law or by the practice of the existing commissioners entitled to exemption,' &c. This seems clearly to intimate that, in rating, the benefit derived from the sewers by the property rated shall still be regarded. Further, the powers given to the commissioners with respect to district rates seem to have a special reference to the well-known rules of law respecting rates by commissioners of sewers, whereby property is to be assessed according to the benefit which is derived from the sewers." [Cockburn, C.J.—In that case it was not a question between parish and district.] The Board of Works may by law take the



Q. B.]

PEW V. THE METROPOLITAN BOARD OF WORKS.

[Q. B.]

parts of a district which may have been benefited, and rate them exclusively. Sect. 181 of 18 & 19 Vict. c. 120, means only that the places liable before shall still be liable under that Act. By sect. 180, giving power to apportion the debt it was not intended to alter the principle of liability. The present case arose before the 25 & 26 Vict. c. 102 came into operation, and therefore sect. 170 of the 18 & 19 Vict. c. 120 applies in its entirety; and taking sect. 170 in connection with sects. 180 and 181, the rating should be with regard to the benefit derived by the property rated. *Reg. v. Head and The Board of Works* does not affect this case, for it arose on another section, sect. 161:

*Howell v. The London Dock Company*, 8 E. & B. 202.

*Lush* in reply.—Sect. 170 does not apply; that applies only to current rates for current expenses. This case turns on the effect of sect. 84 of 11 & 12 Vict. c. 112, and *Rex v. The Commissioners of Sewers for the Tower Hamlets* merely illustrates the old doctrine as laid down in *Callis on Sewers*. The proviso in sect. 76 of 11 & 12 Vict. c. 112, refers to property which is perpetually exempt from liability. The dictum in the judgment in *The Metropolitan Board of Works v. The Vauxhall-Bridge Company* was extra-judicial.

*Cur. adv. vult.*

BLACKBURN J.—This is a case stated on appeal against a rate made by the resp. by virtue of an apportionment made by the Metropolitan Board of Works under the 168th section of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, in consequence of the default of the vestry of St. Giles, Camberwell, to pay the amount required by the precept of the Metropolitan Board of Works. It appears from the statement in the case that the Metropolitan Commissioners of Sewers had, whilst acting under the 11 & 12 Vict. c. 112, borrowed the sum of 200,000*l.*, out of which sum they had expended 67,000*l.* in drainage works for the benefit of the Surrey and Kent sewerage district. That district had been formed by them under the powers given in the 84th section of the 11 & 12 Vict. c. 112. The district comprises parts of nineteen different parishes, as is stated in the 7th paragraph of the case. On the passing of the Metropolitan Local Management Act, the Metropolitan Board had to provide for the payment of the liability of the Metropolitan Commissioners of Sewers. The Metropolitan Local Management Act (18 & 19 Vict. c. 120, s. 181), directs that the money necessary to discharge the liability of the Metropolitan Commissioners of Sewers shall be raised in like manner as the expenses of the board, and sect. 170 directs how these expenses of the board are to be assessed. The Metropolitan Board, acting under these sections, have apportioned this sum of 67,000*l.* amongst the several parishes comprised in the Surrey and Kent sewerage district, and it is not disputed that this was the correct course to take. It appears from the statement in the case in paragraph 9, that the Metropolitan Board apportioned it amongst the several parishes comprised in that district according to the rateable value of the property in such parishes respectively, and not according to the proportion of the sum expended in such parishes respectively, or to the benefit derived by such parishes respectively from the expenditure, and following this principle, the sum charged to the parish of St. Giles, Camberwell, in which the app. property lies, is 9000*l.* It further appears from the case, paragraph 8 and paragraph 18, that the actual expenditure for works locally situate within the parish was only 519*l.*, and that the whole benefit derived directly and indirectly by the parish from the whole expenditure in drainage works amounts to a sum much less than 9000*l.*, and which, for the

purpose of the case, is, by paragraph 13, to be assumed to be 1074*l.* 6*s.* 10*d.* The contention of the app. is stated in the 15th paragraph. It is, that the board ought to have apportioned the amount, having regard not only to the rateable value of the property in the respective parishes comprised in the district, but also to the benefit received by the respective parishes by the expenditure; and if he is right in this contention no doubt the sum which has been assessed on the parishes is very considerably larger than it ought to have been, and his counsel before us argued that the rate was in consequence bad on appeal. The contention on the part of the resp. is, that the board have no power, or at all events were under no obligation, to enter into such an inquiry, and that no appeal was given against the apportionment by the board, which, even if on a wrong principle, was final. The court is called upon to determine judicially whether the rate made is a valid rate or not, which is the first question asked in the case. Mr. Bovill, the counsel for the app., pointed out that in sect. 170 of the Local Management Act, 18 & 19 Vict. c. 120, the Metropolitan Board were bound, in apportioning the expenses of the board amongst the different parts of the metropolis, to have regard to the annual value of the property in the several parts of the metropolis, and also in the case of expenditure on works of drainage to the benefit derived from such expenditure by the several parts of the metropolis affected thereby. But he chiefly relied on the argument that, according to the old law of sewers, the rate was to be only on those deriving benefit from the sewers; and he relied on the extra-judicial opinion delivered in the *Metropolitan Board of Works v. The Vauxhall-Bridge Company*, as an authority that, under the Metropolitan Sewers Act, 11 & 12 Vict. c. 112, the effect of the proviso at the end of sect. 76 was to preserve this old principle, which, according to the same authority, extended so far, that in making a sewers rate, the amount to be imposed on each property should be proportionate to the benefit derived by the property from the expenditure. Mr. Lush, in support of the rate, denied that the old principle of sewers always was, that in making a sewer rate different owners were to be assessed according to the proportion of the benefit derived by their respective properties. He admitted that, according to the old law, no person could be assessed in respect of property which derived no benefit from the works, and also that the commissioners of sewers might, and according to *Rex v. The Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517, ought to divide the limits of their commission into districts or levels, so laid out that every part of each district or level should receive some benefit from the drainage works constructed for it, but he contended that all rates on the inhabitants of a level were to be made equally on all the inhabitants of such level. In the 117th section of the Metropolitan Local Management Act, the words "the several parts of the metropolis" were, according to his contention, to be understood as meaning the several levels or districts in the metropolis, and he contended that when the commissioners of sewers, acting under the 11 & 12 Vict. c. 112, s. 84, had formed a sewerage district such as the Surrey and Kent sewerage district, there was no place of a district or level properly set out under the old commissioners of sewers, and that all rates to be imposed on the inhabitants of that district must be imposed equally on all the inhabitants according to the value of their property, without inquiring whether the amount of benefit derived by the several properties was equal or not. He did not dispute that the extra-judicial opinions given in the *Metropolitan Board of Works v. The Vauxhall-Bridge Company*,

Q. B.]

REG. v. WRAY—REG. v. HARRIS.

[Q. B.]

7 E. & B. 964, were adverse to this argument, but contended that the opinion there given had been given without sufficiently considering that it threw upon those imposing the rate the task of ascertaining what was the separate benefit derived by every property within the district from the works, a task which it would be quite impracticable for them to perform, and which should never be imposed upon them. He contended that the opinion there expressed was inconsistent with what is said in *Rez v. The Commissioners of Sewers for the Tower Hamlets*, that it was extra-judicial and consequently not binding upon us. He further contended that the objection, if at all, could not be raised on appeal. On the whole, we think Mr. Lush's argument must prevail. Though we are not bound by the opinion expressed in the *Metropolitan Board of Works v. The Vauxhall-Bridge Company*, the respect we feel for this authority makes us reluctant to decide in opposition to it; but we are not prepared to hold that the Metropolitan Board were bound to enter into an inquiry as to the amount of benefit derived by the different parochial divisions comprised within the sewerage district. The boundaries of the parish were originally fixed without any reference whatever to the levels or drainage of the district. If, therefore, the mode of apportionment was wrong, it must be because the inquiry ought to extend to the amount of benefit derived from the different houses within the district, an inquiry for which no machinery is provided; and we find no authority before the Vauxhall-bridge case in which such an inquiry was thought to be required; and we do not think that the Metropolitan Board were at all events bound to make such an inquiry. It is, in this view of the case, unnecessary to inquire whether an appeal on such a ground as the present can or cannot be maintained on the ground above indicated. We answer the first question in the case, and that only. We are of opinion that this rate is a valid rate.

*Judgment for the respes.*

*Friday, April 21, 1865.*

REG. v. WRAY.

*Municipal corporation—Disqualification for office—Bribery.*

*Under the 22 Vict. c. 35, s. 11, a conviction in the County Court for bribery at a municipal election does not create a six years' disability to hold any municipal office.*

*Field, Q.C.* applied for a *quo warranto* against Wm. Baynes, a town councillor of the borough of Leeds, to show by what authority he exercised that office. Mr. Baynes was duly elected on 1st Nov. 1864, but it was contended that he had become disqualified by reason of having been since convicted, on the 10th Feb. last, in the County Court, and fined in the penalty of 40s. for the offence of bribery, committed by him at an election of a town councillor of the borough of Leeds, which took place on the 28th Nov. 1864. The 5 & 6 Will. 4, c. 76, s. 54, enacts that for the offence of bribery at a municipal election the person offending shall forfeit 50l. to be recovered by action in the Superior Courts, and be disabled for ever from voting at any municipal or parliamentary election, and also from holding any municipal office. The 17 & 18 Vict. c. 102 (the Corrupt Practices Prevention Act), s. 6, enacts that revising barristers shall, upon proof of conviction for bribery or undue influence at a parliamentary election, expunge the names of the persons convicted from the list of voters and place them on a list of persons disqualified for bribery. The 22 Vict. c. 35 (the Municipal Elections Act), s. 11, enacts:

If any person, at any election of mayor, councillors, &c., for any borough shall be guilty of bribery, he shall, for every such offence, forfeit the sum of 40s. to any person who shall sue for the same in the County Court. And any person offending in any case in which, under the Act or Acts for the time being in force with respect to the election of members to serve in Parliament for boroughs, the name of the offender may be expunged from the list of voters, being lawfully convicted thereof, shall, for the term of six years, be disabled to vote in any election in such borough or in any municipal or parliamentary election whatever in any part of the United Kingdom, and shall for such term be disabled to hold, exercise, or enjoy any office or franchise to which he then shall or at any time afterwards may be entitled as a burgess of such borough, as if such person were naturally dead.

It was contended that the construction of sect. 11 of 22 Vict. c. 35, was that the disqualification attached to bribery committed either at a municipal or parliamentary election. [MELLOR, J.—That may have been the intention, but the language of the section does not seem to carry that out.] By reference to the 5 & 6 Will. 4, c. 76, s. 54, and 17 & 18 Vict. c. 102, s. 6, this will appear to be the right construction. [COCKBURN, C. J.—The language seems to limit the disability to bribery at a parliamentary election.] The 17 & 18 Vict. c. 102 provides for that class of offences. [COCKBURN, C. J.—Sect. 54 of 5 & 6 Will. 4, c. 76, is not repealed, and a person may proceed under that if he pleases. But the 22 Vict. c. 35 creates an additional penalty recoverable in a speedy way in the County Court. And further imposes a six years' disability in respect of holding any municipal office.] So limited, the enactment seems unnecessary.

COCKBURN, C. J.—The words of sect. 11 will not bear the construction contended for, and I doubt if the Legislature intended what has been suggested. I rather think they intended to make the conviction for bribery at a parliamentary election only a disqualification for six years for municipal office. But it is unnecessary to say more than that the words of the section do not warrant the construction we are asked to put on them.

BLACKBURN, MELLOR and SHEP, JJ. concurred.

*Rule refused.*

*Wednesday, April 26, 1865.*

REG. v. HARRIS.

*Night poaching—Open or inclosed land—Waste by side of a highway.*

*On each side of a metalled road (being a highway) was waste land covered with brambles and furze five feet high, and patches of grass, and there was no sign of traffic thereon, although persons could pass over portions thereof on foot or horseback. On each side, at the extremity of the waste, there was a hedge. Persons were found by night on this land with a har-net fastened to the hedge on the one side stretched across the road, but not quite reaching to the hedge on the other, for the purpose of taking game there, and they were convicted under the Night Poaching Act (9 Geo. 4, c. 49), s. 1, for unlawfully entering and being in open land, with a net for the purpose of taking and destroying game there by night:*

*Held, that they were not upon open land, within the meaning of the Night Poaching Act (9 Geo. 4, c. 49), s. 1.*

On an appeal to the Quarter Sessions by Charles Harris against a conviction of two justices for the county of Devon, under 9 Geo. 4, c. 69, s. 1, whereby Charles Harris, of Stockland, in the county of Devon, farmer, was convicted before two justices of the peace for the said county, for that he the said C. Harris, in the parish of Upottery, in the county of Devon, within

Q. B.]

REG. v. HARRIS.

[Q. B.]

six calendar months now last past, to wit, in the night of the 30th Nov. 1863, by night, after the expiration of the first hour after sunset, and before the beginning of the last hour before sunrise, that is to say, about the hour of half-past one in the night of the said 30th Nov. 1863, did by night then and there unlawfully enter and was in certain open land situate in the parish of Upottery, in the county of Devon, the property of the Right Hon. and Rev. William Leonard Viscount Sidmouth, with a net for the purpose of then and there by night taking and destroying game, contrary to the form of the statute in such case made and provided, the said conviction was affirmed, subject to the following case:

The following were the grounds of appeal:

First, that the said C. Harris is not guilty of the said offence.

Secondly, that the formal conviction is not in law sufficient to support the said conviction of him the said C. Harris.

Thirdly, that the said C. Harris did not unlawfully enter on the said land for the purpose of taking and destroying game within the meaning of the statute 9 Geo. 4, c. 69, s. 1.

Fourthly, that the said C. Harris was, at the time in the said conviction mentioned in the Queen's highway, and not on any land within the meaning of the said statute, and ought not to have been convicted, of all which premises you and each and every of you are hereby desired to take notice.

GEO. TWEED,

Residing at Honiton, attorney for and on behalf of the said app.

Dated 31st Dec. 1863.

The said C. Harris, with a certain other man called Frederick Vesey, in the night of the 30th Nov. 1863, entered certain land hereinafter more particularly described, in the parish of Upottery, in the said county of Devon, the property of Lord Sidmouth, for the purpose of taking and destroying game, with a certain hare-net then and there found in his possession.

The land in question has a hedge on either side of it, and a metalled road running through it, while between the said road on both sides of the same and the said hedge is waste land, varying in extent.

The fields on either side of the said metalled road and waste land are the property of the said Lord Sidmouth, who is also lord of the manor wherein the land so entered as aforesaid is situated.

The said waste land on either side of the said road, except where there are interspersed patches of grass, is covered with thick bramble and furze as high as five feet, and there is no sign of any traffic in or use of the said waste land, although persons could pass over portions of the said waste land on foot or horseback.

The said net was found across the said road touching and fastened to the hedge on the one side, but not quite reaching the hedge on the other, the said C. Harris standing between the end of the net and the hedge. At the point where the net was laid there was nine feet waste land on the one side and three feet waste land on the other side of the said road, the road itself being eleven feet wide. At the point where the said F. Vesey was first seen there was eighteen feet waste land on the one side, and twelve feet waste land on the other side of the said road, the road itself being twelve feet wide. At a point 403 feet distant from where the net was found, and in the direction where the said F. Vesey ran, as hereinafter mentioned, there was sixty-four feet waste land on the one side of the said road, and eight feet waste land on the other, the road itself being twelve feet wide.

The said F. Vesey was first seen in the waste land under the hedge 163 feet from the spot where

the said net was laid, and he ran along the waste land and not in the road down to the place where the said net was laid as aforesaid.

It appeared that the notice and grounds of appeal were not signed by the said C. Harris, or by his attorney or agent, but by the attorney's clerk, who was called as a witness, and admitted in cross-examination that he had no authority to sign such notice and grounds of appeal, and that he had signed the same in his employer's absence, without his employer's knowledge.

It was objected on the part of the app. that under these circumstances he could not be convicted under the 9 Geo. 4, c. 69, s. 1, as being by night in inclosed or open land for the purpose of destroying game.

It was also objected that the conviction could not be upheld, as it did not describe with sufficient accuracy the place in which the offence had been committed. An objection was also raised by the resp. that the notice and grounds of appeal were not duly signed.

The questions for the consideration of the Court are:

First, whether the land in question is land open or inclosed within the meaning of the statute; and

Secondly, whether the description of the place as the property of Lord Sidmouth, situate, &c., is a sufficient local description; and

Thirdly, whether the notice and grounds of appeal are duly signed.

If either or both of the first and second points be decided in the negative and the third point in the affirmative, then the conviction to be quashed; but if the third point be decided in the negative, or both the other points in the affirmative, or if the third point be decided in the negative and both the other points in the affirmative, then to be confirmed.

*Karslake and Lopes* for the resps.—No part of the waste land on either side of the highway formed part of the highway, but it was open land within the meaning of the 9 Geo. 4, c. 69. [COCKBURN, C. J.—Could the justices have convicted the app. for entering this bit of land?] The only part of the land dedicated to the public is the metalled road. [BLACKBURN, J.—That is not found as a fact in the case. COCKBURN, C. J.—I cannot see that a man is a trespasser for stepping off the high road on to waste land like this where there is no fence to keep persons off.] The app. was unlawfully on the waste ground, he was not using the road as a road. The case of *Reg. v. Pratt*, 24 L. J. 118, M. C., supports the conviction. [COCKBURN, C. J.—The 7 & 8 Vict. c. 29 is a strong legislative exposition of what is meant by open land and shows that it did not mean waste land like this.] The case of *Beckett v. Upton*, 5 E. & B. 629, was then cited. Secondly, the notice and grounds of appeal were not properly signed. The case finds that the clerk had no authority to sign them. [BLACKBURN, J.—The app. is required to give notice and grounds of appeal, but what requires him to sign them?]

*H. T. Cole* and *M. Bere*, for the app., were not called upon.

By the COURT:

*Order of sessions quashed.*

Q. B.]

WARD v. GRAY.

[Q. B.]

WARD (app.) v. GRAY (resp.)

*Soldiers—Mutiny Act—Exemption from toll—Floating bridge.*

*By a local and personal Act a company were authorised to purchase a ferry over the river Itchen and to establish a floating bridge over the river, which they did. The bridge is a moveable structure resembling a small pier, and is floated over the river by chains laid across the bed of the river. The Mutiny Act 1864, s. 72, exempts from toll officers and soldiers on duty and on march, "in passing along or over any turnpike or other roads or bridges."*

*Held, that under that section soldiers on the march were not exempt from the toll granted by the Companies Act for using the floating bridge to cross the river.*

Case stated by justices under the 20 & 21 Vict. c. 43.

An information was laid under sect. 86 of the Mutiny Act 1864 (27 Vict. c. 3), intituled, "An Act for punishing mutiny and desertion, and for the better payment of the army and their quarters." Sect. 86 makes toll collectors demanding and receiving toll from officers and soldiers on duty or on their march liable to a penalty not exceeding 5*l.* nor less than 40*s.*

Upon the hearing of such information we dismissed the same.

The Company of Proprietors of the Southampton and Itchen Floating Bridge and Roads were incorporated by an Act of Parliament passed in 1834, which Act was amended by other Acts passed in the years 1835, 1839 and 1851 respectively. All these Acts were repealed by an Act passed in 1863 (26 & 27 Vict. c. cii., local and personal), except some clauses which are, however, contained in the schedules to the last-mentioned Act. Such parts of these Acts as are now in force, and also the said Mutiny Act 1864, are to be taken as part of this case.

By the Act of 1834 the company were authorised to purchase, and did purchase, an ancient ferry over the river Itchen, between the town of Southampton and the parish of St. Mary Extra, in the county of Southampton; and they were authorised to establish, and have established, a floating bridge over such river, with chains laid down across the bed of the river, and with roads and approaches.

Sect. 49 of the Act of 1863 directs the company to provide ferry-boats in aid of the bridge. Sect. 52 defines the regular hours for working the bridge; and sect. 58 directs that, when the bridge is out of repair, the company of proprietors shall provide ferry-boats to convey passengers across the river.

Sect. 59 of such Act enacts "that, subject to the provisions of the Act, the company from time to time may demand and take for the passage across the river by the bridge or boats of the company, at the place or within the limits of the company's ferry, any tolls not exceeding the tolls" specified in the Act.

They are also, by sect. 66, authorised to take tolls for the use of the landing-places, from persons landing or embarking, and not using the floating bridge or boats.

The company own about ten miles of road leading to the ferry; and by sect. 51 they are authorised to set up tollgates or bars, and by sect. 67 to take the tolls therein specified for the use of the road. Sect. 87 of the Act provides that no toll shall be demanded or taken at any tollgate or toll-bar erected on the company's road for any soldiers or marines on their march or on duty; but there is no similar exemption from the tolls for the use of the floating bridge.

By sects. 83, 84 and 85, the Royal Family, Custom-

house officers, and persons in the employ of the Post-office, are exempt from all tolls, both on the roads or for the use of the floating bridge.

By sect. 100, the bridge, floating jetties, and other works and property of the company, are to be deemed a bridge and a vessel within the meaning of the 24 & 25 Vict. c. 97, relating to malicious injuries to property.

By sect. 72 of the Mutiny Act 1864, it is enacted as follows:

All Her Majesty's officers and soldiers on duty and on their march, and their horses and baggage, and all recruits marching by route, and all prisoners under military escort, and all enrolled pensioners in uniform, when called out for training, or in aid of the civil power, and all carriages and horses belonging to Her Majesty, or employed in her service under the provisions of this Act, or in any of Her Majesty's colonies when conveying any such persons as aforesaid, or their baggage, or returning from conveying the same, shall be exempted from payment of any duties and tolls on embarking or disembarking from or upon any pier, wharf, quay, or landing place, or in passing along or over any turnpike or other roads or bridges otherwise demandable by virtue of any Act already passed or hereafter to be passed, or by virtue of any Act or ordinance, order, or direction of any colonial legislature or other authority in any of Her Majesty's colonies.

The before-mentioned floating bridge is propelled from one side of the river Itchen to the other, being a distance of about 1400 feet, by steam power, and is kept in its proper course by passing across the river by means of parallel chains laid across the bed of the river, which chains are passed over wheels attached to the floating bridge, and are fastened on each side of the river to heavy weights which are sunk in wells in the ground.

The ferry-boats are constantly crossing the river in aid of the floating bridge, and when a passenger has paid his toll and passed the tollgate, he is at liberty to cross either by the boat or the floating-bridge, and foot passengers usually select either the floating bridge or the boat, according to which is about to make the next trip, unless influenced by weather or other causes.

The resp. is one of the collectors of tolls appointed by the said company.

At the hearing of the aforesaid information it was proved that the app. was a soldier of Her Majesty's Army; that on the 20th Oct. last he was on duty, and on his march in charge of a party of Her Majesty's soldiers proceeding from the Royal Victoria Hospital at Netley to the railway-station at Southampton; that at the toll-house of the said company in the said parish of St. Mary Extra he produced to the resp. a route, and demanded a free passage for himself and the soldiers with him across the river Itchen on the floating bridge, but which demand was refused, and that the app. then paid the toll of one penny for himself and one penny for each of the soldiers with him, and they were conveyed across the river on the said floating bridge.

It was contended on the part of the app. that the said floating bridge is a bridge within the meaning of sect. 72 of the Mutiny Act 1864, and that therefore the resp. illegally demanded and received toll of the app. for his passage over the river Itchen by such floating bridge.

On the part of the resp. it was contended that the said floating bridge is a steam ferry-boat and not a bridge within the meaning of such last mentioned section of the Mutiny Act 1864.

We were of opinion that the said floating bridge is not a bridge within the meaning of such section, and that the app. did not simply pass over the floating bridge, but was conveyed by it across the river, and we therefore dismissed the before-mentioned information.

The question of law arising on the above statement therefore was: Whether the said floating bridge is a bridge within the meaning of sect. 72 of the Mutiny Act 1864.

Q. B.]

BEVINS v. BIRD.

[Q. B.]

The *Solicitor-General* (*Dowdeswell* with him) for the app.—The soldiers were in the service of the Crown, and on march at the time, and were, therefore, not liable to the payment of toll. In the *Mayor, &c. of Weymouth v. Nugent*, 11 L. T. Rep. N. S. 672, it was held that the prerogatives of the Crown could not be affected except by express enactment, and that in the absence thereof, stone brought into the harbour of W. for the use of the Government works was not liable to the wharfage dues granted by a local Act. The floating bridge was a bridge within sect. 72 of the Mutiny Act, and on that ground the toll was not payable. [COCKBURN, C. J.—The words of sect. 72 are, “or in passing along or over any turnpike or other roads or bridges;” and the word bridge there means a bridge over which the road is continued. BLACKBURN, J.—A bridge in that section does not mean a ferry-boat.] The meaning of the word “bridge” in Webster’s Dictionary was then cited, and the 4 & 5 Will. 4, c. 85, s. 89, referred to. [COCKBURN, C. J.—The language of sect. 72 is, that Her Majesty’s officers and soldiers shall be exempt from toll in passing along or over any turnpike or other roads or bridges. How can persons be said to pass over this bridge? It is the bridge that takes them over the river. BLACKBURN, J.—They get over the river by the motive power which moves the bridge. In fact, it is the motive power that is paid for. This bridge is like a ferry-boat, and you cannot say that a ferry-boat is a bridge. SHEE, J.—By their Act the company are bound to provide ferry-boats as well as floating bridges, and could it be argued that soldiers going across in the ferry-boat were exempt from toll?] The company call this a bridge, and their language is to be interpreted most strongly against themselves.

*Milward*, Q. C. and *M. Bere*, for the resp., were not called upon to argue.

COCKBURN, C. J.—It is not a bridge within the Mutiny Act.

BLACKBURN and SHEE, JJ. concurred.

*Judgment for the resp.*

BEVINS (app.) v. BIRD (resp.)

*Salmon Fishery Act 1861—Fixed engines—Stake-nets Sea-shore.*

*In answer to an information under 24 & 25 Vict. c. 109, s. 11, for catching salmon with fixed engines in tidal waters, where all the Queen’s subjects have a right to fish in the ordinary way, the deft. gave evidence that his father and his family and others of the public had for more than forty years been accustomed to fish for salmon in the locus in quo with stake-nets:*

*Held, that this was not evidence of any ancient right or mode of fishing, lawfully exercised at the time of the passing of the 24 & 25 Vict. c. 109, within the exception in sect. 11.*

Case stated by the Justices of Lancaster, under the statute 20 & 21 Vict. c. 43.

On the 28th July 1864 the resp. was charged on the information and complaint of W. J. Bevins, the app., for that he the said T. Bird, on the 11th July 1864, at the township of Ulverstone, in the said county, was then the owner of a certain fixed engine, to wit, a certain stake-net, which was then unlawfully placed for catching salmon in certain tidal waters there, contrary, &c.

Upon the hearing the justices dismissed the information.

The following facts were proved:—That the app. was a keeper appointed by the Severn Fishing

Association. That upon the 11th July 1864 the app. visited what are called Cork Sands, being part of an estuary called the Bay of Morecombe, within the county of Lancaster, which is navigable for vessels when the tide is in, and found on that part of the sands over which the tides flow and reflow, every day stakes firmly driven into the sands two or three yards apart, about five feet out of the sands, with nets fixed on them. Spars were fixed to the nets. The nets rose and fell with the tide by means of tied spars, but the stakes remained fixed, and the nets on them, when the tide was out. The nets were taken up every tide. There was evidence of the resp. being the owner or one of the owners of the nets, and indeed it was not disputed on the part of the resp. that he was the owner. The nets were so found as aforesaid with salmon lying against the stakes on which the nets were fixed; and in our opinion were so fixed to the soil as to be fixed engines within the 11th section of 24 & 25 Vict. c. 109. The nets so found were taken off the stakes by the app. and carried away, and while the app. was engaged in carrying them away, the resp. with his brother (against whom a similar information was laid) and others came up to the app. and said to him, “They are our nets thou’s taking away;” and resp. further said, that the app. had no business to carry them away, and then took them from the app. and carried them to his (resp.’s) house. That afterwards on the same day, with the assistance of a police constable, app. got the nets back from the resps.

On the part of the resps. it was contended that in taking the nets from the app. he did it to assert his right to use the nets in the way in which they were found, *bona fide* believing that by long usage a right had been acquired so to use them.

There was no evidence before us of any exclusive right of fishery there. Evidence however was given on the resp.’s behalf by his father, that nets of this kind with lawful size of mesh and fixed in like manner had for more than forty years past, up to the time of the committing of the alleged offence, been used by resp.’s father and his family and others of the public in fishing on Severn sands or estuary for salmon, and we being satisfied that the evidence was sufficient evidence of this being an ancient right or mode of fishing lawfully exercised at the time of the passing of the said Act, by virtue of immemorial usage within the meaning of the said 11th section of the said statute, dismissed the information.

The questions for the opinion of the court are:

1. Whether the right or mode of fishing so claimed as aforesaid is such an ancient right or mode of fishing as is exempted by sect. 11 from the operation of that section.

2. If so, whether evidence to the effect above stated was sufficient evidence of immemorial usage to support such an exemption under the circumstances of the case.

*Mellish*, Q. C. for the app.—The justices ought to have convicted. Sect. 11 of 24 & 25 Vict. c. 109, enacts, “No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters: and any engine placed or used in contravention of this section may be taken possession of or destroyed, and any engine so placed or used, and any salmon taken by such engine shall be forfeited, and in addition thereto the owner of any engine placed or used in contravention of this section shall for each day of so placing or using the same incur a penalty not exceeding 10*l*.; and for the purposes of this section a net that is secured by anchors or otherwise temporarily fixed to the soil shall be deemed to be a fixed engine; but this section shall not affect any ancient right or mode of

Q. B.]

Ex parte CHARLES WINDSOR.

[Q. B.]

fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant, or charter, or immemorial usage, provided always that nothing in this section contained shall be deemed to apply to fishing weirs or fishing mill dams." The right set up by the resp. in this case was not a right lawfully exercised at the time of the passing of the Act. As a matter of law there could not be a right in all the Queen's subjects to fish in this way. In a case tried at Carlisle, before Shee, J., the jury found that fishing by stake-nets was of modern origin; and in a case in the Court of Ex. two of the barons of that court seemed to think that the exception in sect. 11 applied only to incorporeal rights. In *Hudson (app.) v. McRae* (resp.), 9 L. T. Rep. N. S. 678, it was held that upon an information for unlawfully and wilfully fishing in a non-navigable river, being a private fishery (contrary to 24 & 25 Vict. c. 96, s. 24), a claim by the deft., as one of the public, to fish in the river does not onest the justices of jurisdiction, as such a right cannot possibly be acquired. The case of *Mayor of Oxford v. Richardson*, 4 T. R. 487, was then referred to. [COCKBURN, C. J.—All persons would have a right to fish in Morecombe Bay in the ordinary way. How can the resp. have that right and also the right of fishing in an extraordinary way by stake-nets? The evidence was only evidence of acts by persons as part of the general public, and how could they, as part of the general public, acquire a right as against the general public to use stake-nets, contrary to the provision of this statute, which was passed for the general public benefit?]

Kaye, for the resp., was then called on.—The case does not find any right in all the Queen's subjects to fish there. And there was evidence from which the justices might infer a free fishery in gross in the resp.'s family. [BLACKBURN, J.—There cannot be a right in gross in the resp.'s family at large, but only in them as individuals.] The learned counsel then referred to

*Hale de Jure Maris*, 12.

COCKBURN, C. J.—There was no evidence of right to which the justices should have attended.

BLACKBURN, J.—The true construction of the exception in sect. 11 is, that it only applies to individual rights of property belonging to individuals lawfully exercised at the time of the passing of the Act.

SHEE, J. concurred.

*Case remitted to justices.*

Thursday, April 27, 1865.

Ex parte CHARLES WINDSOR.

*Extradition treaty—Specified crime—Crimes to be construed according to the law of England.*

*Where by the provisions of a treaty (confirmed by statute) with a foreign state the Crown undertakes upon requisition to deliver up fugitives to this country who have committed certain specified crimes in such foreign state, such crimes are to be construed according to the definition of the law of this country; and if therefore a fugitive has committed in such foreign state an act which, though it be one of such specified crimes in such foreign state, is nevertheless not such a crime by the law of this country, the case is not within the treaty.*

*By a treaty (confirmed by statute) with the United States of America the two Governments agreed that upon mutual requisitions they would deliver up all persons who being charged with (inter alia) forgery committed within the jurisdiction of either should seek an asylum,*

*or be found within the territories of the other. Also by an Act of the local Legislature of the State of New York it was enacted, that every person who with intent to defraud shall make any false entry in any book of accounts kept by any moneyed corporation within the state shall on conviction be adjudged guilty of forgery. A. B., who had brought himself within the terms of this enactment by making such false entries, was a fugitive in England:*

*Held, that as by the law of England such offence of A. B. was wanting in an essential element to constitute the offence of forgery, his case was not within the terms of the treaty and statute, and that he was not liable to be apprehended under them.*

McMahon on a former day obtained at chambers a *habeas corpus*, directed to the keeper of Whitecross-street gaol, to bring into court one Charles Windsor, a prisoner. A return to the said writ was accordingly made, which set out the cause for which he was in custody. It appeared that the said Charles Windsor had been a clerk in "The Mercantile Bank of New York" in the United States of America, and that whilst in that capacity he was under suspicion of having made false entries in the bank-books to conceal certain embezzlements. By the law of the State of New York this is declared to be a forgery in the third degree, it being enacted by the local Legislature that

Every person who, with intent to defraud, shall make any false entry, or shall falsely enter or shall falsely alter any entry made in any book of accounts kept by any moneyed corporation within the state, or any book of accounts kept by any such corporation or its officer, and delivered, or intended to be delivered, to any person dealing with such corporation, by which any pecuniary claim, obligation, or credit shall be, or purport to be, discharged, diminished, created, or in any manner affected, shall, on conviction, be adjudged guilty of forgery in the third degree.

The said Charles Windsor absconded from New York on the 29th Oct. last, and came to this country, where, on the 7th of the following Dec., he was arrested on a *capias* granted by Crompton, J., and issued under the Absconding Debtors' Act, at the suit of the before-mentioned bank. Upon this he was taken to the Debtors' Prison at Whitecross-street, where he has since remained. Criminal proceedings were taken against him in New York, and a warrant issued against him on a charge of forgery. That warrant was brought to England, and was sent by the American Minister to the Secretary of State for the Home Department, with a requisition for the extradition of the said Charles Windsor under the provisions of the treaty between the two countries. The Secretary of State issued his warrant to the chief magistrate of Bow-street, signifying to him that such requisition had been made, and requiring him to investigate the matter. On the 25th Jan. last, Sir Thomas Henry accordingly took the evidence of a Mr. Blake, who brought over the information. He proved the original warrant granted at New York, the certified copy of the original information on which it issued, and he proved the correctness of such copy. Upon this Sir Thomas Henry issued his warrant for Windsor's apprehension, and, he being already in custody, a *habeas corpus* was issued to the gaoler on the 27th Jan. last, whereupon Windsor was brought up before the magistrate. Ultimately, on the 3rd Feb., the facts having been gone into, the magistrate held that the offence was made out, and he issued his warrant for Windsor's detention, in order that he might be delivered up in pursuance of the treaty; and he certified the facts to the Secretary of State.

The facts connected with the charge were as follows:

The bank received moneys on deposit, and had in its service a clerk whose duty it was to receive the moneys and securities so deposited, and who was called the "receiving teller," and another clerk,

Q. B.]

*Ex parte* CHARLES WINDSOR.

[Q. B.]

called the "paying teller," whose duty it was to pay all cheques and draughts and orders for the payment of money drawn against the moneys so deposited; that it was the duty of the "receiving teller" to pay over to the "paying teller" all the moneys and all cheques, draughts and orders received by him from depositors, to the end that the same might be by the "paying teller" collected and converted into money, and, with the other moneys and cash received from depositors, applied so far as was necessary to pay draughts and cheques drawn upon the bank, and that the residue might be deposited by him in the vaults of the bank for safe keeping, after the same had been properly entered to the credit of the paying teller in a book. That all the moneys so received from depositors, and the proceeds of cheques, &c. deposited were in the charge and custody of the paying teller, and that he was primarily responsible therefore, and was in duty bound to deposit the same in the vaults of the bank. That at the time in question the prisoner Windsor was the paying teller of the bank, and it was his duty to collect and convert into money all the cheques and draughts received from the receiving teller, and deal with them as above mentioned. That among the books of account kept by the bank was one called "the first teller's proofs," and that it was the duty of the paying teller (the prisoner) daily to make in that book entries showing and specifying the gold and silver coin, bank bills, cheques, draughts and orders, and other written securities for money which were received by him each day, and all the sums paid by him thereout, and also showing the balance of such moneys remaining in his possession at the close of business hours on each day, and also in what manner the same was accounted for, and how the same was made up, and in what it consisted, and how much of it was in specie, and how much consisted of vouchers or securities for money, and that all the coin and cheques therein stated to have been received by him were charged to him, and he was liable to account for the same, he being likewise credited with payments entered as made. That on the 28th Oct. 1864 the prisoner, being the paying teller, made in the book entries showing and stating that he had received and was chargeable with the sum of 2,248,918 dols., and that he had paid out the sum of 1,145,984 dols., and that the balance, 1,102,934 dols., remained in hand in his possession and control, and that he made entries specifying that there were then in the vaults 289,000 dols., and in the trays or tills 1831 dols., and that there were notes, bank bills, &c. to the amount of 545,490 dols., and that the entry of specie to the amount of 290,831 dols. was false or fraudulent, and that there was, in fact, to the prisoner's credit in the vaults in specie only the sum of 258,915 dols., and that the entry that there were notes, &c., to the amount of 545,490 dols. was also false and fraudulent, and that there was, in fact, to his credit in the vaults only the sum of 388,392 dols. in notes, &c., and that his pecuniary obligation and credit purported to be effected by means of such false and fraudulent entries to the amount of the deficiencies aforesaid, and that the prisoner had abstracted from the vaults those amounts.

By the treaty of Washington of the 9th Aug. 1842, ratified on the 18th Oct. in the same year, it is agreed,

That Her Majesty and the said United States should, upon mutual requisition by them to their ministers . . . respectively deliver up to justice all persons who, being charged with the crime of murder, assault with intent to commit murder or piracy, or arson, or robbery, or forgery . . . committed within the jurisdiction of either of the high contracting parties, should seek an asylum, or should be found within the territories of the other. Provided that this should only be done upon such evidence of criminality as according to the law of the place where the fugitive or person so charged should be found, would justify his apprehension and

committal for trial if the crime or offence had been there committed, &c.

This treaty was afterwards ratified by the 6 & 7 Vict. c. 76, which enacts,

That in case requisition shall at any time be made by the authority of the said United States in pursuance of and according to the said treaty for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy or arson, or robbery, or forgery, or the utterance of forged paper committed within the jurisdiction of the United States of America, who shall be found within the territories of Her Majesty, it shall be lawful for one of Her Majesty's principal Secretaries of State . . . by warrant under his hand and seal to signify that such requisition has been so made, &c.

The return to the *habeas corpus* having been read,

*McMahon* and *Edward Clarke* now moved that the prisoner should be discharged out of custody, on the ground that the offence, as not being by our law one of forgery, was not within the provisions of the Treaty and Extradition Act (6 & 7 Vict. c. 76); that the offence as charged against the prisoner was really only embezzlement, or it may be false pretences, but that in no sense could it be designated as a forgery either by our law or the general law of the United States, and that, if it were sufficient that it was designated as forgery by the United States, they might designate the most innocent acts as forgeries or other crimes mentioned in the treaty, and so have a right to demand the extradition of persons who in this country would be considered wholly free from criminality; that the object of the treaty was the delivery up of those criminals who have committed any of the crimes specified, and which crimes must be such as are recognised by both countries.

*Gifford*, Q. C. and *Poland* argued that the prisoner was not entitled to be discharged; for that, admitting that the offence charged was not within our definition of the crime of forgery, the true test is, whether or not it is a forgery according to the law of the country demanding the culprit:

Wheaton's International Law, 236, 241;

Ortolan *Regles Internationales*;

Vattel, 108;

*R. v. Hart*, 1 Moo. C. C. 486.

The further arguments are sufficiently set forth in the following judgments.

COCKBURN, C. J.—We are called upon here to put a construction upon the statute relating to the extradition treaty, and the surrender of criminals committing a particular crime within the jurisdiction of the United States who are found in this country, and the surrender of whom is demanded on the part of the American Government. The offences to which the statute applies are enumerated in the statute, and amongst others the offence of forgery is specified. In this particular instance, in which application is made to the court to obtain the discharge of an American subject who is found in this country, and whose surrender is demanded, and who is now in custody, it appears that he was guilty of making a false entry in a book kept by him in the office of a money corporation in New York, in which book it was his duty to keep an account of the moneys received by him as an officer of the bank, and of the manner in which such money was disposed of. There is no doubt that the entry was a false entry: there is no doubt it was made for fraudulent purposes; but I think it quite clear, for the reasons which have been given by the various members of the court in the course of the argument, that, according to the common law of this country and the state of the law of this country, the offence would not have amounted to the crime of forgery; and I must take it, there being nothing found to the contrary, that, according to



Q. B.]

*Ex parte* CHARLES WINDSOR.

[Q. B.]

the common law of the United States of America taken in the aggregate—and the criminal law generally corresponds with the civil law and the rights of this country—that according to the general law, this would no more amount to the offence of forgery in America than here, and consequently it is only by the act of the Legislature of the State of New York that this particular offence is made to amount to forgery. The question we have to determine is, whether the offence in question, not being an offence according to the law of England, nor, I take it, the common law of the United States of America, and the fact that the local legislation of the State of New York has constituted this particular offence to be forgery, is sufficient to bring the case within the statute, and to call upon the Government of this country to deliver up this American citizen to the American States? I am of opinion that it is not. I think the only true construction to be put upon this statute is, that the terms used in the statute specifying the offences in respect of which criminals are to be surrendered by the respective states must be taken to imply offences that have common elements in the legislation of the two countries, and that where one of two nations thinks proper to make that an offence which does not fall within the definition of an offence as known to the general law of either, it will not be sufficient to bring the case within the statute. Here, by what I have more than once ventured to call a piece of artificial legislation, a matter which would not amount to forgery, according to the general law of this country or the United States, is made to assume that character. I think we ought to interpret this statute according to what may fairly be taken to have been the intention of both parties. I think it would be going a great deal too far to assume that, in passing this statute as to the effect of the treaty, the Legislature of this country went into an elaborate inquiry into what might happen to be the local law of any one of the States composing the United States; or whether they have made this treaty and passed this statute intending to embrace the whole. I do not believe that it was in point of fact done. I think it would be a very monstrous assumption if we were to take it for granted that it was. I think we must, more especially in a case where we are dealing with a country whose laws, if not the same as our own, have so much in common with them, assume, and we ought to assume, that the terms they have used were intended to have the signification which they have in our own law, and not that which they happen to have in the legislation of any particular State. I think, therefore, as in that particular enactment the local law of New York, creating this offence a forgery, does that which is entirely departing from the law of this country as to what constitutes forgery, we cannot consider such a case as within the statute, and therefore not one in which it is the duty of this country, acting under the statute, to surrender the criminal. Therefore, so far as the surrender on the criminal charge is concerned, looking at the statute and the effect of the treaty, Mr. Windsor ought to be discharged. I understand he is in custody on a civil process.

BLACKBURN, J.—I am entirely of the same opinion. The only power that the extradition treaty gives to surrender a prisoner is that derived from the statute; and that statute, as far as I see, does not enact that all fugitives from justice shall be given up, but only those who have committed certain enumerated crimes,—for the delivery of any person charged with the crime of murder, assault with intent to commit murder, the crime of piracy, arson, robbery and forgery; these, both in the treaty and the statute passed to give effect to it, are the

definitions given by those high contracting parties to the treaty to deliver over prisoners to each other. Now the charge that is made out against this person is that he, being a clerk in a bank, did steal a large sum of money, and in order to conceal it has made an entry in a book, which entry, as I made it out, was an entry stating on his behalf that a certain quantity of specie had been deposited in the vaults, whereas, in point of fact, the statement was wilfully and fraudulently false, with the intention to conceal and embezzle. But though he was guilty of that crime, it did not amount to forgery. Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery because it is reduced into writing. The guilt of the thing which he has done is by no means more than that. He has not made any statement that is purported to be made by the authority of any person on behalf of that person. Now this man has made a false statement, falsely stating a fact which purports to be what it is. It is quite true that the State of New York by statute has enacted that those guilty of this offence shall, on conviction, be deemed guilty of forgery in the third degree. I pass by, without entering into them, the various observations that have been made to show that this did amount to this crime within the New York State; I am inclined to think it would be certainly a crime in the New York State. But then, if this is not forgery, how does the fact that the local State of New York in the United States has declared in effect that he shall be deemed guilty of forgery, make it a forgery within the meaning of the statute? That, I think, we cannot do. I think we must construe this statute and the treaty between the two high contracting parties, Her Majesty the Queen of Great Britain on the one part and the United States on the other part, as a bargain and treaty; but that bargain, notwithstanding the dignity of the parties, must be understood like every other contract according to the meaning of the words fairly understood and the intention expressed by them in terms, both parties using the same English language and both speaking of the same sort of thing as to the particular crimes for which prisoners shall be given up—murder, piracy and forgery. I cannot think that is to be construed as meaning any crime; and though this forgery may be so called by the other side, I think it must be fairly limited to mean that this crime according to the United States, though in the nature of forgery, consists of the false making of an instrument purporting to be what it is not. Then that shows the forger to be a man who might be given up for the crime. But I do not think, if either country was to declare that some particular offence shall be a forgery, or called a forgery, that this will do. The true and fair meaning of the local statute is merely, that he who commits a crime, though not forgery in itself, shall be punished as if he had committed forgery. In this case the man who is guilty of a crime is a fugitive, and we might wish that the Legislature gave us the power to give up any criminals who committed a great crime; but that has not been done. I agree with my Lord that he is to be discharged, so far as this ground of objection is concerned.

SHEE, J.—I am of opinion that the demand for extradition upon the terms of this treaty and the Act giving effect to it must be founded upon the charge that an offence has been committed, which offence is to come in all material particulars within the definition by the laws of both the contracting states of the crime for which the extradition is stipulated. Every word designating the crime is

[ARCHES.]

EDWARDS AND MANN v. HATTON.

[ARCHES.]

moned Mr. Grant before the magistrates for a sum certain, and brought this suit for the same amount, the churchwarden cannot now vary it; at all events it is too late now. In the case cited the question arose on the admission of the libel.

Dr. LUSHINGTON.—I am of opinion that it is within the power and competence of the court to make any alteration in the pleadings up to the hearing of the cause. It is said that, if the court accedes to this motion, it would do what it is clear it has no power to do, namely, amend the rate; but I am of opinion that it is in the power of the churchwarden to sue for part and not for the whole amount originally assessed on the party, on reasonable cause shown. Now, on the affidavit before the court, which is uncontradicted, it appears that the churchwarden was absolutely led into the mistake by the previous conduct of the deft. The alteration must be made. As to costs, I think no additional costs should be thrown on the deft. The additional costs caused by the mistake and necessary amendments must be paid by the churchwarden.

Moore and Currey, proctors for the churchwarden.

Crosse for the deft.

March 25 and May 3, 1865.

(Before the Right Hon. STEPHEN LUSHINGTON,  
D.C.L., Dean.)

EDWARDS AND MANN v. HATTON (on admission of  
an allegation).

*Church-rate—Inequality—Injury to deft.*

*The Court will not reject an allegation averring inequality of assessment, though the deft.'s property is one of those alleged to be under-assessed, and the allegation contains no averment that the deft. is aggrieved by the inequality, for it might turn out that he is called upon to pay more than he would if all the properties in the parish were fairly assessed.*

*Query, whether the court would ultimately pronounce against a rate on the ground of inequality, unless the deft. succeeded in showing that he was himself injured by the inequality.*

This was a suit for subtraction of church-rate, brought by the churchwardens of the parish of Mattishall, in Norfolk, against Jonathan Hatton, a farmer, of that parish.

The libel was in the usual form.

The third article of the allegation, brought in on behalf of the deft., pleaded:

That certain lands and other properties mentioned in and assessed to the pretended rate in question in this cause are let to the occupiers thereof at annual sums greatly exceeding the amounts or sums set down in the assessment to the said pretended rate as the rental or annual value thereof respectively; and that the entries thereof under the head "Rental or annual value of property" are generally and throughout grossly inaccurate, and entirely disproportionate to the real rental or annual value of the properties against which the same are placed respectively, and that the amounts at which the properties are assessed therein as the rateable value under the head "Amount at which property is assessed," are less than the sums at which the same would reasonably let after deducting all usual tenants' rates, and less than the commutation rent-charge, and the annual costs of repairs, insurance, and other expenses necessary to maintain them in a state to command such rent, and in particular:

Then followed 109 instances of particular properties, the 45th of which stated:

That the farm in Norwich-road, in the occupation of Jonathan Hatton, which is numbered 127 in the said rate, and is assessed at the sum of 80*l.* 1*s.*, is of the annual rateable value of 101*l.* 15*s.*, which is the sum at which it is assessed in the new valuation hereinafter pleaded and referred to.

The 4th article and paragraph annexed set forth various properties said to be assessed on the rack

rental, or at sums exceeding the rack rental. Of these thirty-seven instances were specified.

The allegation contained no averment that the deft. or others was or were injured by the alleged inequality of assessment.

The admission of the allegation was opposed by

Dr. Swabey (with him the *Queen's Advocate* (Sir R. J. Phillimore).—On the face of the allegation it appears that the deft. is under-rated, and there is no averment that he suffers any grievance by the alleged inequality of assessment, which is the chief point made by the allegation in opposition to this rate. This is the first case, as far as is known, in which any party has opposed payment of a church-rate because he is called upon to pay too little. From *Lambert and Simpson v. Weall*, 4 Hagg. 91, to *Hill and Bailey v. Haskew*, 11 L. T. Rep. N. S. 253, every deft. who has opposed a rate on the ground of inequality of assessment has attempted to make out that he was injured by being overcharged. In *White and Jackson v. Beard*, 2 Curt. 500, the Court said: "The meaning of an unequal rate is this: that some party or other has a right to complain that under the rate, the payment of which is demanded of him, he is made to pay more than he ought to pay under a just assessment." If, in some of the more recent cases, as in *Attenborough v. Kemp*, 5 L. T. Rep. N. S. 67, and the *St. Neot's* case, the court has used language apparently varying from this position, it must be remembered that in those very cases the deft.'s ground was that he was called upon to pay more than he ought to pay.

Dr. Deane, Q. C. and Dr. Tristram contra.—The cases last cited show that the court must consider the fairness and equality of the rate generally without reference to the deft.'s particular assessment; an unequal, i.e. an illegal, rate cannot be enforced by the law against any one; and in this case, for aught that appears, the deft. may be called upon to pay more than he would on a fair assessment of the whole parish, though he is one of those whose property is under-assessed.

*Curr. adv. ult.*

May 3.—Dr. LUSHINGTON delivered the following judgment.—This is a cause of church-rate brought by the churchwardens of Mattishall against Jonathan Hatton, a parishioner. The libel is in the ordinary form, and a very long allegation has been given in on the part of Mr. Hatton. That allegation states very many instances in which, as alleged, the rate is unequal and unjust; instances where the various properties have been unduly assessed either at too high or too low a rate. But the peculiarity in this allegation is, that in the forty-fifth paragraph of the third article, as regards Hatton, the party proceeded against, it is pleaded that he is assessed to the church-rate at a value much less than he ought in fairness to be assessed. I say this is a peculiarity; to the best of my knowledge and belief no similar averment is to be found in any of the preceding church-rate cases. The churchwardens oppose the allegation, and they contend that on Mr. Hatton's own showing he is not aggrieved by the church-rate. The answer to that argument is, that it matters not whether he personally is aggrieved or not, if the church-rate is shown to be unequal, and therefore cannot be enforced. And it is further said that the court adopted and acquiesced in this argument in former church-rate cases. Now here I must observe that I verily believe, whatever might have fallen from the court in preceding cases, that nothing ever was said or was properly applicable to such a case as this, namely a case where the deft. himself alleged that he was rated below the real value of his property. Indeed, such a case not having actually

H. OF L.]

DICKSON v. THE QUEEN.

[H. OF L.]

occurred, observations would be pertinent only to a supposititious case. In the *St. Neots* case, however, the Court did say that it must not be supposed that in the mode of considering the question the court could look only to the amount of rate for which a party may be sued, or how little such an individual may be personally affected. I must see how such an objection affects the rate itself, not an individual ratepayer. If the rate is proved to be itself erroneous in mode of rating, that is to say, some properties charged too much and some too little, and that to a serious extent, the probability is that the party proceeded against is not fairly assessed to the rate in question, though this result may not be at first apparent; but if, when the case came on for hearing, it should clearly appear that, though the assessment of rate were erroneous, the party proceeded against was not aggrieved, the court has never said that it would in his individual case pronounce against the rate; that is a question still left open. So in this particular case, the court will not before the hearing decide whether the party proceeded against is aggrieved or not; it is most probable that he is, but that conclusion must depend upon a review of all the facts. Until that review is made the court cannot safely say that, because an individual is not charged to the full amount of a fair valuation, therefore he is not charged excessively, for it is manifest that others may be so much undercharged as to make the rate unjust and unequal towards him. Under these circumstances I do not think I should be justified in rejecting the allegation.

*Moore and Currey*, proctors for the churchwardens.  
*Crosse* for the deft.

### HOUSE OF LORDS.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,  
Barrister-at-Law.

Monday, Feb. 27, 1865.

DICKSON v. THE QUEEN.

*Excise—Spirit licence—Grocer—Statute—Implied repeal—Taxable words—Construction.*

*The statute 6 Geo. 4, c. 81, imposed a higher duty on licences to retail spirits obtained by spirit grocers in Ireland, and a lower duty on other persons, the spirit grocers being defined as those who do not sell spirits in a greater quantity at one time than two quarts to be consumed on the premises. A later Act, 6 & 7 Will. 4, c. 38, s. 3, enacted that no spirit grocer should obtain a licence to sell on the premises other than a licence to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than on the premises, and no other licence shall be granted to grocers:*

*Held (affirming the judgment of the Ex. Ch.), that the latter statute did not impliedly repeal the higher duty applicable to spirit grocers, but that the two statutes were compatible, the one fixing the maximum, and the other the minimum, of the quantity to be sold at one time; and the two descriptions of restrictions did not necessarily imply two different descriptions of persons.*

This was a suggestion of error in a judgment of the Ex. Ch. The plt. in error was a suppliant in a petition of right, claiming to recover back a sum of 16s. 6½d., as alleged excess on duty claimed by the Crown, for a licence to retail spirits in Ireland.

The Act 6 Geo. 4, c. 81, imposed certain duties on all persons licensed to retail spirits in Ireland, all licences being divided into two classes: one being the spirit grocer's licence, authorising the person licensed to retail spirits in quantities not exceeding two quarts, and to be consumed elsewhere than on the premises; the other being all other licences

to retail spirits. The 6 Geo. 4, c. 81, in its 2nd section, fixes a general rate of duty to be paid throughout the United Kingdom on licences to retail spirits. That duty is regulated by the value of the house in which the retailer resides. The suppliant resided in a house valued at 36l. a-year, and the duty properly payable by him, according to the scale applicable to retailers of spirits under the lower licence, was 2l. 4s. 1d., and no more. The words imposing the duty on retailers of spirits throughout the United Kingdom are as follows: "Every retailer of spirits (except retailers of spirits in Ireland after mentioned)." The words of the exception immediately follow in the same clause, and are as follows: "Every retailer of spirits in Ireland being duly licensed to trade, vend and sell coffee, tea, cocoa-nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts; or any spirits to be consumed in the house or premises of such retailer."

The licence mentioned in this exception is explained in the 4th section, which enacts that

All persons who shall be duly licensed under this Act to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, shall be deemed grocers, within the meaning of the several laws of excise in force in Ireland at and immediately before the passing of this Act, and shall be entitled to take out the licence hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time to be consumed elsewhere than in the house or on the premises of such retailer—subject nevertheless to all and every the regulations contained in the said laws, or any of them, in respect of grocers retailing spirits, except so far as any of them are repealed or altered by this Act.

Although this section entitled the Irish grocer to this special licence without any other qualification than that which he derived from his being licensed to sell groceries, there was nothing in the Act to prohibit him obtaining the ordinary publican's licence by going before the magistrates and obtaining the licence to sell beer, in accordance with the 18th and 14th sections of the Act. In this case he was included in the general class of retailers of spirits, receiving an unrestricted licence upon paying the lower rate of duty.

So long as these licences were issued to grocers in the terms of this Act, no question arose as to the duty payable. If the grocer held a beer licence and applied for a publican's licence, he paid on that licence the lower duty. If he applied for the special licence mentioned in the 4th section, he was charged with the higher rate of duty, and this matter continued up to the year 1836. In that year the statute 6 & 7 Will. 4, c. 38, made a change in respect of the retail licence obtainable by grocers.

The 3rd section of this Act was as follows:

And be it further enacted that from and after the passing of this Act, no person in Ireland who shall be duly licensed under any Act or Acts for granting excise licences to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, nor any person deemed a grocer within the meaning of the laws of excise in force in Ireland at or immediately before the passing of this Act, shall be entitled to take out any licence to retail spirits in the house or on the premises of such retailer or in any house or on any premises within one quarter of a mile of the house or premises of such retailer, other than a licence to retail spirits in not less than one pint at one time, and to be consumed elsewhere than in the house or premises of such retailer. And it expressly enacted that "any licence to retail spirits in any other manner granted after the passing of this Act to any such grocer or person so licensed as aforesaid should be null and void to all intents and purposes whatever."

On the passing of the latter Act (6 & 7 Will. 4, c. 38) doubts arose whether that Act impliedly repealed the higher duty imposed on spirit grocers by the previous Act, 6 Geo. 4, c. 81. In 1841 the suppliant brought an action to try the question, and the Irish Ex. Ch. decided, by a majority of six to four, in his favour: (*Dickson v. Pope*, 7 Ir. L. Rep. 74.) In 1845 the latter Act was repealed by the 8 & 9 Vict. c. 64, whereupon the Irish spirit grocers demanded back the excess of duty which they had paid while the Act of 6 & 7 Will. 4, c. 38, was in

H. OF L.]

DICKSON v. THE QUEEN.

[H. OF L.]

force. The excise authorities having refused to refund the sums, the present petition of right was filed. The Court of Q. B., without hearing argument, followed the judgment of the Irish Ex. Ch., and gave judgment for the suppliant. The English Ex. Ch., in error, unanimously reversed the judgment of the Q. B., whereupon the present suggestion of error was made.

*Is. Butt, Q.C.*, for the plt. in error, contended that the Ex. Ch. was wrong, and the Irish Ex. Ch. right in construing the Act; that the Act of 6 & 7 Will. 4 c. 38, having taken away the higher duty on the licence imposed by 6 Geo. 4, c. 81, that duty could not be transferred by implication to a new and different licence created by the latter Act; that at all events, inasmuch as there was a doubt, a tax was not to be imposed by implication.

The *Attorney-General* (Palmer), the *Solicitor-General* (Collier) and *C. Hutton*, for the resp., contended that there was nothing inconsistent between the two statutes. The first merely imposed a maximum on the saleable quantity, while the latter statute imposed a minimum restriction.

The LORD CHANCELLOR.—My Lords, the question which has been argued before your Lordships at considerable, but by no means unnecessary, length, is one of great nicety, and requiring much care and discrimination in language. The point for your Lordships to decide in reality is, whether the licence granted to the suppliant was properly chargeable with a duty of 3*l.* 0*s.* 7½*d.* or with a duty of 2*l.* 4*s.* 10*d.*, and this depends upon the question whether the suppliant was a retailer of spirits within the description contained in the schedule appended to the 2nd section of the 6 Geo. 4, c. 81, or whether he was within the exception contained in that clause, viz., within the words "except retailers of spirits in Ireland after mentioned." If the suppliant comes within the description of retailers of spirits in Ireland after mentioned, then he is properly chargeable with the larger duty; but if he no longer answers that description, then he is caught (if I may use the phrase) only by the general enactment which is applicable to all retailers of spirits. The words of the exception—that is, the description of those retailers of spirits who are after mentioned—speak of the retailers of spirits in Ireland who have obtained grocers' licences, and are not selling spirits in any greater quantity at one time than two quarts, or any spirits to be consumed in the house or on the premises of such retailers. The argument on behalf of the app. is, that that is a special and definite description of the then grocer who was licensed to retail spirits, and that that specific form of licence has been subsequently altered. So that, if you hold the duty here imposed to attach to the licensed individual who has received the specific form of licence here described, then, if it turns out that that specific form of licence has been altered, the contention is, that as the licence is different, the person bearing it becomes different; for if it be imposed on the person who has received licence A, the argument is, that it is not applicable to the person who has received licence B. Now, undoubtedly, we must not lose sight of that great rule in the construction of fiscal laws, that they are not to be extended by any laboured construction, but that you must adhere to the strict rule of interpretation; and if a person who is subjected to a duty in a particular character, or by virtue of a particular description, no longer fills that character or answers that description, the duty no longer attaches upon him and cannot be levied. The argument which has been most ingeniously and elaborately conducted on behalf of the debt. has been this: first of all it has

been said by the app., that the licence which is here intended to be referred to—I mean by the words I have already read, describing the excepted retailers—is the licence which is described in the 4th section of the same statute. That was a licence to be granted to grocers giving them power to retail spirits in any quantity not exceeding two quarts at any one time to be consumed elsewhere than in the house or on the premises of the retailer. The licence, according to this rule, if it be granted, would be a licence with the maximum of the quantity to be sold, but without the mention of any minimum. It appears from a variety of statutes to have been the earnest desire of the Legislature, in a way which the Legislature sometimes adopts under the notion that an Act of Parliament can render people moral or temperate, it seems to have been the earnest desire of the Legislature to impose every possible difficulty upon the grocers retailing spirits in small quantities. This particular object seems not to have been quite effected by the statute I am now adverting to, for it failed to fix anything like a minimum quantity. It imposed a maximum, but it left the grocer restrained from selling more than two quarts at retail to retail spirits in small quantities. This point appears to have attracted the attention of the Legislature, and in a subsequent statute, the 6th and 7th of Will. 4, and by the 3rd section of that statute, it is enacted in substance, that after the passing of the Act no grocer (I am substituting the word grocer for the larger description which is there given) shall be entitled to take out any licence to retail spirits in the house or on the premises of such retailer, or in any house or any premises within one quarter of a mile of the house or premises of such retailer other than a licence to retail spirits in quantities not less than one pint, and to be consumed elsewhere than in the house or on the premises of the retailer. The former licence restrained the grocer from selling more than two quarts, but there was the same restriction with regard to the house and premises where the spirits sold were to be consumed, viz., the quantity was not to be consumed in the house or on the premises of the retailer. In this subsequent section the Legislature says: "You shall not sell less than one pint, and you shall not sell even a pint to be consumed in the house or on the premises of the retailer." It expressly enacts that the pint sold is to be consumed elsewhere. Now the argument on the part of Mr. Butt has been, that this addition made to the licence makes it a different licence, and that the grocer who is subjected to the restrictions contained in this addition become in reality, *quoad* the selling of spirits, a different person from the person described in the 6 Geo. 4, and that he no longer answers the description which alone is taxed, viz., of the grocer the retailer of spirits not selling spirits in any greater quantity at one time than two quarts. It is difficult so to express the matter as to convey to your Lordships' minds with anything like precision this nice and subtle distinction. It all turns upon this inquiry: Is the limitation of the maximum of the quantity to be sold repealed expressly or by implication by the enactment which I have read out of the 3rd section of the 6 & 7 Will. 4? Because, if the whole limitation as to the maximum be thereby repealed, then, my Lords, I think you will admit that the individual licensed under the 3rd section of the 6 & 7 Will. 4 has different powers and authorities by his licence than those which are contained in the former licence, and if he becomes by virtue of this subsequent statute a grocer at liberty to sell any quantity of spirits, then he would no longer answer the description of a grocer not selling, that is, not being at liberty to sell, any greater quantity than two quarts. But, my Lords, I have laboured

H. OF L.]

DICKSON v. THE QUEEN.

[H. OF L.]

in vain to find any reason for holding that these two enactments are not perfectly compatible the one with the other. I have also laboured in vain to find any reason for holding that when you have added to the licence it can no longer be regarded as answering the description of a grocer not selling, that is, not being licensed to sell, any greater quantity than two quarts. It all turns upon this, whether the two sections may not be most consistently and correctly reconciled by taking the one as fixing the maximum, and taking the other as superadding the minimum. If the superaddition of minimum materially affected the description contained in the taxing clause, and rendered it no longer applicable to the person, then the taxing clause could not be acted upon; but if the superaddition of the minimum leaves the licensee still retaining the characteristics which enable him to answer and exactly to satisfy the description contained in the taxing clause, then no rule of construction would require your Lordships to hold that the two sections are in any way inconsistent. You could not hold that the former section was in any manner affected or repealed by the latter. That is the conclusion at which I have, with some difficulty, been able to arrive, and to which I invite the assent of your Lordships. In this view the thing becomes reasonably clear and consistent. The Legislature had imposed a maximum, but it had not imposed a minimum. It apprehended that much danger might arise from the retailing spirits by grocers in small quantities, and therefore it added a minimum to take away or to obviate that danger. But when it added the minimum it did not say that the licence should be altered; it did not enlarge the capacity of the licensee with regard to quantity, and I think that the licensee still remains at liberty to sell no greater quantity at one time than two quarts, although he was subjected to the further restriction, that of being disabled to retail spirits in glasses, and was obliged to sell a quantity not less than one pint, and that to be taken away from the premises for consumption. It was contended by Mr. Butt that the construction of the statute would be affected greatly by a consideration of the fact of the practice. He has told your Lordships that a practice followed upon the statute of the 6 Geo. 4 of a grocer sinking his character of a grocer, and assuming the guise and character of a publican, getting a licence to sell beer, *so nomine*, and then presenting himself before the justices for a general licence to sell spirits. He desired your Lordships to construe those specific words of the description, "not selling spirits in any greater quantity," &c., as having been used by the Legislature with a prophetic anticipation of the practice that might ensue upon the passing of the Act, and as descriptive of the grocers in their two capacities, viz., grocers that obtained grocers' licences to sell spirits, and grocers that got publicans' licences to sell spirits. I do not think that your Lordships would be at all warranted in giving to the words used in the Act of Parliament, and which are plainly applicable to the existing state of things, the meaning contended for by the learned counsel, that they were used with reference to a possible future state of things. Neither do I think, if the whole of the facts alleged by Mr. Butt were conceded, just for the purpose of the argument, that it would affect the real question upon which the decision of this appeal depends, and which I take to be simply this: whether the description contained in the schedule to the 2nd section of the Act 6 Geo. 4, is or is not rendered no longer applicable by the fact of the maximum quantity therein indicated being the limit, the *ne plus ultra*, and the licence being repealed and altered by the 3rd section of the subsequent Act, 6 & 7 Will. 4. I find nothing to warrant the conclusion that

there was such a repeal. I find in the nature of things that the two enactments are perfectly consistent, the one having given a maximum without a minimum, and the other having given a minimum without disturbing the maximum. If the antecedent description is as I have said, and it refers only to the minimum, and the maximum remains undisturbed and unaffected, the description is applicable, although the minimum is superadded to the maximum. Upon these grounds, although it is impossible to render the matter quite as clear as one would desire to make it, I humbly move your Lordships that the judgment of the court below be affirmed, and that the appeal be dismissed.

Lord CRANWORTH.—My Lords, I entirely concur with my noble and learned friend the L. C. that the judgment in this case must be for the defendant in error. Before the passing of the Act of Geo. 4 there certainly was a licence that limited in its terms the grocer to selling spirits in any quantity within certain limits. The licence was a general licence that the grocer might obtain there, although by former Acts he could not have done so. Then the Legislature enacted that, in spite of his having such a licence, it should not be lawful for him to sell at one time more than two quarts. And so stood the law when the 6 Geo. 4 was passed. The former duties were then repealed, and amongst other duties that were imposed upon every retailer of spirits in Ireland being duly licensed to trade in, vend and sell, coffee, tea, cocoa-nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts. That was the mode certainly (I think it was rather an inartificial and clumsy mode) of referring to the restriction which the law imposed upon the licensed grocer who obtained a licence to sell spirits. There was no such thing then as a licence to sell in any quantity at one time exceeding two quarts. There was a licence to sell, but the law said, "Although you have got that licence in your character of grocer, you shall not sell more than two quarts." It was contended by Mr. Butt, that however that might have stood before the passing of the Act, by the 4th section it became necessary that the licence should be a licence to sell in quantities not exceeding two quarts. That 4th section is very inartificially framed, and in a very blundering manner, because it assumes something to have been said before that had not been said at all. I take the object of the clause to have been this, to remove the doubts that I collect existed before as to who came within the description of grocers in Ireland. It enacts that from and after a certain day all persons who shall be duly licensed under this Act to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, shall be deemed grocers within the meaning of the several laws of the excise in force in Ireland at and immediately before the passing of this Act. And then it goes on in the passage upon which Mr. Butt seems to rely: "and shall be entitled to take out the licence hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time." There has been no such licence hereinbefore mentioned in any part of the description of retailers of spirits in Ireland, as authorising persons to sell spirits not in any greater quantity at one time than two quarts. There was no licence that authorised that, and there was no intention to give any different character to the licence. That being the state of the law, the publicans' Act was passed, and that had reference, not to duties, but to the prevention of intemperance and drunkenness, and in that Act there were a great many provisions, the tendency of which no doubt was to make the inhabitants of that part of the United Kingdom less intemperate; and among other provisions there is

C. P.]

HUNT AND ANOTHER v. HARRIS.

[C. P.]

this: "That from and after the passing of this Act no person in Ireland who shall be duly licensed under any Act or Acts for granting excise licences to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, nor any person deemed a grocer within the meaning of the laws of the excise in force in Ireland at or immediately before the passing of this Act, shall be entitled to take out any licence to retail spirits in the house or on the premises of such retailer, or in any house or on any premises within one-quarter of a mile of the house or premises of such retailer other than a licence to retail spirits in quantities not less at one time than one pint." What is there to show in the slightest degree that other restrictions which existed before were meant to be affected? I see nothing of the sort, and although I agree with what fell from the Lord Chancellor, that we must not strain Acts of Parliament so as to let it be supposed that a duty has been imposed upon the subject which the Legislature has clearly said shall not be imposed, I think one is not bound, because that is a very well-known principle, to shut one's eyes to the obvious meaning of the enactment. The former Act fixed a maximum, and said you shall not, although you have a licence to sell spirits, sell more under that licence than two quarts at any one time. Now it has been said, with a view to promoting temperance in the country, you shall be placed under this restriction, that you shall never sell less than a pint; that is to say, you shall never sell small quantities to persons who might come into your shop to tipple; you must sell a quantity that will be larger than could be so consumed. That, in my opinion, is the obvious intention of the enactment, and I see no reason to suppose that there was any intention to alter the former enactment, viz., they were not to sell more at one time than two quarts. And if so, they remained where they were before and were liable to the higher rate of duty.

Lord WENSLEYDALE.—My Lords, I entirely concur in the observations which have been made by the two noble and learned lords who have preceded me, and I have nothing to add to them. I have felt perfectly satisfied with the reasons which were given by Erle, C. J. in the judgment delivered in the Ex. Ch. It has appeared to me that the ultimate result was perfectly clear, and that the judgment of the court below ought to be affirmed.

*Judgment affirmed.*

Plt. in error in person.

Def't. in error's attorney, J. Timm.

#### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Tuesday, April 25, 1865.

HUNT AND ANOTHER v. HARRIS.

*Metropolitan Building Act 1855*—18 & 19 Vict. c. 122, ss. 3, 73, 74, 83, 84, 85, 88—*Dangerous structure*—*Party structures*—"Owner"—*Lessee and sub-lessee*.

A person who has a long lease of a house at a small ground-rent, and sublets it in portions to different tenants at rack-rent, either on lease or as tenants from year to year, is the "owner" of the house within the meaning of the sections of the *Metropolitan Building Act 1855* (18 & 19 Vict. c. 122) which apply to the repair of dangerous party structures.

This case was tried before Erle, C.J. at the sittings in London after Michaelmas Term, and a verdict was entered for the plt. for the amount claimed, the def't. having leave to move to enter the verdict for him, or a nonsuit.

#### The declaration stated:

That whereas the p'ts. and the def't. were severally owners of a certain party-wall and structure, within the meaning of the *Metropolitan Building Act 1855*, and situate within the city of London, the said party-wall or structure being a party-wall, and situate on the west side of the premises of the def't., being No. 37, Eastcheap, and on the east side of the premises of the p'ts., being No. 38, Eastcheap, in the city of London, which said party-wall or structure was then in a dangerous state, and defective and out of repair; and the Commissioners of Sewers of the city of London then caused a survey of the said party-wall and structure to be made by a competent surveyor, who duly surveyed the same; and upon the completion of his survey certified to the said commissioners his opinion as to the state of such party-wall and structure, to the effect that the same was in a dangerous state; and afterwards the said commissioners gave and served, and caused to be given and served upon the p'ts. and def't., then being such owners as aforesaid, a notice in writing, in the words and figures following, that is to say: "*Metropolitan Buildings Act 1855*.—*Dangerous party structures*.—To the owners and occupiers of the party structure, being a party-wall, and situate, &c., and whomsoever else it may concern.—In pursuance of the provisions of the said Act, I hereby, as the principal clerk for and on behalf of the Commissioners of Sewers of the City of London, give you and each and every of you notice that, it having been made known to the said commissioners that the party structure as aforesaid is in a dangerous state, the said commissioners required a survey of the same to be made by a competent surveyor, who having certified that the said party-wall is in a dangerous state, the said commissioners require you forthwith to, &c. (the notice as set out in the declaration here specified the necessary works to be done); and I further give you and each and every of you notice that, if in the space of six days from the service hereof you fail to comply with the regulations of this notice, the said commissioners will make complaint thereof before a Justice of the peace, and take such other proceedings in relation to the said party structure as are authorised by the said Act, and as may be necessary or expedient.—Dated 6th June 1863, signed, &c." And the p'ts., after receiving such notice and within a reasonable time in that behalf, and while the p'ts. and the def't. continued such owners as aforesaid, did and caused to be done the works in the said notice specified, the same being necessary works to be done in respect of the then dangerous state of the said party-wall and structure, and the same being defective and out of repair. And whereas in the doing of the said works, the p'ts. were necessarily obliged to repair, restore and make good the internal works and finishings of and upon No. 37, Eastcheap, aforesaid, then being such premises of the def't. as aforesaid, which said internal works and finishings were necessarily damaged and destroyed by the doing of the first-mentioned works. And whereas the p'ts. and the def't. always made equal use of the said party-wall and structure, and whereas the def't. alone made use of the said internal works and finishings, and whereas the p'ts. were building owners and the def't. was an adjoining owner, within the meaning of the said Act, and the p'ts. as such building owners as aforesaid, within one month after the completion of the said works, delivered to the def't., as such adjoining owner as aforesaid, an account in writing duly made out of the expense of the said several works duly valued; and the def't. did not within one month after the delivery of such account declare his dissatisfaction to the party delivering the same by notice in writing, given by the def't. or his agent, and specifying his objection thereto. And whereas all things have been done and all times have elapsed, and all conditions have been fulfilled necessary to entitle the p'ts. to have and recover from the def't., under the provisions of the said *Metropolitan Building Act 1855*, one moiety of the expense of doing the first above-mentioned works, the said moiety being 52*l.* 15*s.* 8*d.*, and the whole expense of repairing, restoring, and making good the said internal works and finishings, the same being 33*l.* 14*s.* 1*d.*; and to maintain this action for the recovery thereof;—yet the def't. hath not paid either of the said sums, although duly demanded.

There were also counts for work and labour, money paid and on accounts stated.

The material allegations in the declaration were severally traversed by the pleas.

It was proved at the trial that the p'ts. were the occupiers of premises at 38, Eastcheap, and that the def't. had a lease for nearly ninety years of the adjoining premises, 37, Eastcheap, at a small rent, and that he did not occupy the premises, but sublet them to different persons, the sub-lessee of the ground-floor having a lease for twenty-one years, the sub-lessee of two upper floors having an unstamped lease for seven years (four years and a half of which, at the time of action brought, were unexpired), and the remainder being unlet. The p'ts. were desirous to alter and rebuild their premises, and after giving the proper notice to the district surveyor, they pulled them down. The party-wall between No. 37 and No. 38 was found to

C. P.]

HUNT AND ANOTHER v. HARRIS.

[C. P.]

be in want of repair, and the plts. gave the deft. notice under sects. 83 and 85 of the Metropolitan Buildings Act 1855 (18 & 19 Vict. c. 122) of the work which required to be done to it. No arrangement was made between the plts. and the deft. as to the execution of the works and the proportion in which they were to be paid for, and eventually the plts. and the deft. were severally served with the notice set out in the declaration under sect. 72 of the Act. The plts. executed the works specified in the notice, and brought the present action to recover from the deft. the sums of 52*l.* 15*s.* 8*d.* and 33*l.* 14*s.* 1*d.*, being respectively one moiety of the cost of rebuilding the wall and the cost of making good the internal works on the side of No. 37.

A rule was obtained on behalf of the deft. to enter the verdict for him, or a nonsuit, on the ground that he was not the owner within the meaning of the Metropolitan Buildings Act 1855.

By sect. 3 (the interpretation clause) of that Act the word "owner" is applied to "every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will."

Sect. 73 enacts that

"If the owner or occupier to whom notice is given as last aforesaid fails to comply, as speedily as the nature of the case permits, with the requisition of such notice, the said commissioners may make complaint thereof before a justice of the peace; and it shall be lawful for such justice to order the owner, or, on his default, the occupier of any such structure to take down, repair, or otherwise secure, to the satisfaction of the surveyor who made such survey as aforesaid, or of such other surveyor as the said commissioners may appoint, such structure or such part thereof as appears to him to be in a dangerous state, within a time to be fixed by such justice; and in case the same is not taken down, repaired, or otherwise secured within the time so limited, the said commissioners may with all convenient speed cause all, or so much of such structure as is in a dangerous condition, to be taken down, repaired, or otherwise secured, in such manner as may be requisite; and all expenses incurred by the said commissioners in respect of any dangerous structure, by virtue of the second part of this Act, shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs."

By sect. 83, amongst the rights given to a building owner in relation to party structures is that of performing any necessary works incident to the connexion of party structure with the premises adjoining thereto.

By sect. 84 the adjoining owner may require the building owner to build chimneys, jambs, flues, &c. for his convenience.

By sect. 85

No building owner shall, except with the consent of the adjoining owner or in cases where any party structure is dangerous, in which cases the provisions hereby made as to dangerous structures shall apply, exercise any right hereby given in respect of any party structure unless he has given at the least three months previous notice to the adjoining owner by delivering the same to him personally, or by sending it by post in a registered letter addressed to such owner at his last known place of abode.

Sect. 88 provides that in cases of the repair or rebuilding of party structures the expense shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use each owner makes of such structure.

By sect. 97, when expenses are to be borne by the owner of premises, it is enacted, *inter alia*, that

1. The owner immediately entitled in possession to such premises, or the occupier thereof, shall in the first instance pay such expenses with this limitation, that no occupier shall be liable to pay any sum exceeding in amount the rent due, or that will thereafter accrue due from him in respect of such premises during the period of his occupancy.

2. If there are more owners than one, every owner shall be liable to contribute to such expenses in proportion to his interest.

3. Any occupier of premises who has paid any expenses under this Act, may deduct the amount so paid from any rent payable by him to any owner of the same premises, and any owner of premises who has paid more than his due

proportion of any expenses, may deduct the amount so overpaid from any rent that may be payable by him to any other owner of the same premises.

*Coleridge*, Q. C. and *Day* showed cause and contended that the plts. were entitled to charge the deft. as owner, and that the present case was distinguishable from *Mourilyan v. Labalmondiere*, 1 El. & El. 533, where the sub-lessee had the whole house. In this case the tenant who had the unstamped lease was in law a mere tenant from year to year, whatever might be his right to a lease in equity: (*Coven v. Phillips*, 33 Beav. 18.)

*Hoggins*, Q. C. supported the rule and relied on *Mourilyan v. Labalmondiere*, cited above. He referred also to

*Evelyn v. Whitchord*, 1 E. B. & E. 126;

*Tidey v. Mollett*, 16 C. B., N. S., 298; 10 L.T. Rep. 380.

ERLE, C.J.—This was an action by one adjoining owner against another adjoining owner to recover a contribution in respect of a party-wall, which was in a dangerous state, and was ordered by the Commissioners of Police to be pulled down by virtue of the powers in the Metropolitan Buildings Act. For the purposes of the present rule it must be taken that the plts., the owners on the east side, had given all the notices necessary under the Act to entitle them to call upon Harris, the alleged owner on the west, for a contribution to this party-wall. It appeared at the trial that Harris held the premises on the west side of the plts. upon the terms upon which the greater part of the house property within the Metropolitan Buildings Act is held, namely, that he had a long lease, say for eighty or ninety years, probably at a ground-rent, and that he was making a considerable profit by the improved rents, having let out the premises in floors; that is, the ground floor by lease to one person for twenty-one years, and the two upper floors to another person under an agreement for seven years, which, according to the case of *Coven v. Phillips*, before the M.R., gives him in equity all the rights of a legal estate for the seven years, though it was in law only an agreement. As to the residue of the premises there was no evidence how it was disposed of, but it was not occupied by Harris, and I assume for the purpose of the present judgment that it was occupied by a person unknown, for a term unknown. Harris being in receipt of the rents and profits in the manner that I have mentioned, the claim is made against him, and it seems to me that under sect. 3 he clearly is the "adjoining owner." By that section the word "owner" is applied to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation thereof other than as tenant from year to year. He was the owner in possession and in receipt of all the rents and profits of this tenement, and he is the adjoining owner. Then the party-wall having been pulled down and a claim made against him, coming within the definition of owner, he says, "I am not the owner, because I am not in the immediate occupation of the premises." But, as I read the statute, the action is properly brought against him. The wall was a dangerous structure. Part the second of the Metropolitan Buildings Act contains provisions for pulling down dangerous structures, and sect. 73 gives the building owner, who is to pull down the structure and build up another in its place, a right to demand repayment of the expenses. It says, "all expenses incurred" (I leave out the words, "by the said commissioners," because the building owner is in the place of the commissioners—all expenses incurred by the building owner—as I read it), "in respect of any dangerous structure shall be paid by the owner"



C. P.]

HUNT AND ANOTHER v. HARRIS.

[C. P.]

of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of the repairs." It seems to me to be perfectly clear that the party upon whom the duty of payment is cast is the owner of the structure within the meaning of sect. 3, namely, a person in possession or receipt of the rents or profits of the premises, that is to say, the person having a beneficial lease, or entitled to it. The words "without prejudice to his right to recover the same from any lessee or other person liable to the payment of such expenses of repairs" clearly refer to the owner of a long term who has underlet the premises. There is a very great convenience in giving to the building owner, having all the rights of the commissioners, a recourse in the case of a party structure, to one owner of the entirety of the premises, an ascertained party from whom one payment may be obtained, and there would be a great inconvenience in holding that the building owner must have recourse to every one of the lessees of the adjoining house, where it is let out, as in the present case, to different sub-tenants for different terms. There is great convenience in requiring the owner of the entire house to pay the whole amount and adjust it with the sub-tenants according to their respective contracts. There would be great inconvenience in requiring that the building owner should have recourse to each of the sub-tenants to make them pay for the building up a party-wall. For, take the case of the man who has taken one floor of the house for a term, of which only four and a half years remain, it would be an enormous injustice to make him pay the entire expense of building up that portion of the party-wall which adjoins his floor. That the statute contemplated something in the nature of a permanent interest in the adjoining owner of the whole of the premises, appears from sect. 84, which enables the adjoining owner, while the process of restoration is going on, to require the building owner to build chimneys, jamba, recesses, and other like works belonging to the permanent structure of the adjoining house. It seems much more reasonable to give the right to insist on modifications of the structure of the party-wall to the person entitled to the long lease of the entirety of the premises than to allow such a right to be exercised according to the caprice or convenience of the persons having leases of the separate floors. One might require one line of flue and another another, and so on. It seems to me that the lessee for a long term in receipt of the improved rents and profits is precisely the owner contemplated by this statute against whom the building owner is to have recourse; and I think that sect. 97, construed in this way, tallies exactly with it. That section enacts that in respect of expenses to be borne, the owner immediately entitled in possession to premises, or the occupier thereof, shall, in the first instance, pay such expenses, with this limitation, that no occupier shall be liable to pay any sum exceeding the amount of rent due or to become due from him in respect of the premises. The owner immediately entitled in possession *prima facie* would be the person to pay, and the clause has not contemplated cases where the tenant in fee might be in possession of the land. I think that the clause refers to the definition in sect. 3 of the word owner, and it means, "in the receipt of the improved rents and profits," and is put in contradistinction to an occupier living upon the premises, because the first is liable to the entire demand, and the other is liable only to the extent of the rent that might be due or become due from him. Therefore, if Mr. Hunt was bound to go against the under-lessees, instead of getting the whole from the original lessee, his remedies against them would be limited in each instance to the amount of the rent due or about to

accrue due from them to Harris. I think that this was what was in contemplation, making the party entitled to the permanent interest liable, because by sect. 74, if the "owner" cannot be found, or will not pay, the adjoining building owner has the right to sell the premises. What the section exactly means I do not pretend to say, and whenever a building owner comes to exercise such a right, it will behave him to act warily, and to sell only the interest of the party who makes default. But it would be strange if the premises could be sold and the fee-simple of one of the landowners, against whom the statute has not given any remedy, could be broken up in consequence of the default of a sub-lessee, who might have, as in the present case, an interest only for four years and a half. To my mind the statute has a thoroughly rational and convenient interpretation upon the principle I have stated. I do not mean to say but that the owner in fee-simple may be liable, and somebody else also. I do not pronounce any opinion upon that. But my opinion is, that an action will lie against the owner of the long term who has underlet the premises, and who is entitled to the rack rents, and not against the parties to whom he has underlet. The cases adverted to throw little light upon the question before us. In the case of *Evelyn v. Whichcord*, Evelyn was the owner in fee who had leased the land to one Searle at a peppercorn rent under a covenant with Searle to build houses on the land so let, and the claim made by Whichcord, who was the district surveyor, was for surveying the houses which Searle was building, and in respect of which Searle was the person for whom the service was done, and on his becoming bankrupt Whichcord made a claim for his fees under sect. 51 of this Metropolitan Buildings Act on Evelyn, the owner of the fee-simple. The judgment was, that he was not the owner within the definition in sect. 8, because, as stated in the judgment of Crompton, J., it is enacted that the word owner shall apply to a person entitled to the rents and profits, whereas a peppercorn rent cannot be called a rent or profit. I am reported to have only said in that case, "Under the peculiar circumstances of this case I read the statute as my Lord does." It was very clear to my mind in that case that it was the duty of the judges to look a long way round before they shifted the liability to pay the surveyor from the builder to the owner of the fee-simple. The statute makes the man entitled to receive the rents and profits liable. I consider that the beneficial interest was in the lessee of the term, and not in the person entitled only to a peppercorn rent. That case throws very little light upon the present one, because it has nothing to do with the rights created by proximity between building owner and adjoining owner; and it is contended that the liability of builders to surveyors is totally different from that of the adjoining owners to building owners. The same observation, to my mind, applies to the case of *Mourilyan v. Labalmondiere*. There a chapel had been let by Mourilyan to one Neill for twenty-one years, with a covenant by Neill to keep it in repair. I do not understand that it adjoined anything, or that there was any question of building owner or adjoining owner. The conditions of the lease were not performed, and the west end of the chapel was in a dangerous state, and the commissioners thereupon after a survey pulled down the west end as *per se* dangerous, not in the least degree because it was a benefit to the adjoining house. When the west end was pulled down, it was found that the residue of the chapel was also dangerous, whereupon a further order was made to pull down the residue of the chapel, and the residue was pulled down. These were the expenses in question; and then, as between Labalmondiere;

C. P.]

HUNT AND ANOTHER v. HARRIS.

[C. P.]

be in want of repair, and the plts. gave the deft. notice under sects. 83 and 85 of the Metropolitan Buildings Act 1855 (18 & 19 Vict. c. 122) of the work which required to be done to it. No arrangement was made between the plts. and the deft. as to the execution of the works and the proportion in which they were to be paid for, and eventually the plts. and the deft. were severally served with the notice set out in the declaration under sect. 72 of the Act. The plts. executed the works specified in the notice, and brought the present action to recover from the deft. the sums of 52l. 15s. 8d. and 33l. 14s. 1d., being respectively one moiety of the cost of rebuilding the wall and the cost of making good the internal works on the side of No. 37.

A rule was obtained on behalf of the deft. to enter the verdict for him, or a nonsuit, on the ground that he was not the owner within the meaning of the Metropolitan Buildings Act 1855.

By sect. 8 (the interpretation clause) of that Act the word "owner" is applied to "every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will."

Sect. 73 enacts that

If the owner or occupier to whom notice is given as last aforesaid fails to comply, as speedily as the nature of the case permits, with the requisition of such notice, the said commissioners may make complaint thereof before a justice of the peace; and it shall be lawful for such justice to order the owner, or, on his default, the occupier of any such structure to take down, repair, or otherwise secure, to the satisfaction of the surveyor who made such survey as aforesaid, or of such other surveyor as the said commissioners may appoint, such structure or such part thereof as appears to him to be in a dangerous state, within a time to be fixed by such justice; and in case the same is not taken down, repaired, or otherwise secured within the time so limited, the said commissioners may with all convenient speed cause all, or so much of such structure as is in a dangerous condition, to be taken down, repaired, or otherwise secured, in such manner as may be requisite; and all expenses incurred by the said commissioners in respect of any dangerous structure, by virtue of the second part of this Act, shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs.

By sect. 83, amongst the rights given to a building owner in relation to party structures is that of performing any necessary works incident to the connexion of party structure with the premises adjoining thereto.

By sect. 84 the adjoining owner may require the building owner to build chimneys, jambs, flues, &c. for his convenience.

By sect. 85

No building owner shall, except with the consent of the adjoining owner or in cases where any party structure is dangerous, in which cases the provisions hereby made as to dangerous structures shall apply, exercise any right hereby given in respect of any party structure unless he has given at the least three months previous notice to the adjoining owner by delivering the same to him personally, or by sending it by post in a registered letter addressed to such owner at his last known place of abode.

Sect. 88 provides that in cases of the repair or rebuilding of party structures the expense shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use each owner makes of such structure.

By sect. 97, when expenses are to be borne by the owner of premises, it is enacted, *inter alia*, that

1. The owner immediately entitled in possession to such premises, or the occupier thereof, shall in the first instance pay such expenses with this limitation, that no occupier shall be liable to pay any sum exceeding in amount the rent due, or that will thereafter accrue due from him in respect of such premises during the period of his occupancy.

2. If there are more owners than one, every owner shall be liable to contribute to such expenses in proportion to his interest.

3. Any occupier of premises who has paid any expenses under this Act, may deduct the amount so paid from any rent payable by him to any owner of the same premises, and any owner of premises who has paid more than his due

proportion of any expenses, may deduct the amount so overpaid from any rent that may be payable by him to any other owner of the same premises.

*Coleridge, Q. C.* and *Day* showed cause and contended that the plts. were entitled to charge the deft. as owner, and that the present case was distinguishable from *Mourilyan v. Labalmondiere*, 1 El. & El. 533, where the sub-lessee had the whole house. In this case the tenant who had the unstamped lease was in law a mere tenant from year to year, whatever might be his right to a lease in equity: (*Cowen v. Phillips*, 33 Beav. 18.)

*Hoggins, Q. C.* supported the rule and relied on *Mourilyan v. Labalmondiere*, cited above. He referred also to

*Evelyn v. Whichcord*, 1 E. B. & E. 126;

*Tidley v. Mollett*, 16 C. B., N. S., 298; 10 L. T. Rep. 380.

**ERLE, C.J.**—This was an action by one adjoining owner against another adjoining owner to recover a contribution in respect of a party-wall, which was in a dangerous state, and was ordered by the Commissioners of Police to be pulled down by virtue of the powers in the Metropolitan Buildings Act. For the purposes of the present rule it must be taken that the plts., the owners on the east side, had given all the notices necessary under the Act to entitle them to call upon Harris, the alleged owner on the west, for a contribution to this party-wall. It appeared at the trial that Harris held the premises on the west side of the plts. upon the terms upon which the greater part of the house property within the Metropolitan Buildings Act is held, namely, that he had a long lease, say for eighty or ninety years, probably at a ground-rent, and that he was making a considerable profit by the improved rents, having let out the premises in floors; that is, the ground floor by lease to one person for twenty-one years, and the two upper floors to another person under an agreement for seven years, which, according to the case of *Cowen v. Phillips*, before the M.R., gives him in equity all the rights of a legal estate for the seven years, though it was in law only an agreement. As to the residue of the premises there was no evidence how it was disposed of, but it was not occupied by Harris, and I assume for the purpose of the present judgment that it was occupied by a person unknown, for a term unknown. Harris being in receipt of the rents and profits in the manner that I have mentioned, the claim is made against him, and it seems to me that under sect. 8 he clearly is the "adjoining owner." By that section the word "owner" is applied to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation thereof other than as tenant from year to year. He was the owner in possession and in receipt of all the rents and profits of this tenement, and he is the adjoining owner. Then the party-wall having been pulled down and a claim made against him, coming within the definition of owner, he says, "I am not the owner, because I am not in the immediate occupation of the premises." But, as I read the statute, the action is properly brought against him. The wall was a dangerous structure. Part the second of the Metropolitan Buildings Act contains provisions for pulling down dangerous structures, and sect. 73 gives the building owner, who is to pull down the structure and build up another in its place, a right to demand repayment of the expenses. It says, "all expenses incurred" (I leave out the words, "by the said commissioners," because the building owner is in the place of the commissioners—all expenses incurred by the building owner—as I read it), "in respect of any dangerous structure shall be paid by the owner—"

C. P.]

HUNT AND ANOTHER v. HARRIS.

[C. P.]

of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of the repairs." It seems to me to be perfectly clear that the party upon whom the duty of payment is cast is the owner of the structure within the meaning of sect. 8, namely, a person in possession or receipt of the rents or profits of the premises, that is to say, the person having a beneficial lease, or entitled to it. The words "without prejudice to his right to recover the same from any lessee or other person liable to the payment of such expenses of repairs" clearly refer to the owner of a long term who has underlet the premises. There is a very great convenience in giving to the building owner, having all the rights of the commissioners, a recourse in the case of a party structure, to one owner of the entirety of the premises, an ascertained party from whom one payment may be obtained, and there would be a great inconvenience in holding that the building owner must have recourse to every one of the lessees of the adjoining house, where it is let out, as in the present case, to different sub-tenants for different terms. There is great convenience in requiring the owner of the entire house to pay the whole amount and adjust it with the sub-tenants according to their respective contracts. There would be great inconvenience in requiring that the building owner should have recourse to each of the sub-tenants to make them pay for the building up a party-wall. For, take the case of the man who has taken one floor of the house for a term, of which only four and a half years remain, it would be an enormous injustice to make him pay the entire expense of building up that portion of the party-wall which adjoins his floor. That the statute contemplated something in the nature of a permanent interest in the adjoining owner of the whole of the premises, appears from sect. 84, which enables the adjoining owner, while the process of restoration is going on, to require the building owner to build chimneys, jambs, recesses, and other like works belonging to the permanent structure of the adjoining house. It seems much more reasonable to give the right to insist on modifications of the structure of the party-wall to the person entitled to the long lease of the entirety of the premises than to allow such a right to be exercised according to the caprice or convenience of the persons having leases of the separate floors. One might require one line of flue and another another, and so on. It seems to me that the lessee for a long term in receipt of the improved rents and profits is precisely the owner contemplated by this statute against whom the building owner is to have recourse; and I think that sect. 97, construed in this way, tallies exactly with it. That section enacts that in respect of expenses to be borne, the owner immediately entitled in possession to premises, or the occupier thereof, shall, in the first instance, pay such expenses, with this limitation, that no occupier shall be liable to pay any sum exceeding the amount of rent due or to become due from him in respect of the premises. The owner immediately entitled in possession *primâ facie* would be the person to pay, and the clause has not contemplated cases where the tenant in fee might be in possession of the land. I think that the clause refers to the definition in sect. 3 of the word owner, and it means, "in the receipt of the improved rents and profits," and is put in contradistinction to an occupier living upon the premises, because the first is liable to the entire demand, and the other is liable only to the extent of the rent that might be due or become due from him. Therefore, if Mr. Hunt was bound to go against the under-lessees, instead of getting the whole from the original lessee, his remedies against them would be limited in each instance to the amount of the rent due or about to

accrue due from them to Harris. I think that this was what was in contemplation, making the party entitled to the permanent interest liable, because by sect. 74, if the "owner" cannot be found, or will not pay, the adjoining building owner has the right to sell the premises. What the section exactly means I do not pretend to say, and whenever a building owner comes to exercise such a right, it will behoove him to act warily, and to sell only the interest of the party who makes default. But it would be strange if the premises could be sold and the fee-simple of one of the landowners, against whom the statute has not given any remedy, could be broken up in consequence of the default of a sub-lessee, who might have, as in the present case, an interest only for four years and a half. To my mind the statute has a thoroughly rational and convenient interpretation upon the principle I have stated. I do not mean to say but that the owner in fee-simple may be liable, and somebody else also. I do not pronounce any opinion upon that. But my opinion is, that an action will lie against the owner of the long term who has underlet the premises, and who is entitled to the rack rents, and not against the parties to whom he has underlet. The cases adverted to throw little light upon the question before us. In the case of *Evelyn v. Whichcord*, Evelyn was the owner in fee who had leased the land to one Searle at a peppercorn rent under a covenant with Searle to build houses on the land so let, and the claim made by Whichcord, who was the district surveyor, was for surveying the houses which Searle was building, and in respect of which Searle was the person for whom the service was done, and on his becoming bankrupt Whichcord made a claim for his fees under sect. 51 of this Metropolitan Buildings Act on Evelyn, the owner of the fee-simple. The judgment was, that he was not the owner within the definition in sect. 8, because, as stated in the judgment of Crompton, J., it is enacted that the word owner shall apply to a person entitled to the rents and profits, whereas a peppercorn rent cannot be called a rent or profit. I am reported to have only said in that case, "Under the peculiar circumstances of this case I read the statute as my Lord does." It was very clear to my mind in that case that it was the duty of the judges to look a long way round before they shifted the liability to pay the surveyor from the builder to the owner of the fee-simple. The statute makes the man entitled to receive the rents and profits liable. I consider that the beneficial interest was in the lessee of the term, and not in the person entitled only to a peppercorn rent. That case throws very little light upon the present one, because it has nothing to do with the rights created by proximity between building owner and adjoining owner; and it is contended that the liability of builders to surveyors is totally different from that of the adjoining owners to building owners. The same observation, to my mind, applies to the case of *Mourilyan v. Labalmondieri*. There a chapel had been let by Mourilyan to one Neill for twenty-one years, with a covenant by Neill to keep it in repair. I do not understand that it adjoined anything, or that there was any question of building owner or adjoining owner. The conditions of the lease were not performed, and the west end of the chapel was in a dangerous state, and the commissioners thereupon after a survey pulled down the west end as *per se* dangerous, not in the least degree because it was a benefit to the adjoining house. When the west end was pulled down, it was found that the residue of the chapel was also dangerous, whereupon a further order was made to pull down the residue of the chapel, and the residue was pulled down. These were the expenses in question; and then, as between Labalmondieri;

C. P.]

COMLEY v. CARPENTER.

[C. P.]

who was the Commissioner of Police, and Mourilyan, the owner in fee, the court came to the conclusion that Mourilyan ought not to have been proceeded against in the first instance. There is, I think, a distinction between that case and the present; but in one point of view it is in favour of the judgment I have come to. The court there say, that the action ought not to have been brought against the owner of the fee, but against the intermediate lessee entitled to the rents and profits. I consider that Neill, during his lease for twenty-one years under a covenant to repair, stood exactly *in pari jure* with Harris in the present case. According to the terms of the lease, Harris was making improved rents by letting to the under-tenants who held from him, and although the case does not say whether he got anything by the investment of the money, he intended it to produce a profit. So Neill was making a profit of the chapel by letting parts of it, for I assume that he was making a profit by letting the pews, and he had twenty-one years of the entirety under a covenant to put it in repair, and he was bound to rebuild it if it was falling down or was taken down by the Commissioners of Police in consequence of its bad condition, and he was the person within the reasoning of that decision who ought to have been called on to pay for the very reason that Harris ought to be called on here. It would be a source of infinite dispute and litigation if, without making Harris pay the whole, the building owner had to go against the under-tenants. Harris has a remedy against each of them. I am obliged to Mr. Hoggins for bringing these matters forward, and in coming to the conclusion at which I have arrived I do not in the smallest degree contravene any of the authorities referred to.

BYLES, J.—After the manner in which my Lord has dealt with this case, I will only add a very few words. I very much rejoice that we have had an opportunity of reconsidering the whole question this morning, and of hearing Mr. Hoggins. I cannot conceive, as the case at present stands, that any doubt can now remain upon the question. I think it right to say that, as far as I may venture to pronounce an opinion, all the three cases of *Mourilyan v. Labandiere*, *Evelyn v. Whichcord* and *Cowen v. Phillips* are rightly decided. In the first case it was held that the party who was a tenant for twenty-one years under a covenant to repair was the party liable, and further that he was the only party liable, and that his remedy was by contribution amongst the other parties who were liable to him. It is quite unnecessary to discuss the reasons why, but, on a full examination of the statute, I come to the conclusion that there is no reason whatever for impugning the soundness of that decision. The next case, as my Lord has pointed out, is the case of *Evelyn v. Whichcord*, where it was held that a receiver of a peppercorn rent was not in the beneficial occupation of the rents and profits, and therefore could not be the owner within the meaning of the statute. The third case was *Cowen v. Phillips*, and it is to this effect, that though a man, in point of law, may be a tenant from year to year, yet, if he has a contract for a term, he must be taken in a court of equity to be possessed of that interest, because equity considers that to be done which is contracted to be done. It is to be observed that a statute must receive the same construction in a court of law as in a court of equity. That case certainly shows, that if a person has a contract for a beneficial term, paying rent and putting into repair for twenty-one years, he would be the party liable to pay in the first instance under the statute. Every one of those cases is quite consistent with our decision here. This is an action by a building owner against the adjoining

owner for contribution. *Prima facie* the deft. is the plt.'s companion in the ownership of these premises. In what way did not exactly appear. According to the definition of party-wall, persons may have divided interests in party-walls; they may be joint tenants or tenants in common; or, in the case of parallel freeholds, the upper portions of a wall may belong to the owner on one side, and the lower portions to the owner on another; but in this case, whatever his interest, it is plain that the deft. is the "owner" both within the meaning of the Act of Parliament and in the popular sense of the word. It seems to me he is more than that; he is the occupier of the party-wall. It appears that the ground-floor and the basement are let to one tenant, and the two upper floors are let to another tenant; and, by the terms of a letting which we have not ascertained, the residue of the house, or a portion of it, is let to another. What is there to show that the demise of these tenements carries any interest whatever in the party-wall? Extreme cases, it is said, ought not to be put; but, on the other hand, extreme cases test principles. It seems to me that in this case it is plain the deft. is owner, and as far as I can see he is the occupying owner; and there is nothing in the case to show that any other person than himself is either the owner or occupier of the party-wall. We do not find that he demised any portion of the party-wall. That is a point upon which the case is silent. I should be astonished, if I took a lease for a term greater than from year to year, if I was told that it included a demise of a portion of the party-wall. After what my Lord has said I quite agree with his decision; and I cannot say that I now entertain any doubt that this verdict ought to stand.

M. SMITH, J.—I am of the same opinion. It may be difficult to put a definite construction upon this statute. The best the court can do is, to look narrowly to the facts of each case. I think that in this case the deft. answers the description of "owner" in the statute. He is in the immediate possession of the whole of the rents and profits, and therefore the beneficial owner; and the evidence does not satisfy me that there are other persons who answer the description, and who ought, in the first instance, to be sued. There may be other persons who are liable to contribute; but finding that the deft. is a person clearly within the description of owner in the statute, and the evidence not satisfying me that there are other persons within the description who ought in the first instance to be sued, I see no reason for disturbing the verdict. I thoroughly agree with my Lord that this is the best construction which the court has now put upon the statute. I quite agree with the decision of the M. R. in *Cowen v. Phillips*, but our judgment does not turn on the point raised in that case. On the other point I think the plt. is entitled to keep the verdict, and therefore I agree that the rule should be discharged.

Rule discharged.

Attorney for the plt., C. Harcourt.

Attorney for the deft., W. P. Scott.

Friday, April 28, 1865.

COMLEY (app.) v. CARPENTER (resp.)

*Local Turnpike Act—Cirencester Roads Act 1862—Construction—Liability to subsequent tolls on the same day—Stage coach or waggon—16 & 17 Vict. c. 90, schedule D.*

*A Local Turnpike Act imposed certain tolls on horses drawing (1) any coach, stage-coach, diligence, van, caravan, sociable, &c.; (2) any waggon, wain, cart, van,*

C. P.]

COMLEY v. CARPENTER.

[C. P.]

caravan, dray, &c.; only one toll to be taken in respect of such horse on one day, except in the case of a "stage-coach, diligence, omnibus, van, caravan, chaise, cart, chair, break, or stage waggon, or other stage carriage conveying passengers or goods for hire or reward," on which tolls were imposed every time of passing or repassing. The app. was a common carman, travelling on stated days of the week through one of the turnpikes at which tolls were collected under the Act, with a covered caravan or cart on four wheels, drawn sometimes by one and sometimes by two horses, but not travelling at a rate exceeding four miles an hour. He used his caravan chiefly for conveyance of goods, but took passengers on occasions. The caravan was not licensed under the Stage Carriages Act, but duty was paid for it as for a carriage used by a common carrier under 16 & 17 Vict. c. 90, schedule D.:

*Held, that the app.'s caravan was liable to pay toll on repassing through the turnpikes:*

*Katwell v. Richmond distinguished.*

Case stated by justices under 20 & 21 Vict. c. 43.

## CASE.

The resp. having appeared upon summons before us the undersigned, to answer to the said information, it was thereupon proved upon the part of the said app., that he is a common carrier, living at Cirencester, and travelling between that town and the town of Cheltenham every Tuesday and Thursday, that he so travels sometimes with a covered caravan or waggon, on four wheels, and sometimes with a covered caravan or cart on two wheels, drawn respectively by one or two horses, as the weight of a load or the state of the roads may require, and travelling at a pace not exceeding four miles an hour. That the said app. uses such caravans principally for carrying goods for hire, but that he frequently conveys therein also passengers for hire; that he is not licensed under the Stage Carriages Act for either of such caravans, but pays the duties of 2*l.* 6*s.* 8*d.* and 1*l.* 6*s.* 8*d.* for the same respectively as for carriages used by a common carrier under the 16 & 17 Vict. c. 90, schedule D. That on the day on which the alleged offence is charged to have been committed, being Thursday, the 16th Feb. 1865, the app. travelled as usual from Cirencester to Cheltenham and back, with the said covered caravan or cart on two wheels, and which on that occasion was drawn by one horse. That on the morning of the day in question the app. conveyed goods in such caravan from Cirencester to Cheltenham, and in the afternoon conveyed goods therein from Cheltenham to Cirencester, and in each case delivered such goods according to the directions thereon, and received payment for the carriage and delivery thereof according to a usual scale adopted by him. That he also, on the day in question, conveyed one passenger on each journey, and received payment of such passenger. That the app. travels from Cirencester to Cheltenham along the turnpike-road between these towns, and which is one of the district roads which are repaired and maintained under the provisions of the Cirencester Roads Act 1862. That there is a turnpike or toll-gate upon such road in the parish of Stratton, called the "Stratton-gate," and that the resp. is the collector of tolls at such gate. That on the morning of the day in question the app. passed through the said gate on his way to Cheltenham, and was charged by the resp. a toll of 6*d.* for the horse drawing the said caravan, and paid the same, and that on the afternoon of the same day (but before twelve o'clock at night), the app. repassed through the said gate on his return to Cirencester, and was then again charged by the resp. a toll of 6*d.* for the same horse drawing the same caravan, which second toll the app. thereupon paid under protest.

The Cirencester Roads Act 1862 was put in evidence. The preamble of such Act recites an Act passed in the sixth year of the reign of Geo. 4, c. cxliii., intituled "An Act for maintaining and improving certain roads leading to and from the town of Cirencester in the county of Gloucester," which last-mentioned Act was also put in evidence, and contains the following sections:

And be it further enacted that it shall and may be lawful for the said trustees, and for any person or persons to be appointed collector or collectors of the tolls to be taken by virtue of this Act, to demand and take the tolls hereinafter mentioned, at the several or respective tollgates, or turnpikes, or toll-houses, or side gates, or side bars, or chains which shall be erected or placed by virtue of this Act in, upon, across, or on the side or sides of the said roads, and on every day, such to be computed from twelve of the clock at night to twelve of the clock in the next succeeding night (that is to say),

For every horse or other beast drawing any coach, stage-coach, diligence, van, caravan, sociable, berlin, landau, chariot, vis-à-vis, barouche, phaeton, chaise, marine calashe, curriclo, chair, gig, whiskey, hearse, litter, chaise, or other such like carriage, the sum of 9*d.*

For every horse or other beast drawing any waggon, wain, cart, or other such like carriage having the felles of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, the sum of 6*d.*, and having the felles of the wheels thereof of the breadth of four and a half inches or upwards, and less than six inches at the bottom or soles thereof, the sum of 7*d.*, and having the felles of the wheels thereof of less breadth than four and a half inches at the bottom or soles thereof, the sum of 9*d.*

For every horse, mule, or ass, laden or unladen, and not drawing, the sum of 2*d.*

For every drove of oxen or neat cattle, the sum of 1*s.* 8*d.* per score, and so in proportion for any less number, and for every drove of calves, swine, sheep, or lambs, the sum of 10*d.* per score, and so in proportion for any less number:

Which said sums of money or tolls shall be demanded and taken before any horse, mule, ass, beast, or other cattle whatsoever shall be permitted to pass through any tollgate, or turnpike, or side-gate, or side-bar, or chain which shall be erected or placed by virtue of this Act in, upon, or across the said roads, or on the sides thereof, or any part thereof, and which said respective tolls shall be and are hereby vested in the said trustees and shall be applied for the purposes of this Act in manner hereinafter directed.

Provided always, and be it further enacted, that in case the toll hereby authorized to be taken shall have been paid for the passing of any horse, beast, or cattle through any of such tollgates, turnpikes, or side-gates, such horse, beast, or cattle shall, upon a ticket denoting such payment on that day being produced, be permitted to pass toll-free through the same tollgate, turnpike, or side-gate, and also through such other gate or gates (if any) as the ticket for such payment shall free, at any time or times during the same day, to be computed as aforesaid, except any such horse, beast, or cattle shall return drawing a different waggon, wain, cart, or other such carriage, in which case such horse, beast, or cattle shall be again liable to toll in respect thereof, anything in this Act contained to the contrary thereof in anywise notwithstanding.

Provided also and be it further enacted, that the tolls hereby made payable for and in respect of horses or beasts drawing any stage-coach, diligence, van, caravan or stage-waggon, or other stage-carriage conveying passengers or goods for hire or reward, shall be payable and paid every time of passing or repassing along the said roads or any of them.

The case then set out sects. 13 and 16 of the Act of 1862, which substantially re-enacted the toll-imposing clauses of the previous Act; imposing, however, the toll of 6*d.* on every horse drawing any "waggon, wain, cart, van, caravan, dray, timber-carriage, steam-engine, or other machinery," and exempting certain vehicles from a second payment of tolls on the same day by the following clause:

SECT. 20. The tolls hereby made payable for or in respect of horses or beasts drawing any stage-coach, diligence, omnibus, van, caravan, chaise, cart, chair, break, or stage-waggon, or other stage-carriage conveying passengers or goods for hire or reward shall be payable and paid every time of passing or repassing along the said roads or any of them.

On the hearing of the said information it was treated as an admitted fact on both sides that under the said Acts the sum of 6*d.* demanded and paid in respect of the app.'s caravan on the first time of the same passing the said gate as before stated, was the toll legally and properly payable in respect thereof; but it was not proved or admitted before us whether such toll was payable under the said Act of 6 Geo. 4 as continued by sect. 13 of the Act of 1862, or

C. P.]

COMLEY v. CARPENTER.

[C. P.]

whether the same was payable by virtue of sect. 16 of the said Act of 1862.

The app. contended:

1. That his caravan was not a carriage conveying passengers or goods for hire or reward within the meaning of sect. 20 of the said Act of 1862, and that, therefore, the horse drawing the same was not liable to pay toll on each time of passing through the said gate.

2. That, according to the construction of such section, the stage-carriage thereby made liable to pay toll every time of passing along the turnpike-road means a stage-carriage licensed as such under the Stage Carriage Act (2 & 3 Will. 4, c. 120).

The resp. contended:

1. That the caravan driven by the app. was a stage-carriage conveying goods for hire or reward within the meaning of the said section, and that, therefore, the horse drawing the same was liable to pay toll on each time of passing through the said gate.

2. That, according to the true construction of such section, a carriage which is used as a regular conveyance for goods and passengers between certain places at stated times on fixed dates, and in respect of which duty is paid under the 16 & 17 Vict. c. 90, schedule D, as a carriage used by a common carrier, is a stage-carriage and liable to tolls on each time of passing, notwithstanding that by reason of such carriage travelling at a pace not exceeding four miles an hour, the same may not be licensed or required to be licensed under the Stage Carriage Act.

3. That, by giving the said section the construction contended for by the app., no meaning is attached to the words "or goods" contained therein, inasmuch as a stage-carriage is defined by the Stage Carriage Act, and means "a carriage used or employed for the purpose of carrying passengers for hire."

Whereupon we, the said justices, were of opinion that the app.'s caravan was a stage-carriage conveying goods for hire within the meaning of the said Act, and that the same was liable to toll on each time of passing and repassing along the said turnpike-road, and we therefore dismissed the said information.

The question for the opinion of the court is, whether, upon the above facts, the app. was legally chargeable with the toll of 6d. in respect of the said caravan, on the occasion of his repassing along the said turnpike-road on the day mentioned in the said information.

Kingdon appeared for the app., and relied on the judgment of the court in *Eatwell v. Richmond*, 12 L. T. Rep. N. S. 52.

The resp. did not appear.

WILLES, J.—In this case the court has sustained considerable inconvenience from the fact that no counsel was instructed to argue on the part of the resp. Probably, from having heard only the argument on behalf of the app., my mind has fluctuated considerably; but at last, on the best consideration which I have been able to give to the case, I have come to the conclusion that the decision of the justices was right. I am not desirous to throw any doubt on the decision of the court in the case of *Eatwell v. Richmond*. I give my entire assent to that case. But comparing the Act of Parliament there with that now before us, it appears to me that the expression "conveying passengers or goods" in this Act is substantially different from that on which a construction was put in *Eatwell v. Richmond*. The conclusion to which I have come in this case is similar to that to which the court there came, be-

cause, whereas it was there held that, on the true construction of the statute, a stage-carriage meant to be excepted from the exemption was a stage-carriage licensed as such by the Act relating to the Inland Revenue, without reference to the particular employment of the carriage at the time of passing through the gate; so here my impression is, that all carriages which fall within the more extensive description of stage-carriage in this case must pay on repassing through the gate, without reference to the fact of there being actually passengers in them, or goods, provided they are carriages intended to be stage-carriages for the conveyance of passengers or goods, and are travelling on the road for that purpose. The expression "for the conveyance of passengers or goods" may be intended to denote either the employment of the carriage at the moment when it passes through the turnpike-gate, or the employment for which it is destined, and in which it is engaged at the time, although not at the moment earning money for any particular person or goods. I think that the latter is the true construction, and that the app.'s carriage fell within it, and that the conclusion arrived at by the magistrates was correct. The inconvenience of requiring a search to be made of each carriage coming through the gate was pointed out in *Eatwell v. Richmond*, and my decision here follows out the same train of argument. More effect will be given to the language of the Act, especially to the words "or goods," by adopting the decision of the magistrates, than by putting on the words the construction suggested by Mr. Kingdon, to which my mind inclined at first.

BYLES, J.—I am of the same opinion. It seems to me that the vehicle might fall within both of the single-toll imposing clauses. The first of them seems to comprehend vehicles of a superior class to the second, but the app.'s caravan or cart might fall within either of them. This, however, is immaterial. If any ordinary vehicle, belonging to one owner, goes through the gate once and returns on the same day, it does not pay the toll again, because the toll would fall twice on the same person; but where passengers or goods are carried, the incidence of the toll is on the passengers or goods, and the toll is to be paid twice. The app.'s vehicle falls clearly within the double-toll imposing clause. A stage-coach means, I conceive, a vehicle regularly plying from place to place. The case finds that that was done by the app.'s vehicle, therefore it was a stage, probably a stage caravan or stage waggon. This being so, supposing it is adapted to carry passengers or used to carry passengers at times, or, to take the narrowest definition, supposing it to be both adapted and used for carrying passengers, it comes within the definition. I agree with my brother Willes that no doubt is to be thrown on the case of *Eatwell v. Richmond*. I was not present at the argument in that case; nor am I so conversant with the Act of Parliament on which it depended as to be able to form any opinion upon it without further consideration, but so far as I do see my way to a conclusion upon it, I agree with the decision of the court.

KEATING, J.—I am of the same opinion. The difficulty in Mr. Kingdon's construction which I have not been able to overcome is, that he virtually strikes out of the Act of Parliament the words "or goods." Our decision does not conflict with that in *Eatwell v. Richmond*. The clause in the Act there construed alluded to carrying passengers, and was quite different to that which applies to the present case.

M. SMITH, J.—I also think that the decision of the justices was right. The principal busi-

C. CAS. R.]

REG. v. SHAW.

[C. CAS. R.]

ness of the app's cart was the conveyance of goods for hire, and though it occasionally carried passengers, it falls within 25 & 26 Vict. c. 13, as being a stage-coach conveying goods for hire. It is said that this is not so, because it is not a coach requiring a licence under the licensing Act, but neither does any carriage used for the conveyance of goods for hire. It is impossible otherwise to give effect to the words "or goods." The cart is, as pointed out by my brother Byles, hired by different persons on the two journeys. The case of *Eatwell v. Richmond* is distinguishable on the grounds pointed out by my learned brothers who were members of the court at that time.

*Judgment for the resp.*

Attorneys for the app., *Lewis, Wood and Street.*

### CROWN CASES RESERVED.

Reported by J. THOMPSON, Esq., Barrister-at-Law.

*Saturday, April 29, 1865.*

(Before ERLE, C. J., CHANNELL, B., BLACKBURN, MELLOR and SMITH, JJ.)

REG. v. SHAW.

*Perjury—Sunday beer trading—Information—Summons—Corroborative evidence—Indictment.*

*An indictment, for perjury, alleged that after the 18 & 19 Vict. c. 118, K. was licensed to sell beer by retail on the premises; that he was duly summoned to appear before justices acting in and for the county of L. to answer an information and complaint for selling beer in his house at B. during the prohibited hours on a Sunday; that K. appeared at the petty sessions; and that the deft. appeared as a witness for him and committed the alleged perjury.*

*At the trial it appeared that a policeman reported the case to his superintendent, who went to the clerk of the justices and narrated what the policeman had said, whereupon the clerk filled up a blank summons against K. The superintendent took the summons to a justice, who read it and signed it without further inquiry, and the summons was served on K. K. appeared in pursuance of it, and called the now deft. as his witness:*

*Held, that it was not necessary on the trial of the indictment to prove that an information was laid as the basis of the summons:*

*That if a party appears before justices and allows a charge which they have jurisdiction to hear to be proceeded with without objecting, he waives the want of an information or summons:*

*That justices of the county, under the 18 & 19 Vict. c. 118, have jurisdiction to hear an offence against a beer-retailer of Sunday trading during the prohibited hours, and it is not necessary to allege that they are justices acting in and for the petty sessional division.*

*Quære, whether, where the indictment alleges that a party has been summoned to answer such a charge before magistrates, that allegation ought not to be proved:*

*Held also, that the corroborative evidence given at the trial was sufficient.*

Thomas Shaw was tried and convicted before me at the last assizes, 1865, at Liverpool.

The following is a copy of the indictment:

Lancashire to wit.—The jurors of our Lady the Queen upon their oath present, that heretofore and after the making of a certain Act of Parliament made and passed in the session of Parliament, holden in the eighteenth and nineteenth years of the reign of Her present Majesty, intituled "An Act to repeal the Act of the seventeenth and eighteenth years of the reign of Her present Majesty, for further regulating the sale of beer and other liquors on the Lord's day, and to substitute other provisions in lieu thereof;" to wit, on the 11th day of Dec.

A. D. 1864, at the township of Bartonwood, in the county of Lancaster and within the petty sessional division of Warrington in the county aforesaid, one Samuel Kilshaw was a person licensed to sell beer by retail to be drunk on the premises.

And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards and within the space of six calendar months from the day of the committing of the alleged offence next hereinafter mentioned, to wit, on the 11th Dec. in the year last aforesaid, the said S. Kilshaw was duly summoned to appear before such of Her Majesty's justices of the peace acting in and for the county of Lancaster aforesaid (being the county and place where the alleged offence next hereinafter mentioned was then and there and therein alleged to have been committed by him the said S. Kilshaw, as therein mentioned), to answer before such justices a certain information and complaint against the said S. Kilshaw then and there preferred and laid against him, and then and there depending before the said justices, for that he, the said S. Kilshaw, had then and there and within the county and place aforesaid, unlawfully committed a certain offence against the said statute, to wit, that he, the said S. Kilshaw, on the 11th Dec. 1864, the said day being Sunday, at the township of Bartonwood, in the county of Lancaster, being then and there a beerhouse keeper, and duly licensed to sell beer, ale and porter by retail to be drunk and consumed in his house and premises then situate, did open his house so licensed as aforesaid for the sale of beer, ale and porter, after the hour of three in the afternoon and before the hour of five in the afternoon, to wit, at the hour of forty minutes past four in the afternoon, contrary to the statute, &c.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said S. Kilshaw duly appeared at the petty sessions of the petty sessional division of Warrington, holden at the township of Newton-in-Mackerfield, in the county of Lancaster, the same being the county division and place where the said alleged offence against the said statute was then alleged to have been committed by him the said S. Kilshaw as aforesaid, before Benjamin Pierpoint, Esq. and the Rev. Harold Hopley Sharlock, being and acting as two of Her Majesty's justices of the peace in and for the county aforesaid, and thereupon then and there, to wit, on the 31st Dec. 1864, at the township of Newton-in-Mackerfield, in the county of Lancaster, before the said justices of the peace then and there having competent authority then and there to hear and determine the same, the said charge and complaint against the said S. Kilshaw for the said alleged offence aforesaid then and there depending as aforesaid before the said justices aforesaid came in due form of law, to be then and there heard and determined by and before them the said justices as aforesaid.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that upon the said hearing and determination of the said charge and complaint so depending as aforesaid before the said justices as aforesaid, Thomas Shaw, late of the township of Newton-in-Mackerfield, in the county of Lancaster, appeared as a witness for and on behalf of the said S. Kilshaw, and was then and there in due form sworn and took his corporal oath on the Holy Gospels of God, that the evidence he the said T. Shaw would then and there give should be the truth, the whole truth, and nothing but the truth, so help him God, by and before the said justices as aforesaid, and then and there having competent authority and jurisdiction to administer the said oath; and the jurors aforesaid upon their oaths aforesaid, do further present, that upon the said hearing of the said information and complaint so depending as aforesaid before the said justices as aforesaid, it became and was a material question whether the said T. Shaw was in the house of the said S. Kilshaw at all on Sunday, 11th Dec. 1864, and whether he had seen a certain policeman, to wit, John Todd, then and there and before the said justices then pointed out and shown to him the said T. Shaw, and whether he the said T. Shaw had been at Bartonwood aforesaid on the day and year last aforesaid, or within a fortnight previous thereto.

And the jurors aforesaid upon their oaths aforesaid do further present that the said T. Shaw, not having the fear of God, before his eyes nor regarding the laws of this realm, but seduced and moved by the malice and instigation of the devil, unlawfully, falsely, knowingly, wilfully and corruptly did swear and depose before the said justices aforesaid, and upon the hearing and determination aforesaid of the said information and complaint so depending as aforesaid, in substance and to the effect following: that is to say, "I was never in the house (meaning the beerhouse of the said S. Kilshaw) at all that day (meaning the said Sunday the 11th Dec. 1864), and never saw the policeman (meaning the said J. Todd) before in my life. I never was in Bartonwood (meaning the township of Bartonwood aforesaid) at all that day (meaning the said Sunday last aforesaid). I had not been in it (meaning the township of Bartonwood aforesaid) for a fortnight before that day (meaning the said Sunday last aforesaid)." Whereas in truth and in fact he the said T. Shaw was, upon Sunday the 11th Dec. 1864, in the house of the said S. Kilshaw and saw the said J. Todd there then, as he the said T. Shaw at the time he so swore then well knew. And whereas in truth and in fact the said T. Shaw had been at Bartonwood aforesaid on the day and year last aforesaid and within a fortnight previous thereto, as he the said T. Shaw at the time then well knew. And so the jurors aforesaid upon their oaths aforesaid do say that the said T. Shaw on the day and year last aforesaid, in the township aforesaid in the county aforesaid, did unlawfully commit wilful and corrupt perjury, to the great dis-



[C. CAS. R.]

REG. v. SHAW.

[C. CAS. R.]

pleasure of Almighty God, in contempt of our Lady the Queen and her laws, and against the peace of our said Lady the Queen, her crown and dignity.

On arraignment before plea pleaded it was objected by the prisoner's counsel that the indictment did not show jurisdiction in the said justices to hear and determine the information against the said S. Kilshaw.

First, because, although it was alleged that the offence had been committed within the petty sessional division of Warrington, it was not alleged, nor did it anywhere appear, that the said justices had any jurisdiction whatever within such petty sessional division.

Secondly, because it did not show that the information against Kilshaw contained any offence over which they had any jurisdiction.

It was afterwards—that is to say, in the course of inquiry into the facts of this case—proved that the two magistrates named in the indictment did, in Kilshaw's case, act as such within the petty sessional division of Warrington.

Again, the only evidence at the trial before me of the fact of any information or complaint ever having been made against Kilshaw was this, namely, the policeman Todd reported to the superintendent the fact of his having seen the prisoner in Kilshaw's beerhouse between the hours of three and five p.m. on the day in question, and the circumstances thereof.

The superintendent submitted the facts and circumstances contained in this report to the magistrates' clerk, and he thereupon filled up a blank summons against Kilshaw. This blank summons so filled up was taken by the superintendent to the magistrate, who, after reading it, signed it. It was then put into the officer's hands for service. This was stated to be the usual practice in such matters. The magistrate who signed such a summons has always any explanation he may require made to him. In this case he made no inquiry into the particulars, facts, or circumstances, and no statement of any kind was in fact ever made to him. The summons against Kilshaw was not produced upon the trial before me, nor was any other evidence given of its contents or about it than what I have stated. At the close of the case for the prosecution the prisoner's counsel objected that there was, in fact, no information or complaint to justify the issuing of a summons against Kilshaw, and therefore that the whole proceeding before the magistrates was *coram non iudice*.

Again, to prove the perjury assigned, a policeman of the name of Todd was called. He swore, amongst other things, that he had seen the prisoner in Kilshaw's beerhouse in Burtonwood, and that he had spoken to him there at twenty minutes to five p.m., or thereabouts, on the day in question.

To confirm Todd two other witnesses were called for the prosecution. One of them swore that he had seen the prisoner Shaw in the village of Burtonwood (the village in which Kilshaw's beerhouse is) at two o'clock in the afternoon on the same day. The other witness swore that she had seen the prisoner between three and four o'clock in the afternoon of the same day on the road leading to Kilshaw's house, and when she last saw him he was close to Kilshaw's beerhouse. The direction the prisoner was then taking led also, as was proved, to the house of the prisoner's brother, where, according to the witnesses for the prisoner, he was, in fact, at the very time when, according to Todd's statement, he was in Kilshaw's house drinking ale.

It was contended upon this part of the case by the counsel for the prisoner, that there was no corroboration of the principal witness Todd, in support of the assignment of perjury. I overruled all these objections. A great number of witnesses was then

called for the prisoner with a view to contradict the witness Todd, and to show the truth of the prisoner's statement before the magistrates, namely, that he never was at Kilshaw's house on the Sunday in question, but that he was, in fact, at the house of his brother drinking tea at the time, when, according to Todd's statement, he was drinking beer in Kilshaw's house. One of the witnesses for the defence (one Sarah Bury) admitted that she saw the prisoner in the village of Burtonwood on the day in question, between three and four o'clock in the afternoon. I left all the facts and circumstances of the case, at once voluminous and conflicting, to the jury.

He was convicted, and I at once sentenced him to twelve calendar months' imprisonment, with hard labour.

He was, however, the next day, with the sanction of Mellor, J., let out on bail.

The opinion and advice of the Court is desired on the case, especially on the following points:

1. Is the indictment sufficient?
2. If sufficient, was the production of, or further proof of, an information or complaint, as the basis of the summons against Kilshaw, indispensably necessary on the prisoner's trial?
3. Is the last objection as to want of corroboration of any value under the circumstances?

GEORGE ATKINSON.

*Cottingham* for the prisoner.—The conviction was wrong. First, the non-production of the information before the magistrate and the summons was fatal to the indictment. In *Reg. v. Whybrow*, 8 Cox C. C. 438, where the prisoner was indicted for wilful and corrupt perjury committed at a police court upon the hearing of a summons, it was held essential that the summons should be produced. [BLACKBURN, J.—In this case it does not appear that the point was taken at the trial or anything reserved about that. For all that appears the prisoner may have had the summons and would not produce it, and secondary evidence may have been given of it. CHANNELL, B.—In the case cited the Court could not see the materiality of the answers of the deft. until it saw the charge in the summons.] Here the information was the basis of the jurisdiction before the justices, and in the absence of the summons there was not proper evidence of the charge depending before them. And before the magistrate could sign the summons he must have an information laid before him. But, in point of fact, there was no information laid before the magistrate; but the magistrate's clerk drew up the summons upon the report of a police superintendent, who reported what a policeman had told him. And further, the summons so drawn up was not produced at the trial. This, it is submitted, is a fatal objection,

*Paley* on Conv. by Macnamara, 54;

*Cripps v. Durdex*, 1 Sm. L. C. 649;

*Reg. v. Millard*, Dears. C. C. 167; 6 Cox C. C. 150;

*Stone's J. P.* 55.

Secondly, as to the corroboration of the principal witness. The corroborative testimony must not be circumstantial merely, but probative: (Best on Ev. 672.) It should be of such force that, in a case where the testimony of one witness is sufficient, it would prove the case:

*Reg. v. Hurrell*, 3 Fos. & Fin. 271;

*Roscoe Law of Ev. in Crim. Cas.* 863, edit. 1861;

*Reg. v. Yates*, 1 Car. & M. 187;

*Reg. v. Boiliter*, 2 Den. C. C. 896;

*R. v. Champneys*, 2 Lew. C. C. 52.

Here the question was, whether Shaw was in Kilshaw's beerhouse between three and five o'clock on the Sunday in question, and the utmost corroborative evidence came to was, that he was seen near the house at that time. Next, as to the sufficiency of the indictment. First, the indictment leaves it

C. CAS. R.]

REG. v. SHAW.

[C. CAS. R.]

in doubt as to the statute in which it is framed. The indictment merely states that after the passing of a statute made in the session held in the 18th and 19th Vict., &c. Kilshaw was a person licensed to sell beer by retail, &c., &c. The proceedings may have been under that Act or under the 1 Will. 4, c. 64, or the 4 & 5 Will. c. 85. Then it is not alleged that the justices were acting in and for the place where the summons was heard: (*Reg. v. Rawlings*, 8 C. & P. 439.) [ERLE, C.J.—The 1 Will. 4 gave the petty sessions the jurisdiction, and the 18 & 19 Vict. c. 118, s. 5, gave jurisdiction to any justice of the county.] Here the indictment shows that the charge was preferred at the petty sessions; and it should also have averred that the justices were acting in and for the division in which the offence took place:

*Reg. v. Dowlin*, 5 T. R. 318.

No counsel appeared to argue for the prosecution.

ERLE, C. J.—I think that this conviction must be affirmed. Kilshaw was proceeded against before two magistrates on a summons, and he was convicted of keeping open a beerhouse during the prohibited hours. The 18 & 19 Vict. c. 118, s. 5, says that every person who shall offend against that Act shall be liable upon summary conviction for the same before any justice for the county, riding, division, &c., or place where the offence shall be committed. Then Kilshaw being proceeded against for the offence under that statute, a policeman swore that Shaw was the person to whom the beer was supplied, and that he saw him in Kilshaw's house. To rebut that, Shaw was called for Kilshaw, and he swore not only that he was not in Kilshaw's house at all on the day in question, but that he had not been in it for a fortnight before that day. The indictment alleges that Kilshaw was summoned to appear before such of Her Majesty's justices acting in and for the county (being the county and place where the offence was alleged to have been committed) to answer a certain information and complaint preferred against him and depending before the said justices. Now, no summons was proved at the trial of this indictment, and no written information warranting the issuing of the summons was proved; but, in my opinion and in my experience, where a party appears before a justice charged with an offence within his jurisdiction, the justice has jurisdiction to dispose of the case without a summons or without any information in writing being laid before him, unless the statute creating the offence imposes the obligation of not hearing the case without these preliminaries. The whole of the proceedings may be drawn up at the time of the hearing. This indictment is so framed as to give countenance to the objection of the non-production of the summons at the trial, because it contains an allegation that a summons was duly issued to bring Kilshaw before the magistrates. As far as I can make out, no summons was produced at the trial, but there was a great deal of evidence to show that a summons had been issued, and I do not find it stated in the case that the objection was taken that the summons was not produced. It may have been there in court in the officer's pocket, and would have been produced if called for. We have only to decide on the points reserved, of which this is not one. The learned counsel for the prisoner then took an objection that there was no written information justifying the issuing of a summons against Kilshaw. A written information is not necessary for issuing a summons, and this objection falls to the ground. As to the objection to the indictment for not showing that the justices were acting in and for the petty sessions where the offence took place, I read the 18 & 19 Vict. as creating a different tribunal from that created by the 1 Will. 4, which

gave the jurisdiction over the offence of selling beer within the prohibited hours to the petty sessional division. As to the last objection, the one of substance and merit, that the testimony of the policeman was not supported by proper corroborative evidence, the law says that the offence of perjury is not established by one witness swearing to the contrary of that which the deft. swore, and the prosecution is bound to turn the scale by additional evidence. What degree of corroborative evidence is requisite must be a matter for the opinion of the tribunal that tries the case, which must see that it deserves the title of corroborative evidence. Any attempt to define the degree of corroboration necessary would be illusory. Then, in this case, was the oath of the accusing witness corroborated? One of the charges of perjury is, that the deft. swore that he was not in the parish on the Sunday in question. To corroborate the accuser two witnesses were called who saw the deft. not only in the parish on that day, but one of them saw him on the road and close to Kilshaw's beerhouse at the time. I think that this was some corroboration at least, and that the case was properly left to the jury.

CHANNELL, B.—I also think that the conviction should be affirmed. I entertained a doubt on one of the points during the argument; but, after carefully considering the matter, I think that the conviction should be affirmed. It was contended that the indictment was bad because it was uncertain under what statute the charge was preferred. I think that argument is without foundation, for the indictment refers to the 18 & 19 Vict. c. 118. Another objection was, that it did not appear that the justices were acting in and for the petty sessional division where the offence took place. That might or might not have been an objection if the indictment had been preferred under the earlier Acts; but under the 18 & 19 Vict. c. 118, it is no objection. Then it was urged that there was not sufficient corroborative evidence. There were two allegations on which perjury was assigned, and no objection was made to the materiality of those allegations. Now, two witnesses were called to prove one of the allegations, and, if the only allegation had been the other one, there would have been some corroborative evidence as to that. The only other objection is the one on which I entertain some doubt, viz., whether it was not a material allegation in the indictment that a summons had been duly issued, and whether on that point there was not a failure in the evidence. If it had been necessary to decide that point, I should have required more time for consideration. I do not find, however, that the point arises. The objection made at the close of the prosecution, that there was no information or complaint to justify the issuing of a summons against Kilshaw, does not raise the point.

BLACKBURN, J.—I am of the same opinion. The substantial objection was, that the justices had no jurisdiction to hear the case, because, prior to the summons, there was no information or complaint. But none such was required prior to the summons. It might be essential to know that the charge was one of perjury, and that was a good reason for asking for an adjournment when the party appeared. But if he chooses to waive the information, and allow the hearing to proceed, the justices have jurisdiction.

MELLOR, J.—I share in the doubt of my brother Channell; and, if the point was before us, I should require further time for consideration.

M. SMITH, J.—Unless it is required by statute, where a party voluntarily appears to answer a

C. CAS. R.]

REG. v. BJORNSEN.

[C. CAS. R.]

charge before a magistrate, no information or summons is necessary. It is clear that in this case the objection was not the non-production of the summons, but the want of an information.

Conviction affirmed.

REG. v. BJORNSEN.

*Murder on the high seas—British ship—Register of ship—Prima facie proof—Alien owner—17 & 18 Vict. c. 104.*

A murder was committed on board a ship on the high seas, sailing under the British flag, and the accused brought to England in custody, and put on his trial for the crime. To show jurisdiction in the courts of this country it was sought to establish that the ship was a British ship, and the register of the ship at the port of London was put in evidence, wherein the owner's name was stated to be C. A. Rehder, of 14, London-street, City of London, merchant. It was proved, however, that Rehder was alien born, and it did not appear that he was a denizen of this country or naturalised. It was further proved that the ship was foreign built, and that the officers and crew, including the accused, were foreigners:

Held, that although the register might be *prima facie* evidence of the facts stated therein, and that the ship was a British ship, yet the proof that the owner was alien born rebutted the inference from the register that he was a British subject, and he was therefore disqualified by the Merchant Shipping Act (17 & 18 Vict. c. 104), s. 18, from being the owner of a British ship:

Held also, that it would not be presumed that he was denizenised or naturalised.

Case reserved by Channell, B.

The prisoner Adolph Bjornsen was indicted before me at the last Winter Commission for the county of Southampton, for the wilful murder, on the high seas, of one Heinrich Leonard Paul Scherck.

The jury acquitted the prisoner of murder.

They found him guilty of manslaughter.

This verdict is to be taken for the purposes of the present case to be correct, subject to the points of law hereinafter stated respecting the jurisdiction of the court to try the prisoner for the offence.

The offence was committed on board the barque *Gustav Adolph*, on the 21st June last, on the high seas, at a point about five days' sail from Pernambuco, and about 200 miles from the nearest land.

In opening the case to the jury the counsel for the prosecution stated that since the prosecution had been instituted doubts had arisen as to whether the *Gustav Adolph* was a British ship, so as to give jurisdiction to the Court to try the prisoner for an offence committed on board the barque on the high seas, and that he should place at the disposal of the prisoner's counsel, if desired by him, all the documents in the possession of the prosecution for clearing up those doubts.

The facts relating to the commission of the offence on board the ship having been proved, it was further proved that the ship in question was built at Kiel, in the duchy of Holstein, in the spring of the year 1864. That she sailed from Kiel to London, thence on the voyage in the course of which the offence was committed.

All the officers and crew were foreigners; the prisoner being second mate, and the deceased the master. The ship was sailing under the English flag on the 21st June 1864. The crew were told before sailing that Mr. Rehder was sole owner. He was not a born Englishman.

A certified copy of the register of the *Gustav*

*Adolph*, under the 17 & 18 Vict. c. 104, was put in by the counsel for the prosecution.

It was objected that the qualification of Mr. Rehder to be an owner of a British ship according to the 18th section of that Act ought to be proved.

I admitted the certified copy as *prima facie* evidence that the ship *Gustav Adolph* was a British ship.

In consequence of the opening statement of the counsel for the prosecution, the prisoner's counsel called for certain letters, which were then put in evidence by the prosecution, at the request of the prisoner's counsel. They were as follows:

Hamburg, 31st Dec. 1863:

C. H. Rehder, Esq., London.

Dear Sir,—As verbally agreed upon, I hereby make over to you my part of a contract signed on the 29th May, A.C. by and between Mr. C. L. Bock, shipbuilder of Kiel, and myself, whereby, after due delivery of the vessel therein contracted for, you become the sole owner of the barque-ship called *Gustav Adolph*, of the following dimensions:—

Length of keel .....	ft. in.	
Length over all .....	116	6
Width outside all over .....	131	0
Width inside .....	27	0
Depth of hold from below to the upper deck plank .....	24	0
	12	4

British measurement.

at the price of cost stipulated for, say, Hamburg burnmarks, 62,500. As further agreed upon, I shall make the necessary payment to Mr. C. L. Bock, and see to the true fulfilment of the contract, debiting you all payments made in accounts current. With regard to the vessel herself, I can in future act as your agent only, and it will thus be necessary for you to send me a power of attorney at your earliest convenience.—I remain, dear Sir, your obedient servant, PAUL EHLERS.

I, Edward Lehrenger, Doctor of Laws of the Free Hanseatic town of Hamburg, Notary Public, &c., hereby certify and attest that the letter hereinbefore written was duly signed by Mr. Paul Ehlers, &c.

Hamburg, 7th Jan. 1864.

(Signed)

LEHRENGER, DR.

London, 13th Jan. 1864.

Paul Ehlers, Esq., of Hong Kong, p. t., Hamburg.

Dear Sir,—I reply to your letter of the 31st Dec. last. I hereby accept your responsibility in a contract signed the 29th May 1863 by your good self and Mr. C. L. Bock, shipbuilder of Kiel, relating to the barque-ship *Gustav Adolph*, now in course of construction at or near Kiel. As sole owner of this vessel I beg to inclose power of attorney, and request you to be kind enough to undertake the whole and entire fitting out of my above-named ship *Gustav Adolph*, declaring at the same time that I shall be satisfied with all and everything that you may do or cause to be done in or to her interest. The vessel being intended for the China trade, I request at the same time that you will be kind enough to keep all the accounts, and in consideration of these services and upon condition that you charge no interest on any part of the first cost of the above vessel for which you remain under advance, I hereby promise, make over and transfer to you as verbally agreed between us, 6-7th, say six-sevenths parts of all the profits arising out of this venture. On the other side it is understood between us that in case any losses should arise out of this business you share in them to the same extent as in the profits, say for six-sevenths (6-7ths).

Trusting that the result may be a favourable one, I remain, dear Sir, yours truly,

(Signed)

C. A. REHDER.

Here follow two names as witnesses to the signatures of C. A. Rehder, James L. Wulff, and T. C. Bremer, jun.

It was admitted by the counsel for the prosecution that Paul Ehlers was not a natural-born British subject, and they had no evidence of his having received letters of denization or having been naturalised.

It was submitted on the part of the prisoner that these letters showed a partnership in the vessel between Rehder and Ehlers, and that it was shown by the 18th, the 38th, the 103rd, and other sections of the Merchant Shipping Acts, that the owner of a beneficial interest in a British ship must be qualified in the same way as the owner of a legal interest; that, even admitting the registration of the ship in the name of Rehder by the proper officer to be *prima facie* proof of Rehder's qualification to be an owner of a British ship, it could be no evidence of Ehler's qualification, and therefore the letters proving

C. Cas. R.]

REG. v. BJORNSEY.

[C. Cas. R.]

Ehler's interest in the ship rebutted the *prima facie* evidence that she was a British ship. The 106th section of the Act was also referred to.

I respited sentence upon the prisoner, who is now in custody, till the next assizes, and reserved for the consideration of this court the following questions:

1. Whether I ought to have received the certified copy of the register of the ship as *prima facie* evidence that the ship was a British ship.

2. If it was rightly received as *prima facie* evidence, whether the letters of the 31st Dec. 1863, and of the 18th Jan. 1864, taken with the admission as to the status of Paul Ehlers, rebutted that *prima facie* evidence.

3. Whether, upon the evidence, there was sufficient proof that the *Gustav Adolph* was a British ship.

*Harington* for the prisoner.—It is submitted that the conviction was wrong. There was no sufficient evidence that this was a British ship. The register is only *prima facie* evidence of the matters contained or recited in the register or indorsed on it: (17 & 18 Vict. c. 104, s. 107.) The register describes Rehder as sole owner, and it was proved at the trial that he was alien born. He could not, therefore, be the owner of a British ship, because sect. 18 enacts that no ship shall be deemed a British ship unless she belongs wholly to owners of the following description, that is to say, first, natural-born subjects; second, persons made denizens by letters of denization or naturalised; third, bodies corporate established under, subject to the laws of, and having their principal place of business in the United Kingdom or some British possession. There was no proof that Rehder was denizenised or naturalised. The Merchant Shipping Amendment Act (24 & 25 Vict. c. 63), s. 3, shows the intention of the Legislature to exclude unqualified persons from the ownership of British ships and the privileges incident thereto. Accordingly, when a British ship is transferred to any person not qualified to be the owner of a British ship, that fact is to be notified to the registrar and the certificate of register is to be delivered up. Sect. 106, which enacts that unregistered ships shall be treated as British ships in respect of offences committed on board thereof, is limited to ships owned by persons qualified to be owners of British ships. It will be contended that as by sect. 88 no person shall be registered until he has made a declaration of ownership containing a statement of his qualification to be an owner of a British ship and other particulars, it must be presumed that Rehder has made that declaration. But sect. 97 enables the registrar for reasonable cause to dispense with such declaration. No such presumption can be made, therefore, in this case: (*Reg. v. Sewell*, 8 Q. B. 161.) A register is not a document required by the law of nations as expressive of a ship's character: (*Le Cheminant v. Pearson*, 4 Taun. 367.) As to what gives the character of a British ship independently of statute, there is no case to be found reported. The case stands thus, the *prima facie* evidence of the ship being a British ship is rebutted by the proof of Rehder being an alien born:

*The Eagle*, 1 W. Rob. 246;

*The Fortuna*, 1 Dods. Adm. 81, 86;

*Pirie v. Anderson*, 4 Taun. 652;

*Liverpool Borough Bank v. Turner*, 1 H. & J. 159; 2 De G. F. & G. 502.

A certificated ship and a British ship are not convertible terms.

*Prideaux* (*M. Bere* with him) for the prosecution.—The conviction ought to be affirmed. There was evidence that this was a British ship. The question is not whether this was a British ship within the provisions of the Merchant Shipping Act, for a ship may be entitled to the protection of the British laws

although it may not be within its provisions. The Admiralty Courts hold that the tests of a ship being a British ship are the residence of the owner in the British dominions and the ship sailing under the British flag. The case shows that Rehder, the registered owner, was resident in London, and that the ship sailed from a British colony and carried the British flag. From these facts the court will infer that this was a British ship. It will be inferred that the declaration of ownership required by sect. 38 of 17 & 18 Vict. c. 104 was made previous to the ship being registered. [BLACKBURN, J.—Why so? The fact was not proved, and sect. 97 enables the registrar to dispense with it on reasonable grounds.] Sect. 42 requires certain particulars to be entered in the register-book, and among them the several particulars as to the ship's origin stated in the declaration of ownership. And on the principle *omnia rite acta presumuntur* it must be presumed that as the Act directs a public officer not to register a ship until such declaration is made, it will be presumed that it has been duly made. Illegality is not to be presumed, nor anything that would subject the ship to forfeiture.

Taylor on Evid. 128, 4th edit.;

*Butler v. Albutt*, 1 Stark. R. 222;

*Van Omerson v. Donick*, 2 Camp. 44;

*Sissons v. Dixon*, 5 B. & C. 758.

The court will further presume that the party who made the declaration of ownership was qualified according to his declaration. [BLACKBURN, J.—I own I have great difficulty in a criminal case against a third person in making any such presumptions. Sect. 107 carefully avoids saying that the register and declaration shall be proof of the contents, but says that they shall only be *prima facie* evidence of the matters therein.] It is not to be presumed that a party has committed the indictable offence of making a false declaration and unduly assuming a British character: (sect. 108). [BLACKBURN, J.—The truth of a statement is not to be presumed against a stranger on the ground that the party making the statement is not to be presumed to have committed a crime.] In *Rex v. Hawkins*, 10 East, 211, it was held that the presumption of law being that every person has conformed to the law till something appear to rebut that presumption, it was to be taken that a person elected to a municipal office had duly taken the sacrament within a year as required by the 13 Car. 2, c. 12. [MELLOR, J.—But in this case it is an admitted fact that Rehder was not born in England. CHANNELL, B.—Suppose that a declaration of ownership had actually been put in evidence, would there have been any presumption of the truth of its contents?] In *Rodwell v. Redge*, 1 C. & P. 220, a theatre was presumed to have been licensed from the fact of performances having taken place there; and in *Sichell v. Lambert*, 15 C. B., N. S., 781, a Roman Catholic chapel was presumed to have been licensed for the celebration of marriages from the fact of marriages taking place there. A somewhat similar presumption was made in *McMahon v. Ellis and others*, 14 Ir. C. L. Rep. 499. By sect. 97 the declaration of ownership can only be dispensed with where the registrar is satisfied that from any reasonable cause it cannot be made, and in that case the registrar, upon production of such other evidence, and subject to such terms as he may think fit, may dispense with the declaration. So that it is to be inferred either that the declaration of ownership was duly made, or that evidence equivalent thereto was produced before the registrar. [BLACKBURN, J.—Supposing there had been no statutory enactment affecting the question, what is the definition or character of a British ship at common law?] There is no abstract definition to be found in the books:

*The Indian Chief*, 8 Rob. 18, 33;

C. CAS. R.]

REG. v. ROBINSON.

[C. CAS. R.]

*The Matchless*, 1 Hag. Adm. Rep. 103;  
*Tabbs v. Bendelack*, 3 B. & P. 207;  
*The Vigilantia*, 1 C. Rob. 12.

On the whole it is submitted that in this case this was a British ship for the purpose of giving jurisdiction to the Admiralty to prosecute for offences committed on board of her, and it would be dangerous to hold the contrary.

*Harington* in reply.—It is not found as a fact that Rehder was an English merchant or resident in London. Carrying any particular flag is evidence against the owner, but not for him, and is not a circumstance from which jurisdiction can be presumed against a foreigner.

ERLE, C. J.—I am of opinion that this conviction cannot be sustained. The prisoner was convicted of manslaughter committed on the high seas, and the question is whether there was any jurisdiction to try the prisoner in England. The crime was committed on the ocean thousands of miles away from British territory, and the ground on which the prosecutor relies for jurisdiction to try in England is that the crime was committed on board a British ship, which carries with it British law, and that the case is therefore as if the crime had been committed on British land. The whole question is whether the ship was a British ship. I am clearly of opinion that there was *prima facie* evidence that she was a British ship. There was evidence of a certificate of registry in London, wherein Rehder was described as the owner at that time as resident in London, and the ship was sailing under the British flag. But Rehder was described therein as sole owner, and I take it to have been proved at the trial that he was alien born. That reduces the question to this, whether the *prima facie* evidence of its being a British ship was rebutted by the negative proof that Rehder was alien born. I am of opinion that it was. Then is the proof that he was alien born disposed of by the presumptions relied on by Mr. Prideaux in his argument, viz., letters of denizenship or naturalisation, and is the court to make such presumptions because Rehder, being alien born, would have become liable to be proceeded against for penalties under the Merchant Shipping Act, for registering the ship as belonging to a British owner? I am of opinion that there is no presumption to justify us in inferring that letters of denizenship or naturalisation were granted to Rehder. I limit my judgment to the question of evidence, the point reserved is merely a matter of evidence.

CHANNELL, B.—I also am of opinion that the conviction cannot be sustained. The offence was committed on board a ship of which the captain, mate and crew, including the prisoner, were foreigners. In one sense the ship may be taken to have been the property of Rehder, who, it was clear, was not a British-born subject. The question is, whether an English court has jurisdiction to try the foreigner for this offence. An English court can have no jurisdiction unless it is to be presumed that this was a British ship, and I can see no ground for inferring that this was a British ship. On the Merchant Shipping Act I cannot come to that conclusion, but on the evidence I agree that there was *prima facie* evidence that the ship was British; but the ordinary rule that *prima facie* evidence may be rebutted applies in this case. I must look at the case then as presenting this fact, that the owner was an alien born. If letters of denizenship or naturalisation had been produced they would have removed that difficulty, but they were not. I see no ground on which the court may draw the inference that one or the other may have been granted. It was then said that the ship might be a British ship, independent of the provisions of the Merchant

Shipping Act, but I can see no ground for any such inference. Some doubt might arise on sect. 106 at first sight. That section, however, has no application; it supposes the capacity to register as a British ship, but the privileges of a British ship to be lost because some requisition has not been complied with. It is therefore quite out of the question.

BLACKBURN, J.—I am of the same opinion. It is established that if a ship is a British ship, it carries with it the notion that it is part of the British territory, and crimes committed on board thereof may be tried in England. I agree that the facts of the ship sailing under the British flag, and being treated as a British ship, and being registered in London, were *prima facie* evidence that it was a British ship. The register was *prima facie* evidence that apparently Rehder was sole owner, but it was proved that he was alien born. There would be no pretence for saying that this was a British ship, but from the circumstance of the register stating Rehder to be resident in this country at the time of the registry. That fact merely shows that he owed a temporary allegiance to this country, and in the case cited of the *Indian Chief*, that was the effect of the decision. For aught that appears, he might have left this country, and so his allegiance here would have ceased. The Merchant Shipping Act requires an owner to be a British subject, and sect. 106 does not apply where the sole owner is a foreigner. I do not think, therefore, that this ship could be said to be a British ship so as to make it part of British territory.

MELLOR, J.—I am of the same opinion. I will only add that Mr. Prideaux, while citing the cases which he brought before us, and which are unquestioned, was losing sight of the admitted fact in this case, that the owner was alien born.

SMITH, J.—I am of the same opinion. To prove jurisdiction, the register of the ship in London was put in evidence, but when it was proved that the owner was a foreigner, the *prima facie* effect of the evidence in the register was rebutted. The declaration of ownership is prior to the register being drawn up, and if the effect of the evidence of the register is got rid of it can hardly be said that something done prior to it is not also rebutted.

Conviction quashed.

Saturday, May 6, 1865.

(Before ERLE, C. J., CHANNELL, B., BLACKBURN, MELLOR and SMITH, JJ.)

REG. v. ROBINSON.

Coining—Uttering a medal resembling a coin—24 & 25 Vict. c. 99, s. 13.

The prisoner was convicted under the 24 & 25 Vict. c. 99, s. 13, of uttering "a medal resembling in size, figure and colour, a half-sovereign."

The medal was similar in diameter and colour to a half-sovereign: on one side of it was an impression of the Queen's head, with a legend different to that on a half-sovereign: there was no evidence as to what was on the other side of the medal. The medal was quartered, but the quartering instead of being square as it is in a half-sovereign, was round:

Held, that there was some evidence for the jury that the medal resembled a half-sovereign in size, figure and colour.

Case reserved by the Common Serjeant of the City of London.

C. CAS. R.]

REG. v. LEVI.

[C. CAS. R.]

The prisoner was indicted at the Central Criminal Court, under 24 & 25 Vict. c. 99, s. 13, for that he on the 13th March 1865, in the county Middlesex, and within the jurisdiction of the said court, one medal resembling in size, figure and colour one of the Queen's current gold coins called a half-sovereign, the same medal then being of less value than one of the Queen's said current gold coins called a half-sovereign, unlawfully, unjustly, and with intent to defraud, did utter and put off to one Mary Piper as and for one of the Queen's said current gold coins called a half-sovereign, against the statute, &c.

#### Second count:

That the said George Robinson afterwards, to wit, on the 13th March 1865, in Middlesex, and within, &c., one piece of mixed metals resembling in size, figure and colour, one of the Queen's current gold coins called a half-sovereign, the same piece of mixed metals then being of less value than one of the Queen's said current gold coins called a half-sovereign, unlawfully, unjustly, and with intent to defraud, did utter and put off to the said Mary Piper as and for one of the said Queen's said current gold coins called a half-sovereign.

#### Third count:

That the said George Robinson, afterwards, to wit, on the 13th March 1865, in Middlesex, and within, &c., did with intent to defraud, utter and put off to the said Mary Piper, as and for one of the Queen's current gold coins called a half-sovereign, one coin not being such current gold coin called a half-sovereign, but resembling in size, figure and colour one of the Queen's said current gold coins called a half-sovereign, the same coin so uttered and put off then being of less value than one of the said Queen's said current gold coins called a half-sovereign.

After proof of the uttering by the prisoner of the medal, Mr. Webster, the Inspector of Coin to Her Majesty's Mint, was called, and his evidence was as follows:

This (the medal which was uttered) is a medal made of metal, the same diameter as a half-sovereign—somewhat similar in colour. On the obverse, there is the head of the Queen similar to that on a half-sovereign—the legend is entirely different from that on a half-sovereign, being "Victoria Queen of Great Britain" instead of "Victoria Dei Gratia." The medal is guerded, but the guerdling is round and not square.

At this point in his evidence the witness accidentally dropped the medal, and it rolled on to the floor. Strict search was made for it by the witness assisted by the ushers, for more than half-an-hour, but it could not be found. The witness then added, "The medal is of less value than a half-sovereign."

It had been proved by a former witness that the prisoner placed the medal in her hand, when he uttered it, with the obverse side uppermost. The medal was not shown to the jury. Mr. Webster was about to give a description of the reverse of the medal from memory after it was lost, but this was objected to by the prisoner's counsel, and the counsel for the Crown declined to press it.

For the prisoner it was objected that the word "figure" in the indictment meant the impression on the medal, and that such impression must be similar to the impression on the genuine coin for which it was uttered, and that there was under the circumstances stated no evidence to go to the jury that the medal resembled in size, figure and colour a half-sovereign.

For the Crown it was contended that "figure" meant the general shape and outline of the medal, not the impression upon it, and that there was evidence for the jury.

I thought it should be left to the jury, and the prisoner was found guilty and remains in custody.

The questions for the court are, first, what is the true meaning of the word "figure" in the statute and the indictment?

And, secondly, whether under the circumstances stated there was any evidence for the jury?

THOMAS CHAMBERS.

(*G. Francis* for the prisoner.—Upon this indictment the counterfeit should resemble a genuine coin, in size, figure and colour. Now here there was not

sufficient evidence that the medal resembled in figure a half-sovereign. Figure differs from size and colour. The jury never saw the coin. Figure in this section means a delineation on the coin calculated to impress the mind that it is intended to resemble a current coin. The meaning of the word "figure" in Webster's Dictionary was referred to.

*E. H. Crauford*, contra, was not called on.

ERLE, C. J.—The conviction must be affirmed. We think that there was some evidence for the jury that this medal, in size, figure and colour, resembled a half-sovereign.

*Conviction affirmed.*

#### REG. v. LEVI.

##### *Bankruptcy—Evidence of—London Gazette.*

*The London Gazette* is, by sect. 238 of the B. C. A. 1849, conclusive evidence of the bankruptcy on an indictment against a bankrupt, for a misdemeanor under the Bankruptcy Act, 24 & 25 Vict. c. 134, s. 221, clause 3, if it appear that the bankruptcy was within the U. K. at the date of the adjudication, and that no step has been taken to annul the adjudication.

Case reserved by Martin, B., at the Spring Assizes, 1865.

On the 4th March 1865, Morris Levi was tried and convicted before me at Warwick, on an indictment which charged that he became and was adjudicated a bankrupt on the 12th Nov. 1864, at Birmingham, in the Court of Bankruptcy for the Birmingham district, and that within sixty days next before the said adjudication he committed a misdemeanor under the third clause of the 221st section of the B. A. of 1861 (24 & 25 Vict. c. 134).

Upon the trial, the proceedings in bankruptcy were given in evidence, from which the following facts appeared:

On the 7th Nov. 1864, John Painter, a creditor to the amount of more than 50*l.*, presented a petition for adjudication of bankruptcy against Levi, which was duly filed.

On the 10th Nov. 1864, an order was made by the Court of Bankruptcy in the following words:

##### *The Bankruptcy Act 1861.*

In the Court of Bankruptcy for the Birmingham District. In the matter of Morris Levi, of Edgbaston-street, Birmingham, in the county of Warwick, clothier, against whom a petition for adjudication of bankruptcy hath been filed, this 10th day of Nov. 1864.

Upon the application of Mr. Hodgson, solicitor in the matter of this petition, and upon reading his affidavit filed herewith, I do extend the time for opening the said petition until Saturday next the 12th Nov. instant, at 12 o'clock at noon.

G. W. SANDERS, Commissioner.

On the 12th Nov. 1864, at about one o'clock in the afternoon, another order was made by the Birmingham Court of Bankruptcy in the following words:

##### *The Bankruptcy Act 1861.*

In the Court of Bankruptcy for the Birmingham District. In the matter of Morris Levi, of Edgbaston-street, Birmingham, in the county of Warwick, clothier, against whom a petition for adjudication of bankruptcy has been filed on the 7th day of November 1864.

This 12th day of Nov. 1864.

The petitioner John Painter, not having proceeded to obtain adjudication of bankruptcy within the three days after the filing the petition, nor within such extended time which was granted for the purpose by order of the court, dated the 10th day of Nov. inst.; it is hereby ordered, upon the application of Mr. Herbert Wright, on behalf of James Murray, John Hardy and John Kershaw, creditors to the amount required to constitute a petitioning creditor, that the said James Murray, John Hardy and John Kershaw be at liberty to proceed to obtain adjudication of bankruptcy against the said Morris Levi.

G. W. SANDERS, Commissioner.

C. CAS. R.]

REG. v. LEVI.

[C. CAS. R.]

On the same day Morris Levi was adjudicated a bankrupt in the following words :

The Bankruptcy Act 1861.

In the Court of Bankruptcy for the Birmingham District.

12th day of November 1864.

In the matter of Morris Levi, of Edgbaston-street, Birmingham, clothier, against whom a petition for adjudication of bankruptcy was filed on the 7th day of Nov. 1864.

Before Mr. Commissioner Sanders.

I, the said commissioner, upon good proof upon oath before me this day taken, do find that the said Morris Levi became bankrupt within the true intent and meaning of the law of bankruptcy, before the day of the date of the filing of the said petition against him, and I do therefore declare and adjudge him bankrupt accordingly.

G. W. SANDERS, Commissioner.

The alleged bankrupt was within the United Kingdom at the date of the adjudication, and has not taken any step or proceeding to dispute or annul it.

The *London Gazette* of the 15th Nov. 1864 was duly proved and put in evidence, and contains the advertisement of the adjudication.

Upon this it was contended for the debt, that the adjudication of bankruptcy was invalid, because that the proceedings must have been taken either under the 101st section of the B. A. 1849, or under the 96th section of the B. A. 1861; that the 101st section of the B. A. 1849 was inconsistent with the 96th section of the B. A. 1861, and was therefore repealed by the 230th section of the B. A. 1861; that under the 96th section of the B. A. 1861 a new petition ought to have been presented by James Murray, John Hardy and John Kershaw. It was also contended that the adjudication was void, because it did not appear from the proceedings upon what petition the commissioner proceeded to adjudication.

I reserved these points for the consideration of the Court for Crown Cases Reserved.

The act of bankruptcy on which the adjudication was made, and the only one proved at the trial before me, was an assignment by Morris Levi, made in the form given in schedule D. to the B. A. 1861. The deed was dated 5th Nov. 1864. It was stamped on the 9th Dec. 1864, and registered on the 10th Dec. 1864. It further appeared that on the 10th Dec. 1864 an order was made in the following words :

The Bankruptcy Act 1861.

In the Court of Bankruptcy, Basinghall-street, London, the 10th day of Dec. 1864.

In the matter of a trust-deed executed by Morris Levi, of Birmingham, in the county of Warwick, clothier, bearing date the 5th day of Nov. 1864, and made between the said Morris Levi of the one part and Henry Howell, of Birmingham, aforesaid, accountant, of the other part. Before Mr. Registrar Winslow, acting for Mr. Commissioner Fonblanque. Upon the application of Mr. Burton, solicitor for the assignees of the estate and effects of the said Morris Levi, it is ordered that the time for registration of the deed be extended to the 17th day of Dec. inst., so that the same may be receivable in evidence under the 194th section of the B. A. 1861, but the order is in no way to interfere with the 4th condition of the 192nd section of the said Act.

T. E. WINSLOW, Acting Commissioner. [L. S.]  
Filed 10th Dec. 1864.

No evidence was given as to Mr. Winslow's authority to make this order.

Upon this it was objected, that under sect. 192, clause 4, and sects. 193 and 194 of the B. A. 1861, the deed was invalid, and that it ought not to have been received in evidence of an act of bankruptcy before the Birmingham Court of Bankruptcy, and that therefore the adjudication founded on it was void. It was also objected that under the same sections the deed could not be received in evidence before me.

It was further objected, that as the conditions of sect. 192, clause 4, of the B. A. 1861 had not been fulfilled, it was not competent to the court in London to extend the time for its registration. It was also objected that evidence ought to have appeared on the face of Mr. Winslow's order, or to have been

given, of Mr. Winslow's authority to act upon the occasion under the provisions of the 27th section of the B. A. 1849.

I admitted the deed in evidence, and reserved these points for the consideration of the Court for Crown Cases Reserved.

I request the opinion of the Court of Criminal Appeal upon the following questions :

1. Whether the alleged bankrupt was precluded, under the circumstances, from raising any objection to the validity of the adjudication, and, if not,

2. Whether, in order to authorise a legal adjudication of bankruptcy, a new petition ought to have been presented by James Murray, John Hardy and John Kershaw.

3. Whether the adjudication is void by reason of its not appearing upon the proceedings on whose application the commissioner proceeded to adjudication.

4. Whether the deed of the 5th Nov. 1864 was admissible in evidence at all, and, if so, whether upon any of the grounds stated in the case there was any irregularity or defect in it, or the manner in which it had been dealt with, or any proceedings taken upon it which prevented its being made use of at the trial as evidence of a good and available act of bankruptcy.

*Fitzjames Stephen* for the prisoner.—The case depends upon the construction of the 233rd section of the B. A. 1849 (12 & 18 Vict. c. 106), which enacts that if the bankrupt do not dispute the fiat or petition, the *London Gazette* containing the advertisement of the bankruptcy shall be conclusive evidence "in all cases" as against the bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which the bankrupt might have been sued had he not been adjudged a bankrupt, that the person adjudged a bankrupt became a bankrupt before the date and suing forth of the fiat, or before the date or filing of the petition for adjudication, and that the fiat was sued forth or such petition filed on the day on which the same is stated in the *Gazette* to bear date." Does that section apply to criminal proceedings? It is submitted that it does not. The point has not yet been determined in this court. In *Reg. v. Lyons*, 9 Cox C. C. 299, it was held by Martin, B. that the section applied to civil proceedings only; but in a previous case, *Reg. v. Hilton*, 2 Cox C. C. 318, upon a statute *in pari materia*, the 5 & 6 Vict. c. 122, s. 24, the contrary was held. In *Reg. v. Harris*, 4 Cox C. C. 140, the *Gazette* was held to be evidence of the bankruptcy only against the bankrupt himself, and not against others though indicted with him. [*ERLE, C. J.* referred to 12 & 13 Vict. c. 106, s. 234.] The words "in all cases," in sect. 233, are limited to cases of the same nature, that is, "civil cases," as actions at law or suits in equity.

*Field, Q. C.* (*A. Wills* with him), for the prosecution, was not called upon to argue.

*ERLE, C. J.*—The conviction must be affirmed. I am clearly of opinion that the words of the 233rd section, "the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt," show that the Legislature intended that, so far as the bankrupt is concerned, it should be conclusive evidence in all cases, both civil and criminal.

The rest of the Court concurred.

*Conviction affirmed.*



C. CAS. R.]

REG. v. MULLANY—REG. v. EDWIN JOHNSON.

[C. CAS. R.]

Saturday, May 6, 1865.

(Before ERLE, C. J., CHANNELL, B., BLACKBURN, MELLOR and SMITH, JJ.)

REG. v. MULLANY.

*Perjury—Materiality—False swearing as to name.*

The prisoner, sued for debt in a County Court as B. E. M., and having been sworn and examined, and the judge having come to the conclusion that the debt was due, was, pending a discussion as to the payment of the debt by instalments, asked by the judge, *What was his name?* he replied, E. M. only. The Judge refused to amend, and struck out the cause. The prisoner was afterwards indicted and convicted of perjury in having falsely sworn that his name was E. M. only, whereas in truth it was B. E. M.:

*Held, that the conviction was right, and that the inquiry as to deft.'s name was a relevant and material inquiry.*

Case reserved by Martin, B.:

In the beginning of 1864 a person called Robinson sued in the County Court held at Birmingham, a person named in the proceedings Bernard Edward Mullany, for a debt of 8l. 18s. 6d. The suit went to issue and came on to be tried on the 2nd Feb. 1864. The plt. was called and gave evidence in support of his case. The deft. was called and sworn in the usual way and gave evidence, and the judge came to the conclusion that the debt was due and the plt. entitled to recover, and a discussion was taking place as to the times at which instalments of payment were to be made.

The Judge then asked the deft. what was his name. He replied, "Edward." The plt.'s attorney then asked him was it Edward only? The deft. answered, "Yes." And the plt.'s attorney then asked him whether it was not Bernard? The deft. answered, "not Bernard, only Edward."

Application was then made for leave to amend, but it was refused, and the Judge struck out the cause.

At the last Warwick assizes the deft. was indicted before for perjury in answering the above questions, and evidence was given which clearly proved that he had wilfully and corruptly sworn falsely in the above answers; that he was christened Bernard only and so called up to his manhood, when he left Ireland. No evidence was given as to how he came to take the name of Edward, but he had told the plt. that his name was Bernard Edward, and this was the name inserted in the Birmingham Directory, he being a tradesman there.

The jury found him guilty, but at the request of the counsel for the prisoner I desire the opinion of the Court upon the following question:

Whether the wilful and corrupt false swearing by the prisoner in giving the answers as above, under the circumstances and at the time above stated, was indictable as perjury.

*Gibbons* for the prosecution.—The conviction ought to be affirmed. The plaintiff in the County Court is not vitiated by misnomer of the parties: 9 & 10 Vict. c. 95, s. 59, "no misnomer or inaccurate description of any person or place in any such plaint or summons shall vitiate the same, so that the person or place be therein described so as to be commonly known." [BLACKBURN, J.—There is no evidence that the deft. was commonly known by the name of Bernard Edward Mullany, and the County Court judge seems to have thought the variance in the name as sworn to by the deft. fatal to the action.] The judge had power to amend (19 & 20 Vict. c. 108, s. 57), but not having exercised that power the false answer of the deft. as to his name was material. The right name was material, as otherwise difficulties might arise in enforcing execution upon the judgment. In *Reg. v.*

*Gibbons*, 9 Cox Cr. Cas. 105; 1 L. & C. 109, it was held that perjury could be assigned upon evidence relevant to the credit of a material witness that was improperly admitted by the court. And in *Reg. v. Philpotts*, 5 Cox Cr. Cas. 363; and 2 Den. C. C. 309, the deft. having sworn falsely that he had examined with the original a copy of a will that was produced on the trial of the cause, and the judge having determined to admit the copy in evidence, although the counsel thought proper to withdraw it, it was held that the deft. could be indicted for perjury, and Lord Campbell said: "We are of opinion, as the evidence was given in a judicial proceeding with the view to the reception in evidence of a document which was material, and as that evidence was false, that all the ingredients necessary to constitute the crime of perjury are present." Here the false swearing of the deft., that his name was Edward only, was in a judicial proceeding, and on a material point, viz., whether the plaint was rightly sued out against him.

No counsel appeared for the prisoner.

ERLE, C. J.—The question is, whether on the perjury alleged the conviction can be sustained. The perjury alleged is, that the deft. swore that his name was Edward only, and not Bernard Edward, and the objection made at the trial was, that the false swearing was upon a matter that was immaterial to the inquiry. I am of opinion that the objection cannot be maintained. The jury found that the prisoner gave the answer wilfully and corruptly, and for the purpose of deceiving the tribunal before which he was a witness. The answer was given in the course of a judicial inquiry, and with the intention of misleading the judge. The judge had made up his mind that the debt was due, and was in the course of deciding as to when the deft. should pay the debt by instalments. It was relevant to the court then to inquire as to the deft.'s name with reference to any misnomer, and the effect of the prisoner's answer was to cause the judge to strike out the case, and so virtually to nonsuit the plt. The principle of the decisions in *Reg. v. Philpotts* and *Reg. v. Gibbons* applies. Whenever the question arises whether perjury can be assigned on a false swearing in the course of a judicial inquiry in answer to an immaterial question, it may be worthy the consideration of the fifteen judges. This conviction must be affirmed.

The rest of the Court concurred.

Conviction affirmed.

Saturday, June 3, 1865.

(Before COCKBURN, C.J., MARTIN, B., CROMPTON, J., BRAMWELL and CHANNELL, BB.)

REG. v. EDWIN JOHNSON.

*Indecent assault—Girl between ten and twelve years old—Consent.*

*An indecent assault on a girl between the ages of ten and twelve, if she is a consenting party, is not an offence punishable at law.*

Case reserved for the opinion of this court from the Surrey sessions.

At the General Quarter Session of the peace holden by adjournment at St. Mary Newington in and for the county of Surrey, on Monday, the 1st May 1865, Edwin Johnson was tried on the following indictment:—

Surrey.—The jurors for our Lady the Queen upon their oath present, that Edwin Johnson, on the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and sixty-four, unlawfully did carnally know and abuse one

C. CAS. R.]

LAUGHLIN AND OTHERS v. OVERSEERS OF SAFFRON-HILL.

[Q. B.]

Emily Eliza Aslett, then a girl above the age of ten years and under the age of twelve years, to wit, of the age of ten years and nine months, against the form of the statute in such case made and provided.

**Second count:**

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Edwin Johnson afterwards, to wit, on the day and year aforesaid, unlawfully and indecently did make an assault in and upon the said Emily Eliza Aslett, and did then unlawfully beat, wound and ill-treat the said Emily Eliza Aslett, against the form of the statute in such case made and provided.

**Third count:**

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Edwin Johnson afterwards, to wit, on the same day, and in the year aforesaid, in and upon the said Emily Eliza Aslett, in the peace of God and our said Lady the Queen then being, did make an assault, and the said Emily Eliza Aslett then did beat, wound and ill-treat, to the great damage of the said Emily Eliza Aslett, and against the peace of our said Lady the Queen, her crown and dignity.

The jury returned a verdict of guilty on the second count, of an indecent assault on the said Emily Eliza Aslett, but stated that the girl consented to the acts with which the deft. was charged.

The counsel for the deft. moved the court to enter the verdict as of acquittal, but the Court refused to do so, and reserved the following point for the decision of the Court for Consideration of Crown Cases Reserved:

Can the deft. be rightly convicted of an indecent assault upon the second count of the above-mentioned indictment, the jury having found that the person upon whom the assault is charged to have been made consented to the acts which constituted alleged assault, she being under twelve years age?

The Court respited judgment and admitted the deft. to bail until the above-mentioned point shall be decided.

JOHN EDWARD JOHNSON,  
Chairman.

*Oppenheim* for the deft.—It is submitted that the conviction is bad. At common law it was not a criminal offence to have carnal knowledge of a girl under the age of twelve. It was made an offence by statute, although the girl was a consenting party, but the statute left untouched the case of an assault on a girl under that age. In *Reg. v. Read*, 3 Cox C. C. 266; 1 Den. C. C. 377, where, on a count for an assault on a girl of the age of nine years, the jury returned a verdict of "Guilty, the child being an assenting party, but that from her tender years she did not know what she was about," it was held that the conviction was wrong, the verdict showing an assent by the girl. Parke, B. there said, "If we are asked whether a girl of such tender years can consent in law, that is settled by *Reg. v. Martin*, 9 C. & P. 213." Those cases were acted on in *Reg. v. Mehegan*, 7 Cox C. C. 145, by the Court of Criminal Appeal in Ireland, where a conviction for an indecent assault on a girl between the ages of ten and twelve was quashed, on the ground that the girl was a consenting party.

No counsel appeared for the prosecution.

COCKBURN, C. J.—This case is quite concluded by the authorities, which rest on a very intelligible principle. Independently of the statutes, the having carnal knowledge of a child was not an offence at law. The statutes made it an offence, saying that whether the child was an assenting party or not, it should be an offence. It follows, therefore, that the offence in this case, not being an offence within any statute, it was not an offence at common law. However much we may regret it, this conviction must be quashed.

The rest of the Judges concurred.

*Conviction quashed.*

**COURT OF QUEEN'S BENCH.**

Reported by JOHN THOMPSON and T. W. SANDERS, Esqrs.,  
Barristers-at-Law.

Saturday, April 29, 1865.

LAUGHLIN AND OTHERS v. THE OVERSEERS OF  
SAFFRON-HILL.

*Poor-rate—National school-houses.*

*National school-houses, though no profit whatever is made of them, are assessable to the poor-rate.*

This was a special case, stated under the 12 & 13 Vict. c. 45, as to the rateability to the poor-rate of a national school-house.

The case stated, that by a deed dated the 18th Dec. 1852 a piece of land was conveyed by the minister and churchwardens of the ecclesiastical district of St. Peter's, Holborn, to hold to their use for the purposes of the 4 & 5 Vict. c. 38, and upon trust to permit the premises and all buildings to be thereon erected to be for ever appropriated and used as a school for the education of children and adults, or children only of the labouring, manufacturing and poorer classes of the said district, and for no other purpose. The school was to be at all times open to the inspectors of schools appointed in conformity with the Order in Council, and should always be in union with the National School Society, and be conducted according to its principles and in furtherance of its ends. The deed also provided that the management and government of the school should be vested in a committee to consist of the officiating minister of the district and fourteen other persons. Schools had subsequently, in accordance with this deed, been erected partly by parliamentary educational grants and partly by voluntary subscriptions, and consisted of rooms necessary for the purposes of the institution. Two small rooms were inhabited by the parish beadle, who, however, had nothing to do with the school, and these rooms had been duly rated. The rest of the building was only used for the ordinary purposes of a national school, no one residing on the premises. The children who attended paid a small sum per week of 2d. and 3d., and the school was open to all poor children irrespective of parish or locality. Such amounts were applied to the expenses of the establishment, but did not meet them by a considerable sum, which was made up by voluntary subscriptions and grants from the Church Education Society, and those also made by Government.

*Huddleston*, Q. C. (*Hopwood* with him) appeared for the resps. (the parish), and argued, that the premises were liable to be rated:

*Reg. v. Sterry*, 12 Ad. & Ell. 84;  
*Reg. v. Temple*, 2 Ell. & Bl. 160;  
*Reg. v. The Baptist Missionary Society*, 10 Q. B. 884;  
*Reg. v. Stapleton*, 4 B. & Sm. 629.

*Mellish*, Q. C. (*Beresford* with him) appeared for the apps., and contended that, as the premises were wholly devoted to charitable purposes, and there was no beneficial occupier, they were not rateable:

*Reg. v. St. Lukes*, 2 Butt. 1058;  
*Sheppard v. The Churchwardens of Bradford*, 10 C. B. N. S., 869.

COCKBURN, C. J.—I think that in this case our judgment should be for the resps. The parties to be assessed are clearly the persons in whom is vested the management of the school. With respect to the argument, that this is not rateable property inasmuch as it is wholly devoted to charitable purposes, I think we are bound by the previous deci-

Q. B.]

REG. v. STEVENS AND ANDERSON.

[Q. B.]

sions to hold that it is rateable property. I cannot distinguish this case in principle from *Reg. v. Stapleton*.

*Judgment for the resps.*

Resps.' attorneys, *Norris and Allen*.

Wednesday, May 31, 1865.

REG. v. STEVENS AND ANDERSON.

*Poor-rate—Licensees of premises—Actual occupation.*

*Certain gasworks were erected by the Crown at Aldershot for the use of the camp there, and by an arrangement with A. B., who agreed to make and supply gas to the camp upon certain terms, a licence was granted by the Crown to them to use the premises for seven years, for the purpose of enabling the said A. B. to perform their contract, the Crown reserving a right to enter by its servants for certain purposes at all times, the licence also containing a stipulation that it should be revocable at any time by writing, and that full possession might thereupon be had without any proceedings at law or equity. A. B. being rated to the relief of the poor in respect of their occupation of the said premises:*

*Held, that, as actual occupiers, they were liable to be so rated.*

This was a special case, stated upon a judgment for the resps. upon an appeal to the quarter sessions for Hampshire by James John Stevens and George Anderson against a poor-rate. The sessions confirmed the rate subject to this case. The case stated that James John Stevens and George Anderson were rated in a poor-rate for the parish of Aldershot, on the 3rd June 1864, in respect of gasworks, as occupiers, of which the War Department were owners to the rateable value of 100*l*. In their grounds of appeal they stated that they were not occupiers of the said gasworks, or of any messuage, premises, house, land, or other rateable property in the said parish, and that they had a mere licence, permission and privilege to use the same gasworks in a particular manner, the legal possession and right of possession remaining in the Crown; that the said gasworks and premises are not legally rateable in consequence of the possession and right of possession thereof being in the Crown.

Upon the appeal it appeared that the Camp Gas Works above mentioned are extensive gasworks, the property of the Crown, erected at a great expense by Government, under the direction of the Board of Ordnance, A.D. 1861, for the purpose of supplying gas for the lighting of the camp established at Aldershot, and the Government buildings in connection with it. The apps. are gas engineers and contractors for gasworks, and on the 2nd July 1862 the contract hereafter mentioned was entered into between the apps. and Her Majesty's principal Secretary of State for the War Department, and on the same day an indenture between the said parties was executed which forms part of the case. From the time of the making of the said contract to the present time the apps. have used the gasworks according to the provisions of the said indenture, and have made and supplied gas to the Government according to the contract, the gas being made by them in the said gasworks and supplied into the meter-house, from which the servants of the Government supply the gas to the camp and Government buildings thereto belonging, as it is required. The contractors have in their employ a manager of the works who resides upon the premises; he keeps one key of the meter-house, and a Government officer keeps another; the keys are of different makes, so that neither of the parties in possession of the keys

can gain admission without the other. The said manager also uses a room, on the door of which the word "office" has been painted by Government, separate from the place in which he lives, where he keeps his accounts with the Government and receives money in payment for coke and tar sold to the public as hereinafter mentioned. The Government officer goes to the meter twice a-day to turn the gas on and off, and to ascertain the quantity consumed. In order to get to the meter-house, he must pass through the premises belonging to the gasworks. The keys belonging to the other parts of the gas premises are in the possession of the manager; they are the property of the Government, and are marked with the broad arrow. Coke and tar, the residual products of the manufacture, are according to the contract sold by the said apps. to the public upon the premises, and produce a profit to the apps. There is one gate admitting to the gas premises which is never closed. There is a well upon the premises lately opened by the Government authorities, and which is used by them and from which they take water as they require it for their horses in the camp, and for the use of the commissariat department. It is necessary for the proper management and superintendence of the works that a man should be generally resident upon the premises, and the manager above mentioned, who is in the employ of the apps., is paid a weekly salary, does reside there with his wife, and they are provided with necessary accommodation and no more. Neither of the apps. reside on the premises. In making the calculations by which the payment for the gas was regulated in the contract, the expense of production alone was taken into consideration. The apps. pay no rent, and no allowance was made for charges in respect of rates. The apps. derive a profit from the supply of gas to the Government, and from the sale of coke and tar to the public, and they supply the gas to the public at a less price than they could do if they paid rent to the Government for the premises. The apps. contended that they had no exclusive occupation, nor any such occupation of the premises in question as rendered them liable to pay rates.

By an indenture made on the 2nd May 1862, between the Secretary of State for the War Department (called afterwards the licensor), and the apps. (called the licensees), the said licensor granted unto the licensees full licence to use all that building lately erected at Aldershot, known as the gas establishment, together with all the outbuildings, offices, plant, &c., the meter and meter-house being excepted during the term of seven years for the purpose of enabling the licensees to fulfil a contract entered into for supplying gas at Aldershot.

And it also being the true intent of these presents and the parties hereto, that these presents shall not be a lease, or an agreement for a lease, or in the nature of a lease or of an agreement for a lease, and that neither by these presents nor by reason of any act or thing to be done, suffered, or omitted by the licensor or his successors or otherwise on behalf of Her Majesty, or by the licensees, their executors or administrators, or any of them, the licensees shall have any term or interest whatsoever in the gas premises, or in any part thereof, or be or become actually or constructively vested in the licensees, their executors or administrators, or any of them, nor shall they or any of them be or become tenants or tenant of the gas premises or any part thereof.

The licence then contained certain restrictions as to the use of the premises by the licensees, and certain powers to the licensor to enter upon the premises. The licence then contained this proviso.

That the licence hereby granted shall be revocable and determinable by the licensor or his successors at any time by writing under his or their hand or hands delivered to the licensees, their executors or administrators.

And it was also provided,

That immediately upon the revocation of the licence hereby granted . . . may immediately . . . without bringing

Q. B.]

REG. v. HEATH AND OTHERS.

[Q. B.]

or instituting, or being obliged to bring or institute any action of ejectment or other proceeding at law or in equity, resume and take full and complete possession of the gas premises for the use of Her Majesty, &c.

*Giffard*, Q. C. (*Gates* with him) appeared in support of the order of sessions, and contended that the apps. were liable as actual occupiers, for that, until the will of the Crown was determined by notice, they had possession of the premises, and that it mattered not that they occupied only under what was termed a licence. [COCKBURN, C. J.—It is clear that, until the Crown gave notice, the apps. could not be dispossessed.]

*Hayes*, Serjt. (*C. B. Russell* with him) was called upon, and he argued that, as the Crown had the right to use the premises for certain purposes, and its officers to enter upon them at any time, and it was only a licence which was granted, the apps. could not be said to have such an occupation as would render them liable to be assessed to the poor-rate. [COCKBURN, C. J.—We must look at the whole instrument, and its effect is that the Crown has permitted the apps. to have possession, reserving to its officers a power to go upon the premises for certain purposes. Does this amount to anything else than a tenancy at will? The object may have been to prevent the apps. from being in a position to render an ejectment necessary to turn them out. The real question is, whether or not there is an exclusive occupation?] They refuse to make them tenants.

COCKBURN, C. J.—Just construe the deed with reference to its object. It is quite inconsistent to suppose that the Crown could use these premises itself for this purpose. There is an express provision showing that the Crown cannot put out the apps. without notice. It is not necessary to decide whether there is a tenancy or not, for there is clearly an occupation.

CROMPTON, J.—A licence to use is a liberty to occupy. It is not like a licence to use an incorporeal hereditament. They say that the licence is not to operate as a lease, but that you shall have the premises till we do an act which is to put an end to it. That, therefore, gave the possession.

BLACKBURN and SHEE, JJ. concurred.

*Judgment for the resps.*

Attorney for the resps., *Eve*, Aldershot.

#### REG. v. HEATH AND OTHERS.

*Highways—Obstruction—Indictment to remove—Costs—25 & 26 Vict. c. 61, s. 20.*

*The township of W. was included in a highway district under the provisions of the 25 & 26 Vict. c. 61 (Highway Act), and A. having caused an obstruction in a street in W. the highway board, at the instance of the waywarden of W., indicted A. for the same, who removed the indictment by certiorari. Upon the trial A. was found guilty, and subsequently paid the taxed costs of the indictment. There was, however, a sum of 60l. extra costs upon the indictment, which the highway board charged against the township of W.:*

*Held, that the costs of the indictment were such costs as the highway board were justified in incurring to remove an obstruction from a highway, and that they were properly chargeable in this case against the township of W.:*

In this case the township of Wareham had been included in a highway district under the provisions of the 25 & 26 Vict. c. 61; and a Mr. Burroughs having caused a nuisance by erecting a building

upon the highway in one of the streets (though not within fifteen feet of the centre), he was indicted by the highway board at the instance of the waywarden of the said township. This indictment he removed by *certiorari* into this court; and upon its trial at the assizes he was found guilty, whereupon he abated the nuisance and paid the taxed costs of the prosecution. There were, however, extra costs of the prosecution amounting to 60l., and these costs were allowed by the highway board as against the township of Wareham. Against this allowance there was an appeal upon the ground that the highway board had no power to allow the costs of an indictment. The Court of Quarter Sessions affirmed the allowance, subject to a case for the opinion of this court.

By sect. 11 of the 25 & 26 Vict. c. 61 (Highway Act), all the powers, rights, duties, liabilities, capacities and incapacities (except the power of making highway rates) as were vested in or attached to any surveyor of any parish forming part of the district were vested in and attached to the highway board.

The 6th section of the 5 & 6 Will. 4, c. 50 (the General Highway Act), after directing the manner in which surveyor of the highway is to be annually elected, provides that he shall repair and keep in repair the several highways in the said parish for which he is appointed.

By the 69th section a penalty is imposed upon any person for encroaching by any building within fifteen feet of the centre of the highway, and the surveyor is empowered to pull down such building, &c.

Sect. 19 of the 25 & 26 Vict. c. 61, provides for the preferring of an indictment where a highway is out of repair, and the liability to repair is disputed.

Sect. 20 enacts that

The expenses of maintaining and keeping in repair the highways of each parish within the district, and all other expenses in relation to such highways . . . shall be a separate charge on each parish.

The obstruction in this case was more than fifteen feet from the centre of the highway.

*McIntyre* appeared in support of the order of sessions, and contended that, as it was the duty of the board to keep the highways in repair, it was necessarily incident that they should get an obstruction removed, which in this case could only be effected by indictment.

*Heath*, contra, contended that the costs of the indictment could not be charged against the township, that the highway board have no general powers to prosecute, but only such as are specified in sect. 19 of the 25 & 26 Vict. c. 61. [COCKBURN, C. J.—What other means except by indictment are there of removing such an obstruction?] It may be that there is an omission in the Act in this particular. Under sect. 111 of the 5 & 6 Will. 4, c. 50, the sanction of the vestry is necessary before the expenses incurred in defending an indictment against the parish can be allowed. [COCKBURN, C. J.—That is where an indictment is preferred against the parish.] The surveyor might enter and abate the nuisance. [CROMPTON, J.—Not in such a case where it is not within fifteen feet of the centre.] The words "maintaining and keeping in repair" cannot be construed to include preferring an indictment. [COCKBURN, C. J.—But there are the additional words, "and all other expenses in relation to such highways."] Those words can only refer to matters expressly authorised by the Act. He cited

*Townsend v. Rees*, 10 C. B., N. S., 808; 4 L. T. Rep. N. S. 447.

COCKBURN, C.J.—Mr. Heath has thought it

Q. B.]

REG. v. HEATH AND OTHERS.

[Q. B.]

necessary to enter upon the general statutory law relating to highways, but in point of fact the question before us is a very limited one indeed, being simply this, whether where a highway board has instituted a prosecution against an individual for an obstruction to a highway, they can charge the expenses of the prosecution—in this case the extra costs of the prosecution—upon the parish in which the highway was situate, and upon which the nuisance existed which it was necessary for the prosecution to remove. I quite agree with Mr. Heath that a highway board is by a recent Act placed in the situation of the surveyor under the former Highway Act, but it does not follow that on that account they may not have extended to them under the Act of Parliament by which such board is created larger powers with regard to raising money for expenses than the surveyor had under the previously existing Act of Parliament; but even if this question had arisen under the former Act of Parliament, 5 & 6 Will. 4, c. 50, and the case had been that of a surveyor instituting a prosecution for the purpose of removing a nuisance from a highway, I should have been very much disposed to think so, though in the view I take I do not think it necessary to decide the question. I should be strongly disposed to hold, were it necessary, that the power to raise a rate for such a purpose, or to include the expenses of such a prosecution in a highway rate, would have been incidental to the power vested in the surveyor by the Act of Parliament, where he has power to make and levy a rate for the purposes of the Act. Now the main purpose of the Act is the repair of the highway, and the keeping of the highway in a proper condition; but the existence of an obstruction which is a nuisance on a highway is manifestly inconsistent with the highway being kept in a proper state of repair, and therefore I think, on a wise and liberal construction of the Act, they might have been fairly and legitimately included in the purposes of the Act, in carrying the purposes out. But it was pointed out that the words of the 20th section are much larger than under the old statute. The 20th section, while it gives the board power to charge upon the district fund whatever expense it shall incur for the benefit of the whole district, goes on to say that the expenses of maintaining and keeping in repair the highways of each parish within the district, and all the other expenses in relation to such highways, except those that are thrown on the district fund in the earlier part of the section, are to be borne by the individual parishes. The whole question, as it appears to me, in this case is one of simple solution and is easily answered; and it is whether this is an expense relating to the maintaining and keeping in repair the highway? Can it be said the expense incurred in the removal of a nuisance that obstructs a highway is not an expense incurred in relation to that highway? I called Mr. Heath's attention some time ago to the question whether a surveyor, & *fortiori* a highway board, removing an obstruction by mechanical or manual means, would not be entitled to charge the expenses so incurred; Mr. Heath, with all his anxiety in maintaining the case of his client, could not answer that in the negative, but sought to make a distinction between the having recourse to manual means, by labour or otherwise, in removing it, and by having recourse to proceeding at law. I should always uphold a man who has recourse to the process of law, in preference to a man who has recourse to force, which may lead to consequences by no means to be desired. I cannot think there is any difference, and I have no hesitation in saying, that the proper course of proceeding adopted with a view to the removal of an obstruction on a highway is an

expense relating to the highway, and therefore comes within the 20th section. If one looks at the expediency and the reason of the thing, one cannot doubt that is the construction the Legislature must have intended to have had put upon it, and which answers the clear justice of the Act. There is no doubt of the duty of those who have the care of a highway to keep that highway in a proper and effectual condition. If there is an obstruction, which it appears to them interferes with the use of it by the public, those are the authorities, and they have as incidental to their duty the power to take the necessary steps to remove the nuisance. No one can expect that those who are to act in a matter of that description should put their hands into their own pockets to defray the expenses of a prosecution if by any accident the prosecution fails and the expenses come to be taxed. Therefore, if they are expenses that must be borne by some one, and the costs which have been incurred must be paid, it would be monstrous to expect the authorities who have put the law in force to find themselves, personally, out of their own pockets, the amount that may be necessary, and therefore it ought properly to fall upon the parish who by this prosecution have occasioned the obstruction to be removed, the further continuance of which would be a nuisance. Both as regards the policy and the expediency of the matter, and the language of the enactment, I can entertain no doubt this was an expense which the highway board were right in incurring; and therefore the individual parish must bear it.

CROMPTON, J.—I am of the same opinion. Mr. McIntyre put his case very shortly and simply, and on two very short and simple propositions. He said, "Here is this body bound to keep in repair from time to time the roads. It is impossible to do that without removing obstructions. It is impossible in many cases that obstructions can properly be removed without having recourse to the arm of the law." He says those are repairs under one or both of these Acts. I have not heard a word that has been said during the whole course of the case that seems to meet that argument, and I think those propositions are correct, and the inference drawn from them is correct. I do not feel any difficulty in carrying out the Act of Parliament. As to there being any waste or improper proceeding, the board are now the representatives of the different parishes, and it may well be left to them more widely than it was before, and I am very strongly of opinion that it does not depend upon the success of the prosecution, but whether it was a proper expense; and when an appeal was sent to the sessions, and it had been successful, it might well be, if they thought it really was not for the benefit of the parish, that the expenses would not be allowed. To try it by an extreme case: if it was clear that the parties had indicted to put money into some attorney's pocket, the board would have been very right in disallowing the costs; but that is left in the discretion of the quarter sessions upon appeal. If the first Act did not include such a power, though I should be disposed to think it does, the second Act enlarges it and gives power to the surveyor. It does not necessarily follow that it only gives this power; it clothes them with all the powers the surveyor had; and it is impossible to say this is not an expense in relation to highways. I therefore think our judgment should be for the resp.

BLACKBURN, J.—I am of the same opinion. I think the old Act of 1835, by the 8th section, made it the duty of the surveyor to repair and keep in repair the several highways of the parish. I quite agree with what my Lord and my brother

Q. B.]

GUARDIANS OF WINCHCOMBE AND GUARDIANS OF STOURBRIDGE UNION.

[Q. B.]

Crompton have said, that for the purpose of repairing and keeping in repair, it may be necessary and proper to institute a prosecution against some one who prevents the road from being kept in repair, and if such a prosecution is properly and rightly and fairly instituted, I think it would be one of the expenses falling within a part of their duty in carrying out the Act, and if it was wasteful, extravagant, or improper, then that would be a question of fact; they could not incur an expense of that nature, or if they did incur it, then on appeal the quarter sessions would properly disallow it if they were satisfied of the fact. Then under the former Act, in the 27th section there is power to raise a rate for the purposes of the Act, one of which was to pay the expenses of repairing the road and incidentally any prosecution really and properly necessary for that purpose. I am inclined to think that the new Act does not extend this further than before. The board are required to perform the duty the surveyor had to maintain the highways. I do not think it extends that duty further than before; but it does not cut it down. Then again, under the 20th section, they are to charge upon the parish the expenses in relation to the maintaining and repairing the highways, and all other expenses in relation to such highways. I do not think myself that it much extends it beyond, because the only expenses relating to highways were expenses for the purposes of the Act, maintaining and repairing; but, again, I say it does not cut it down. The board have at least as much power as the surveyor had, and as much right to do it; and if, under the former Act, the surveyor might have done it, subject always to this, that they could be disallowed by quarter sessions if they were wasteful and extravagant, the board can do it now.

SHEE, J.—I am of the same opinion.

*Order of sessions confirmed.*

*Saturday, June 3, 1865.*

REG. v. THE JUSTICES OF WORCESTERSHIRE, re AN APPEAL BETWEEN THE GUARDIANS OF THE WINCHCOMBE UNION AND THE GUARDIANS OF THE STOURBRIDGE UNION.

*Poor-law—Break of residence.*

*To render the absence of a party from his parish not a break of residence, it is essential that he should have a residence in such parish to which he has a right to return.*

*A. left his parish, where he had a lodging, which he gave up to seek elsewhere for work, intending to return when work was better, and the occupier of the house would have permitted him to have the same lodgings again on his return, and they were not, in fact, occupied in his absence:*

*Held, to be a break of residence.*

This was an appeal by the guardians of the Winchcombe Union against an order for the removal of George Whittle, a pauper lunatic, on the ground of his irremovability by reason of a three years' residence in resp. union. At the hearing the sessions quashed the order of removal, subject to a case.

The case stated, that the appeal was against an order of justices adjudging the settlement of George Whittle, a pauper lunatic, to be in the parish of Beckford, in the app. union; that the settlement at Beckford was proved, but the apps. called witnesses in support of a ground of appeal, alleging the pauper's irremovability from the resp. union by reason of a three years' residence therein prior

to the 17th Feb. 1864, when he was conveyed to the lunatic asylum; that the facts material were, that the pauper, who had lived with his wife and a child in a cottage at Quarry Bank, in the resp. union, about Whitsuntide 1861, left the cottage in consequence of his wife having deserted him and his goods being seized for rent; that the child was apprenticed to a tailor, with whom he went to reside, and has ever since continued to live, and the pauper became a lodger at the house of a Mr. and Mrs. Drew at Quarry Bank; that in Oct. 1862 he left Drew's and went to Kemmerton to work there, telling the Drews he meant to return when the trade (he was a puddler) at which he worked became better, and he asked them to write to him and let him know if the trade improved; that he left behind him a waistcoat and pair of trowsers, which were stated by Mrs. Drew to be scarcely worth wearing; that during his absence his lodgings were not occupied by anybody else, but had he returned at any time he might have had them; that he was absent at Kemmerton, out of resp. union, for three months, when he returned to the Drews at Quarry Bank, and in a fortnight after left them again, and left his watch behind him because he was subject to fits; that his watch was afterwards sent to him; that after a period of three weeks he again returned to his lodgings; that during his absence his lodgings were not occupied by any one else, and had he returned at any time he might have had them.

Powell, Q.C. and E. T. Holland appeared in support of the order of sessions, and contended that there was no break of residence, for that the leaving of his residence with the Drews at Quarry Bank being for the purpose of seeking work, and his lodgings, in which he had left some of his clothing, being kept for him in the event of his returning, he must be held to have constructively resided there the whole time. [BLACKBURN, J.—He does not keep on the lodgings. I know of no case in which it has been held not to be a break of residence where there was no residence to which he had a right to return.] The question is, whether there was the *animus revertendi*:

*R. v. St. Marylebone*, 20 L. J. 109, M. C.;

*R. v. Tacolneston*, 8 Q. B.; 18 L. J. 44, M. C.;

*R. v. Stapleton*, 1 Ell. & Bla.; 22 L. J. 102, M. C.;

*R. v. Brighthelmston*, 24 L. J. 41, M. C.; 4 Ell. & Bla. 236.

Gray, Q.C. and Streeten, for the resps., were not called upon.

BLACKBURN, J.(a)—I am of opinion that the order must be quashed. The question is, whether the pauper was resident during the requisite period? There have been several cases upon the subject, and some have been decided one way and some another. But there is no case whatever in which it has been yet decided that a man can be said to be residing in a place when he was physically absent and had no dwelling-place or residence in the parish. In the present case the facts appear to be these. The pauper had lodgings and gave them up; he did not live there; he went away, stating that he would come back when work was better; he said he intended to return, and no doubt that was his intention. He left behind him a waistcoat and a pair of trowsers, which, however, were stated by the landlady to be scarcely worth wearing. The leaving them there might be some indication that he was intending to return. I cannot say the fact of a man leaving some old clothes behind him amounts to a retaining of his lodging as a dwelling-place in the

(a) Cockburn, C. J. and Mellor, J. were absent in the Court for Crown Cases Reserved.

Q. B.]

REG. v. THE GOVERNOR OF THE DEBTORS' PRISON IN WHITECROSS-STREET.

[Q. B.]

parish so as to make a settlement, and that he continues to reside in a place where he has no residence. I think, therefore, the quarter sessions were wrong, and the order must be quashed.

SHEE, J.—I am of the same opinion. In the absence of any case which says that where a party has no residence in the parish there may still be no break of residence, I think the order of sessions bad.

*Order of sessions quashed.*

Wednesday, June 7, 1865.

REG. v. THE GOVERNOR OF THE DEBTORS' PRISON IN WHITECROSS-STREET.

REG. v. THE GOVERNOR OF NEWGATE.

*Prison—Poor-rates—Committal—Newgate and Whitecross-street prisons—52 Geo. 3, c. 209—12 Vict. c. 14.*

*The gaol of Newgate is the common gaol for the confinement of criminals only for the city of London and county of Middlesex, and the gaol in Whitecross-street is a gaol for the confinement of prisoners for such jurisdictions upon civil process. By the 12 Vict. c. 14, persons in default for nonpayment of poor-rates may, upon no distress being available for the amount, be committed by a justices' warrant to the common gaol or house of correction for any time not exceeding three calendar months, unless the sums be sooner paid. A. B. and C. D., defaulters as above, were committed respectively to Newgate and Whitecross-street :*

*Held, that such committals were upon civil, and not criminal process, and that the committal to Whitecross-street prison was good, and (Cockburn, C. J. dubitante) that the committal to Newgate was bad.*

In a former term this court made absolute, subject to a special case, rules calling upon the governor of the Debtors' Prison in Whitecross-street and the Governor of Newgate, to show cause why writs of *mandamus* should not issue, directed to them respectively, commanding them to receive into and detain in their said prisons the bodies of A. B. and C. D. respectively, pursuant to certain warrants under the hands and seals of certain justices of Middlesex, and there to imprison them for certain spaces of time unless certain sums of money should be sooner paid.

It appeared (from the statements in the cases respectively) that the said A. B. and C. D. had been committed, the one to the gaol of Newgate, and the other to the gaol of Whitecross-street, by certain justices of Middlesex, for the nonpayment of poor-rates, under the provisions of sect. 2 of the 12 Vict. c. 14, but that upon being tendered respectively to the governors of the said gaols, they refused to receive them: the governor of Whitecross-street prison upon the ground that such prison was neither the common gaol nor house of correction for the county; and the governor of Newgate upon the ground that he had been directed by the gaol committee of the Court of Aldermen not to receive any persons committed there for nonpayment of rates.

The case proceeded to set out the facts relative to the prisons in Middlesex, as given in the recent case of *Reg. on the Prosecution of the Vestry of St. Mary, Islington, v. The Keeper of the House of Correction in Coldbath-fields*: (*Reg. v. Colvill*, 12 L. T. Rep. N. S. 341.) The case then proceeded to state that there is not now, and never was, a common gaol for the county of Middlesex locally situate in the said county of Middlesex, except it be one or the other of the gaols or prisons mentioned in this case; that the Queen's gaol of Newgate is situate in the city

of London; that the statutes of 7 Geo. 3, c. 37, and 18 Geo. 3, c. 48, are the statutes under which the gaol of Newgate was rebuilt, and are to be taken as part of this case, as are also the statutes of the 18 Geo. 3, c. 60, and the 52 Geo. 3, c. 209; that the Debtors' Prison of London and Middlesex was erected under the provisions of the said last-mentioned Act, and is situated in Whitecross-street, in the said city of London; that the governor of that prison refuses to receive persons committed for non-payment of rates; that the justices of Middlesex had always claimed the right to send Middlesex prisoners to the Queen's gaol of Newgate, as the common gaol of the county, and are now daily in the habit of committing them there under the 4 & 5 Will. 4, c. 86 (the Central Criminal Court Act), and before that Act they were in the habit of sending prisoners there for the purpose of being tried at the Court of Oyer and Terminer and general gaol delivery in the Old Bailey; that since the Debtors' Prison in Whitecross-street was built, the following classes of prisoners only have been received there, viz., debtors in custody of the sheriff; prisoners in contempt from the County Court, Mayor's Court, Small Debts Court and Bankruptcy Court.

In the year 1812 an Act was passed (52 Geo. 3, c. 209) entitled "An Act for building a new prison in the city of London, for removing thereto prisoners confined under civil process in the gaol of Newgate and the two compters of the said city," &c., which recites that

Whereas the gaol of Newgate is not only the common gaol both of and for the city of London, and of and for the county of Middlesex, for the confinement of felons and other offenders, but is also a prison for the confinement of other persons in the custody of the sheriffs of London and of the sheriff of Middlesex. . . . And whereas it is desirable that prisoners confined under civil process should not be confined in the same gaol with prisoners for felony and other offences. . . . and whereas the building of a new prison of a sufficient extent in a commodious situation, and the removing thereto prisoners confined under civil process in the said gaol of Newgate . . . will be of great public utility, &c.

Power is then given to the corporation of London to build a new prison, which shall be divided into four separate and distinct parts, one for the confinement of prisoners confined under civil process in the custody of the sheriff of Middlesex; two other of the said four parts for the two compters of the city of London, &c.; and the remaining fourth part for the said prison of Ludgate.

Sect. 56 enacts, that

From and after such time as the prisoners confined under civil process shall have been removed from the said gaol of Newgate to the said new prison, in pursuance of this Act, the said gaol of Newgate, and every part thereof, shall for ever thereafter be appropriated exclusively to the confinement of such felons and other prisoners liable to be confined therein as are not by this Act authorised to be confined in the said new prison.

Sect. 57 provides,

That all prisoners by process of contempt for not paying any sum or sums of money, or costs, issuing out of any court of law, and all prisoners for contempt of any court of equity for not paying any sum or sums of money, or costs, ordered to be paid by any decree or order of any such court, shall for the purposes of this Act be considered as prisoners confined under civil process, and shall be accordingly removed to and confined in the said new prison.

Sect. 58 provides,

That nothing in this Act contained shall extend or be construed to extend to infringe, defeat, or affect the power or authority of any court, judge, justice, commissioner of bankrupts, or others to commit any person or persons whomsoever to the said gaol of Newgate, or to any other gaol or prison.

By sect. 2 of the 12 Vict. c. 14 (an Act to enable overseers of the poor and surveyors of highways to recover the costs of distraining for rates), it is enacted (*inter alia*) that

When to any warrant of distress for the levying of any sum or sums to which any person or persons is or are now or may hereafter be rated or assessed in or by any rate or assessment hereinbefore mentioned, it shall be returned by the com-



stable . . . that he could find no goods or chattels . . . whereon to levy such sum or sums . . . It shall be lawful for any two or more justices of the peace before whom the same shall be returned, . . . if in their discretion they shall so think fit, to issue their warrant of commitment against the person with relation to whom such return shall be so made as aforesaid, . . . and thereby order such person to be imprisoned in the common gaol or house of correction for any time not exceeding three calendar months, unless the sum or sums therein mentioned shall be sooner paid, &c.

*Bovill, Q. C. (Poland with him)* appeared for the parish authorities, and contended that Whitecross-street prison is the proper gaol to commit to for the nonpayment of poor-rates; for, although the 12 Vict. c. 14, directs defaulters to be committed either to the common gaol or house of correction, yet, as by the 52 Geo. 3, c. 209, prisoners on civil process are not to be committed to Newgate, and as the Legislature in passing the 12 Vict. c. 14 must be taken to have been aware of the provisions of that statute, it could not have intended that prisoners on civil process, as this is, should be committed to Newgate, but to that gaol which in such cases was made a substitute for it. He contended that a commitment in default of distress for nonpayment of a poor-rate was a civil process:

*R. v. Cope*, 6 Ad. & Ell. 226;

*Mather v. Egginton*, 2 Ell. & Bl. 717;

*Re Masters*, 38 L. J. 146, Q. B.; 9 L. T. Rep. N. S. 788.

*Keane, Q. C.* contended that Newgate, and not Whitecross-street, was the proper prison to which to commit in such cases, for that the subsequent statute of the 12 Vict. c. 14, in express terms directs such persons to be committed to the common gaol or house of correction; and moreover that the commitment for nonpayment of a poor-rate is in fact penal process and not civil process, the justices having a discretion to commit or not, and only committing where they believe that the party refuses from wilfulness to pay the amount. [*Cockburn, C. J.*—But if that were so, how is it that he has a right to be discharged immediately upon payment? He is sent to prison because he will not pay the debt. His commitment does not discharge the debt. For not paying the amount he may be imprisoned for three months. Newgate is certainly still the common gaol. But Whitecross-street is neither a common gaol nor house of correction.

*Mellish, Q. C.*, the Recorder of London, and *Clarke* appeared for the corporation.

*COCKBURN, C. J.*—I am of opinion that this order for the commitment of a person to prison for nonpayment of rates which he is liable to pay under the statute should be to Whitecross-street prison. I think there can be no doubt whatever that, under the Act of the 52 Geo. 3, c. 29, the gaol of Newgate being the common gaol of the county of Middlesex, that would have been the place to which a person committed under such circumstances would have been properly sent. Then, that Act of Parliament, practically speaking, divides the common gaol of the county of Middlesex (that is Newgate) into two departments, a civil department for persons in custody on civil process, and a department for persons in custody on criminal process. Then arises the question of whether this class of prisoners falls under the one or the other category, and I can entertain no doubt, having paid the greatest attention to all that has been urged by Mr. Keane, that this is a commitment on civil process. The liability is clearly a civil liability. Upon nonpayment, no offence is created, but process against the goods of the party failing to satisfy the statute is issued. In the event of no goods being found on which distress or execution may take effect, then there is an authority to the magistrates upon sum-

mons to commit the party to prison, but not to do so in the character of a punishment for the offence he has committed in not paying, but simply as a means of enforcing payment if by possibility the process of imprisonment can have that effect. As soon as the man pays he is entitled to liberation, and it is clearly shown that the whole proceeding is for enforcing payment of a civil liability, and not by way of punishment; and I think the true criterion is, whether or not an indictment would have lain in the event of the statute not providing the summary remedy which it has given, and I am of opinion it would not. The whole is a civil liability from beginning to end, the liability to pay money to enforce which the power is given; but as soon as it is discharged by payment the party is entitled to freedom, and his liability is at an end. Considering it therefore as a civil process, it seems to me the commitment must, by virtue of the 52 Geo. 3, c. 209, be to the civil department of the common gaol of the county of Middlesex, and not to the criminal department. The only difficulty which presents itself is created by the 57th and 58th sections; but when these come to be looked at the difficulty disappears. I doubt very much whether there was any necessity for the enactment of the 57th section. I cannot help thinking it was put in out of abundant—perhaps superabundant—caution. Whereas the division is made for two classes, persons in confinement under civil process, and persons in confinement under criminal process, it might be doubted whether contempt ranged itself under one class or another. The 57th section was intended to remove the possibility of a doubt by enacting that persons in custody on process of contempt for not paying any sum or sums of money or costs, shall be considered as prisoners in custody under civil and not under criminal process. And then comes the 58th section, which I own I have considerable difficulty in understanding or putting a construction which is at all satisfactory to my own mind. I cannot help thinking that this section was intended again to operate by way of distinction between the civil process of contempt for not paying any sum or sums of money, and any of those contempts of any court, judge, justice, commissioners of bankrupts, or others, for which, in the administration of justice, they have power to commit. But be that as it may, though I do not think it necessary on the present occasion to say whether or not by virtue of that 58th section any of the authorities in the administration of justice to which that section refers might commit to the gaol of Newgate, though I am very strongly inclined to think that it is limited to cases of contempt, as distinguished from contempt for nonpayment of money, I am bound to say (whether or not the power to commit to Newgate is or is not taken away) that it seems to me, looking at the scope and intent of this Act, and at what the Legislature evidently contemplated and meant, that a commitment in respect of a civil liability of this sort would be wrong; and the proper course to pursue is, to commit to the civil department of the gaol of the county of Middlesex, that is to say, to Whitecross-street prison. The question for us to determine is, whether a commitment or an order for commitment to Whitecross-street prison is proper or not? I entertain no doubt, on the whole view of the matter, such an order is right, and that the keeper of the gaol of Whitecross-street is bound to receive a prisoner under it. I think it is unnecessary to say whether the commitment to Newgate is legal or not; it is sufficient to say that the commitment to the county gaol is right, therefore the order must, of course, be considered as good.

*CROMPTON, J.*—I am of opinion this commitment

Q. B.]

REG. V. THE GOVERNOR OF THE DEBTORS' PRISON IN WHITECROSS-STREET.

[Q. B.]

is in the nature of *civil* process, and, according to the true construction of the Act of 52 Geo. 3, there was no power to send to Newgate, but they were bound to send to Whitecross-street. Now, first, as to this being *civil* process. This is clearly process analogous to an execution. It is on a debt; it is on the return of *nulla bona*, and just like an ordinary *ca. sa.* It holds a man not for any punishment for contempt, or anything of that kind, but it is as purely civil as it can be. If he does not pay, there is the process against his goods, and, on the return of *nulla bona* for that, there will be an execution in the nature of *ca. sa.* till he pays the debt, *capias ad satisfaciendum* strictly. If the magistrate thinks there ought to be a *ca. sa.* under the circumstances, he should have the discretion to order it. It does not alter in my mind the nature of the process. The only question, as it appears to me, really is, is anything in the nature of punishment inflicted? It seems to me to alter and strain the enactment to say it is a punishment if he does not pay. It is no more a punishment than is an ordinary *ca. sa.* I am clearly of opinion it is in the nature of *civil* process, and I think more so than it was in the case of *Reg. v. Egginton*, which was for handing over books and accounts. That being so, where is he to go? The object of the Act is to divide the common gaol of Newgate into two—a gaol for London and Middlesex for criminals, and a gaol for the sheriffs of London and Middlesex in civil matters; and it seems to me on these enactments, without going through them, that no others but criminals, felons and misdemeanants are to be confined in Newgate, by reason of there not being room for others there, and that a new prison is to be built which is, in effect, the sheriffs' prison, as is so said in the section referred to by Mr. Bovill and Mr. Mellish, and which new prison is to be divided into four parts, one being for the confinement of prisoners under civil process in the custody of the sheriff of Middlesex, two other parts for the confinement of prisoners under civil process in the custody of the sheriffs of London, and the remaining part for the confinement of freemen of the city of London, or clergymen, proctors, or attorneys who would have been confined under some old enactment in Ludgate, I suppose. That being so, there is a clause expressly to say, "That from and after such time as the prisoners confined under civil process shall have been removed from the said gaol of Newgate to the said new prison in pursuance of this Act, the said gaol of Newgate and every part thereof shall for ever thereafter be appropriated exclusively to the confinement of such felons and other prisoners, liable to be confined therein, as are not by this Act authorised to be confined in the said new prison." Then some doubt might be raised, whether civil process extended to matters which are really of contempt, which this is not; because it is by a fiction of contempt we make an attachment against a person for not paying a sum of money, if he has not paid it under our rule of court. You may have a rule of court drawn up in form and served upon a person, and that would be merely a civil process, though there might be some doubt as to whether it is a process of contempt. This 57th section was to meet that. This case of contempt, which is for not paying money, is only a form, it is only a remedy for getting your money paid, and the man might be discharged after he had paid the money. It is very different in the case of contempts of court by its officers, or anything of that kind. They get into contempt, and must purge it, or answer it, or pay the money as the court or judge directs. That is the meaning, I think, of the 57th section. You must not have recourse to any quibble in saying this is not civil process in the case of ordinary

debt, but you must mind that it includes what is really the process of getting so much money by means of the fiction you may call it almost, of an attachment. Then, they seem to me to put in the 58th section, I do not think very necessarily, because I do not think it would have touched the power of the commissioners of bankrupts to commit a bankrupt for not answering them. They seem to have thought, "Oh, we must take care that no person gets into it for any other contempt besides what is mentioned." Therefore, where there is contempt of a court sitting, which I take to be a contempt of a criminal nature (and I think the Lord Chief Justice gave a good answer to that in saying that was a proviso of the 57th), they do not mean to take in cases of contempt of that nature. I have considerable doubt whether any justice exercising a duty of this kind ministerially, awarding execution, would come within that if it did not mean and was not confined to a real contempt; but I am inclined to think it means a real contempt. At all events, "Commissioners of bankrupts" seems to me to point to the nature of the crime. I think it means crimes of that nature and species. "Any court, judge, justice." "Justice" might mean what Mr. Mellish referred to, justices of any Superior Court. "Nothing in this Act contained shall affect the power or authority of any court, judge, justice, or commissioners of bankrupts, or others, to commit any person or persons whomsoever to the said gaol of Newgate, or to any other gaol or prison." I think that must allude to contempts of the nature that have been referred to. At all events, I do not think it can destroy the effect of the 58th section, because, if so, that would extend to the power to commit for debts of any kind. To my mind, that would upset the meaning of the whole Act of Parliament, and destroy in effect the great object of classification which the Act intended to enforce, confining what is strictly crime, or a contempt of court, or matters of criminal complexion, to Newgate, and what is really for payment of debt to Whitecross-street. That is the great object of the Act, and I think we should be frustrating it, if in so doubtful a clause as this 58th section we said there was this discretion in the magistrates, which it was the object of the Act to take from them. Therefore, I think the Whitecross-street prison is the right one, and Newgate is the wrong one.

BLACKBURN, J.—I am of the same opinion. The Act under which the magistrates have acted gives them power to commit to the common gaol or house of correction. The regulations of the justices of Middlesex provided for being received in the house of correction; but still it remains that they may be sent to the common gaol, and if matters had remained as they were prior to the 52 Geo. 3, there is no doubt that Newgate would have been the common gaol to which they would have been properly sent; and under those circumstances, having got to Newgate, they would have been in the custody of the sheriff of Middlesex; but then comes the Act of 52 Geo. 3, to build Whitecross-street prison, which by the 48th section enacts that, when the new prison is completed, one part shall be the prison for persons confined under civil process in the custody of the sheriff of Middlesex, and the 56th section says, "from and after that time Newgate, and every part thereof, shall be appropriated exclusively to the confinement of such felons and other prisoners, liable to be confined therein, as are not by this Act authorised to be confined in the said new prison." Stopping there, the thing would seem to be pretty plain, that those who were in the custody of the sheriff of Middlesex would thenceforth be detained in the Debtors' Prison, Whitecross-street, and those

Q. B.]

DAY v. PEACOCK. COBB v. SAME. BINDER v. SAME.

[C. P.]

who were not in custody under civil process would be confined elsewhere. I think there can be very little doubt that that is civil process which is process for the purpose of enforcing a civil liability to pay a sum of money, as much as that is civil process which is for the purpose of enforcing a debt. The difference between the two is a remedy for enforcing a civil right to pay money and a remedy for enforcing it from some person who is in the nature of a criminal. It would be in the nature of a civil or criminal process, according to the nature of the commitment. Where a person is attached for contempt and sent to prison for the purpose of enforcing payment, where it was a commitment for nonpayment of money or costs, it would be by civil process; where it is a commitment for something in the nature of a crime, for the purpose of punishing him, there it would not be civil process; and clearly, having that in their minds, the Legislature, by the 57th section, put in a proviso, saying, "Provided always, and be it further enacted, that all prisoners by process of contempt for not paying any sum or sums of money, or costs, issuing out of any court of law, and all prisoners for contempt of any court of equity for not paying any sum or sums of money, or costs, ordered to be paid by any decree or order of any such court, shall for the purposes of this Act be considered as prisoners confined under civil process." I think that was unnecessary, for it will be considered—at least, according to my construction of the Act—as intended for persons confined under civil process, even if this Act had not expressly so said. Nevertheless, the Legislature thought it safer to mention it. Then, immediately after that, comes the 58th section, which seems to me to be a proviso grafted on the other as to committing for crimes in the nature of punishment and other rights which may be saved. It may be a little obscure, but I do not think we can account for that proviso in the way Mr. Keane's argument would require if committal to Newgate under civil process was to be put an end to—that every committing justice might still send persons under civil process to Newgate, just as if the Act had not passed. I think no such construction as that can be put on the section, and consequently the only question in this case is, whether it was a commitment under civil process? I do not think it is necessary to repeat what has been said; but, taking the definition of civil process to be process to enforce payment of a liability to pay a sum of money, and criminal process for enforcing payment as punishment, I think, on the authority of *Egginton's* case, this was civil process and not in the nature of punishment; and that being so, I think by the true construction of this Act the keeper of Newgate is not bound to take him, and the keeper of Whitecross-street is bound to take him in, which is really the point raised.

SHEE, J.—I am of the same opinion. It seems to me perfectly clear, for the reasons already given by my Lord and my brothers, that this was civil process, and that the person arrested under the warrant was a person to be confined, within the words of the 56th section of the Act of Parliament, under civil process. Now it is also, as appears to me, quite clear that, previously to the passing of the 52 Geo. 3, c. 209, the gaol of Newgate was the common gaol for persons to be confined in, whether under criminal or civil process, and by the 56th and other sections of that Act of Parliament it was expressly provided that for the future the gaol of Newgate "shall be appropriated exclusively to the confinement of such felons and other persons liable to be confined therein as are not by this Act authorised to be confined in the said new prison." Now the persons authorised by this Act to be con-

fined in the said new prison are persons confined under civil process; therefore, as it seems to me, this person would be properly confined in the new prison as a prisoner under civil process. Then we are met with the suggestion of the difficulty arising upon the words of the 12 Vict. c. 14, under which this person was committed, the words being that the justices shall issue their warrant of commitment against such person, and order such person to be imprisoned in the common gaol or house of correction, and it is said that the Act of Parliament passing long after the Act of the 52 Geo. 3, must control any provisions in the 52 Geo. 3, and that therefore it is still open to the justices to order the commitment of the person being a defaulter under the provisions of this Act of Parliament to the common gaol of Newgate. But it seems to me, on the other hand, that this Act of the 12 Vict. c. 14 must be taken to have been passed with a knowledge of, and with some reference to, previous Acts of Parliament for the regulation of gaols and the classification of prisoners in them—this Act of the 52 Geo. 3, as respects London and Middlesex, and the Act of the 4 Geo. 4, c. 63, as to the classification of prisoners in other counties, and that we may well read this particular enactment of the 12 Vict. c. 14, authorising the justices to order such person to be imprisoned in the common gaol or house of correction, as meaning "order such person to be imprisoned in the common gaol for such persons, under the previous Acts of Parliament now in force." Therefore, I think, under the provisions of the 52 Geo. 3, this prison in Whitecross-street was the common gaol, within the meaning of this Act of Victoria, for persons imprisoned under civil process in the county of Middlesex, and that therefore the commitment was properly made to Whitecross-street.

*Judgment for the Crown, in Reg. v. The Governor of the Debtors' Prison in Whitecross-street, and for the debt, in Reg. v. The Governor of Newgate.*

*Reg. v. The Governor of Whitecross-street: Attorneys for the Crown, James and Curtis; attorney for the debt., T. J. Nelson, City Solicitor.*

*Reg. v. The Governor of Newgate: Attorney for the Crown, E. G. Randall; attorney for the debt., T. J. Nelson.*

#### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUNLEY SMITH, Esqrs.,  
Barristers-at-Law.

Wednesday, May 8.

DAY v. PEACOCK.

COBB v. SAME.

BINDER v. SAME.

*Burial fees—Incumbents of districts—15 & 16 Vict.  
c. 85, s. 32.*

*Prior to 1831 the township of B. formed one parochial chapelry. The church of St. Mary's was the parochial chapel of the chapelry, and there was an ancient burial-ground belonging to it, in which the remains of the inhabitants of the chapelry were buried, and the incumbent of St. Mary's received the fees. In 1823 the church of St. George's was built within the chapelry, and a burial-ground was appropriated to it, together with a district, and the residue was called St. Mary's. The ancient burial-ground was enlarged forty years ago, and, since the formation of St. George's district, had been the burial-ground of St. Mary's, and the fees for burial have been paid to the incumbent of St. Mary's. In 1844 a district called*

C. P.]

DAY v. PEACOCK. CORD v. SAME. BINDER v. SAME.

[C. P.]

*St. John's was divided from St. George's, and in 1858 a church was built, but there never has been any burial-ground assigned to it, but the remains of persons dying within the district have been buried in the burial-ground of St. George's, whose incumbent has always received the fees for his own and this district. In Feb. 1857 an order was made, under 16 & 17 Vict. c. 134, for the discontinuance of the burial-grounds of St. Mary's and St. George's, and a fresh burial-ground was provided for the whole chapelry under 15 & 16 Vict. c. 85:*

*Held, that the incumbents of St. Mary's and St. George's were entitled to the fees for the burial of the remains of the inhabitants of their respective districts, and that the latter was also entitled to those of the St. John's district, as they were incumbents of the parish within sect. 32 of the above-mentioned Act.*

This was a case stated for the opinion of the court by order of the learned judge.

The township of Barnaley, in the county of York, forms a part of the parish of Silkstone. It has separate overseers of the poor, and separately maintains its own poor.

Up to the time of the making of the Order in Council of the 8th Aug. 1831, hereinafter mentioned, the said township formed one parochial chapelry, which had existed from time immemorial. The church of St. Mary's was the parochial chapel of the said chapelry, and there was belonging to the said chapelry, and within the said township, an ancient burial-ground in which from time immemorial the remains of the inhabitants of the said chapelry had been and were of right entitled to be buried, and for burials in this burial-ground, and for the erection of monuments therein, and in the said church of St. Mary, fees had always been paid to the incumbent for the time being of the said chapelry.

In or about the year 1823 an additional church, called St. George's Church, was built within the said chapelry by Her Majesty's Commissioners for building new churches under the provisions 58 Geo. 3, c. 45, and 59 Geo. 3, c. 184, and on or about the 16th June 1824, a burial-ground within the said township was, under the provisions of the same statutes, purchased and appropriated by the said commissioners as and for a burial-ground for the said church of St. George. This church and burial-ground were afterwards duly consecrated.

By an Order in Council, bearing date the 8th Aug. 1831, a district was divided from the said chapelry and assigned to the said church of St. George under the provisions of the statutes above referred to.

The district so assigned to the said church of St. George has, since the said Order in Council, been called St. George's district; the residue of the said township has, since the same Order in Council, been called St. Mary's district. In this latter district are situate the said church of St. Mary and the said ancient burial-ground belonging to the said chapelry. This ancient burial-ground was enlarged about forty years ago, and from the time of its being so enlarged until the formation of St. George's district as aforesaid was the burial-ground of the said chapelry, and since the formation of St. George's district as aforesaid has been the burial-ground of the said district of St. Mary, and for burials and the erection of monuments therein fees have always been paid to the incumbent for the time being of St. Mary's.

Since the formation of St. George's district, as aforesaid, the burial-ground so appropriated as and for the burial-ground of St. George's Church, as aforesaid, has been the burial-ground of the said district of St. George's, and for burials and the erection of monuments therein fees have always been paid to the incumbent for the time being of St. George's district.

By an Order in Council bearing date the 23rd May 1844, a district called St. John's district was divided from St. George's district under the provisions of the statute above referred to. From the making of this order until the year 1858 Divine service for St. John's district was performed in a schoolroom in that district, and in 1858 a church called St. John's Church was built for the same district, in which church Divine service has since been performed.

The district so assigned to St. John's church has, since the said last-mentioned Order in Council, been called St. John's district. The residue of St. George's district has, since the same Order in Council, been called St. George's district.

There has never been any burial-ground assigned to, or belonging to, St. John's district, but the remains of persons dying within the limits of this district have been accustomed to be buried in the burial-ground of St. George's district, of which St. John's district formerly formed part, and for such burials in the said burial-ground of St. George's district fees have always been paid since the formation of St. George's district as assigned to the incumbent for the time being of St. George's district.

By an Order in Council, bearing date the 2nd Feb. 1857, made under the provisions of 16 & 17 Vict. c. 134, it was ordered (amongst other things) that (with certain exceptions therein mentioned) burials should, after periods in that behalf appointed, be discontinued in the said burial-grounds of St. Mary's and St. George's districts.

Upon the last-mentioned Order in Council being made, it became necessary to provide a new burial-ground for the said township of Barnaley, and the vestry of the said township having refused to provide such burial-ground, the local board of health for the said township became, on or about the 8th Feb. 1858, under the provisions of the 4th section of 20 & 21 Vict. c. 81, the burial board for the said township.

Which burial board afterwards duly provided a burial-ground for the said township.

The burial-ground so provided by the said burial board (except the portion thereof not intended to be consecrated, and upon which portion a chapel is erected and built) was, with a chapel erected thereon on or about the 6th Nov. 1861, duly consecrated, from which time it became the burial-ground for the said several ecclesiastical districts of the said township within the meaning and according to the provisions of the said last-mentioned statutes.

The plt. the Rev. Henry Josiah Day is the incumbent of the said district of St. Mary, and claims to be entitled to perform the duties and have the same rights and authorities for the performance of religious service in the burial-ground so provided by the said burial board of the remains of parishioners or inhabitants of the said district of St. Mary, and also to be entitled to receive the same fees in respect of such burials, which he has previously enjoyed and received for burials, in the said burial-ground of St. Mary's district, as if such burial-ground so provided by the said burial board were the burial-ground of St. Mary's district. He also claims to be entitled to fees for such monuments, gravestones, tablets and monumental inscriptions erected or placed in the consecrated part of the burial-ground so provided by the said burial board as assigned, in the chapel erected therein, as may be so erected or placed over the remains or in memory of parishioners or inhabitants of the said district of St. Mary, in lieu of the fees or sums which he would have been entitled to for the erecting or placing of such monuments, gravestones, tablets and monumental inscriptions in the said burial-ground of St. Mary's district, or in the said church of St. Mary.

C. P.]

DAY v. PEACOCK. COBB v. SAME. BINDER v. SAME.

[C. P.]

The plt. the Rev. Clement Francis Cobb made the same claim for the district of St. George's.

The plt. the Rev. William John Binder made the same claim for the district of St. John's.

If the court should be of opinion that neither the said C. Francis Cobb as the incumbent of St. George's district, nor the said Wm. John Binder as the incumbent of St. John's district, has any rights or title to fees as in the 15th and 16th paragraphs of this case is respectively mentioned, then the said Henry Josiah Day, as the incumbent of St. Mary's district, claims to have the same rights and to be entitled to the same fees in respect of parishioners or inhabitants of the whole of the said township, which before the said Order in Council of the 8th Aug. 1831 formed one parochial chapelry as hereinbefore mentioned, as he claims in respect of parishioners or inhabitants of the said district of St. Mary, as in the 14th paragraph of this case is stated.

If the court should be of opinion that the said C. Francis Cobb as incumbent of the said district of St. George has the rights and is entitled to the fees claimed by him, as in the 15th paragraph of this case is stated, but that the said Wm. John Binder as the incumbent of the said district of St. John has no rights or title to fees as in the 16th paragraph of this case mentioned, then the said C. Francis Cobb as incumbent of the said district of St. George claims to have the same rights and to be entitled to the same fees in respect of parishioners or inhabitants of the whole of the district of St. George as it existed before the said district of St. John was formed out of it, as he claims in respect of parishioners or inhabitants of the said district of St. George as now existing, as in the 15th paragraph of this case is stated.

The said burial board, who are the defts. in the said several actions, deny that the plts. or any of them have or has the rights, or are or is entitled to fees as above claimed by them respectively.

The questions for the opinion of the court are, whether the plts., or any and which of them, have or has any, and if any, what rights, or are or is entitled to any, and if any, what fees as above claimed by them respectively.

Judgment is to be entered for 1s. damages and costs of suit (including one-third of the costs of this special case and the argument thereof) in each of the said actions in which the court shall decide in favour of the plt. in such action; and judgment is to be entered for the defts., with costs of suit (including one-third of the costs of this special case and the argument thereof) in each of the said actions in which the court shall decide in favour of the defts. in such action.

*Lush, Q.C. (Kempsey with him)* for the defts.—As to the districts of St. Mary's and St. George's, the question turns upon the construction to be put on 15 & 16 Vict. c. 85, s. 32. That section provides that, "from and after the consecration, as aforesaid, of any burial-ground provided under this Act (except any portion therein not intended to be consecrated), such burial-ground shall be deemed the burial-ground of the parish for which the same is provided, and where the same is provided for two or more parishes such burial-ground shall be in law as if such parishes were one parish, and if such burial-ground were the burial-ground of such parish; and every incumbent or minister of the parish, or of each of the parishes (as the case may be) for which such burial-ground is provided, shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorise, perform the duties and have the same rights and authorities for the performance of religious service in the burial-ground, or in the consecrated portion thereof, of the

remains of parishioners or inhabitants of the parish of which he is incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received, and the parishioners and inhabitants of such parish, or of each of such parishes, shall have the same rights of sepulture in such burial-ground as they respectively would have had in the burial-ground in their respective parish." Neither St. Mary's district nor St. George's was a parish within the interpretation clause, which enacts that a parish shall mean every place having separate overseers of the poor and separately maintaining its own poor. That clause also enacts: "That an incumbent and minister shall in respect of any fee made payable to an incumbent or minister under this Act, mean the clergyman who would have been entitled to the fee had the body been buried in the churchyard or burial-ground of the parish from which it came, or in the burial-ground of the ecclesiastical district, in case such district had a burial-ground." Now, there is no incumbent of the whole parish, but the clause must mean the incumbent of any ecclesiastical district.

*Manisty, Q.C. (Maule with him).*—It is admitted that the incumbent of St. John's is not entitled to burial fees. As to the claims made by the incumbents of St. Mary's and St. George's, they are purely statutory. Each incumbent of a church with a burial-ground attached is entitled to have the fees for burying so long as the ground is used for the purposes of burial, but no longer; and under the Act, the burial fees are to be given to the incumbent of the whole parish, and therefore the incumbent of the whole parish is the only person to have the fees.

*ERLE, C. J.*—I am of opinion that the incumbent of St. Mary's and St. George's are both entitled to the burial fees of their districts, in respect of the corpse of every inhabitant over whom they have performed the burial service. Barnsley is a township maintaining its own poor, and so comes within the statute. Formerly there was one burial-ground for the whole parish, but before the burial board was created there were two burial-grounds, one for St. Mary's and the other for St. George's district, but there was no burial-ground for St. John's, whose people were buried at St. George's. Then the board of health established a new burial-ground for the whole of Barnsley, and we are to say who is to receive the fees in respect of the new ground. I think the 32nd section is capable of the construction put upon it by Mr. Lush; it says that "every incumbent of the parish for which such burial-ground is provided shall perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground of the remains of parishioners or inhabitants of the parish of which he is such incumbent, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received." Now, reading that section with the interpretation clause, it seems to me to mean each incumbent of a district having a burial-ground. Mr. Manisty, however, says that the words of the 32nd section are, "every incumbent or minister of the whole parish," and that neither of the present plts. are incumbents or ministers of the whole parish, but that each is incumbent of part only, the parish having been divided into two districts; but, as my brother Byles says, these incumbents fall in some sense within the meaning of the Legislature; and, as I read the Act, every incumbent of a parish in which a burial-ground is provided is to perform the duties of burying the remains of parishioners, and to receive the same

## BAIL.] REG. v. BACKHOUSE AND OTHERS—REG. v. JUSTICES OF WEST RIDING OF YORKSHIRE [BAIL.]

fees as he did before. The statute, in my opinion, casts the same duties on the incumbent as he had before, and entitles him to the same fees; and, looking at the 52nd section, I read the 32nd section thus, "every incumbent or minister of any ecclesiastical district in the parish, which district had a burial-ground at the passing of this Act."

BYLES, J.—I am of the same opinion. No one reading the Act can doubt that the Legislature wished that the clergymen should not be deprived of their emoluments, and that the public should have the burial services performed as before. The clergy have duties to perform and fees to receive, and they cannot be relieved of one or deprived of the other without the express authority of an Act of Parliament. A bishop of the province of Canterbury means a bishop beneficed in that province, and the words of this statute should receive the same literal construction, and then they are as consistent with the paramount intention of the Act as under any other construction which could be suggested.

KEATING and M. SMITH, JJ. concurred.

*Judgment accordingly.*

Attorneys for plt., *Brooksbank and Galland.*

Attorney for defts., *H. H. Poole.*

## BAIL COURT.

Reported by W. GRAHAM, Esq., Barrister-at-Law.

Monday, June 12, 1865.

## REG. v. BACKHOUSE AND OTHERS.

*Quo warranto—Election of local board—Absence of returning officer—Public Health Act 1848.*

*By the Public Health Act 1848, the elections of members of local boards of health are to be conducted by the chairman, who is the returning officer, assisted by other persons appointed by the board, and a penalty is imposed on persons neglecting their duty in that behalf. The chairman having been absent during the election:*

*Held, that the election was absolutely void, though it was conducted by the other officers in the ordinary manner, and it was not suggested that the result would have been different if the chairman had been present.*

This was a rule for a *quo warranto*, calling on six members of the Darlington Local Board of Health to show cause why their election should not be set aside as void.

By the Public Health Act 1848, 11 & 12 Vict. c. 63, s. 20:

The chairman of the local board of health shall have the powers and perform the duties vested in or imposed on the chairman by this Act, and shall perform all other duties which it shall be requisite for him to perform in conducting and completing elections under this Act, and the local board shall appoint a competent number of persons to assist him.

By sect. 26:

The chairman shall cause the voting papers to be collected on the day of election in such manner as he shall direct, and if any voting paper has not been collected through the default of the chairman or the persons appointed, the voter may deliver the same to the chairman on the day of election.

By sect. 27:

The chairman shall, on the day immediately following the election, attend at the office of the board and ascertain the validity of the votes, and cast them up; and the candidates who have obtained the greatest number of votes shall be deemed to be elected, and shall be certified as such by the chairman under his hand.

By sect. 28:

If the chairman or other person charged with taking &c., the votes at any such election shall neglect or refuse to comply with the provisions of the Act, he shall be liable to a penalty of 50l.

In the case of the election in question the chairman had duly issued the required notices of the election, but before the day of the election he went to Ireland, having left word that the clerk of the board should conduct the election. The election was conducted in the usual way, the usual officers were present, and the list of candidates elected was sent to the chairman in Ireland and he signed it. It was not suggested that the election would have been different if he had been present, or that anything was done which ought not to have been done, but it was contended that the election was absolutely void as the returning officer was not present.

*Rew* showed cause, and contended that the election was not absolutely void, but it must be shown that if the chairman had been present there would have been a different result. [CROMPTON, J.—It is clear that if you had to plead to the *quo warranto* you could show no title. This is an election before no returning officer. The Act of Parliament says the election is to take place in one way, and you conduct it in another.] There was nothing done here that would not have been done if the returning officer had been present, and it did not become necessary for him to exercise his discretion. He certainly ought to be present, and he may be liable to penalties, but the question is if the election is void: (*Reg. v. Justices of Middlesex*, 17 Jur. 188.) This is a purely vexatious application, as they do not suggest that there would be any difference if there was another election:

*Reg. v. Trevenen*, 2 B. & Al. 479;

*Reg. v. Parry*, 6 A. & E. 810.

The affidavits do not show that there was any corrupt motive in conducting the election in this manner. [CROMPTON, J.—In *Reg. v. Parry* there were no duties to perform; here there were duties, and they were performed by another person. It is like the case of a reference to a barrister, who goes away and leaves it to his clerk.]

Quain, for the relator, was not called on.

CROMPTON, J.—This is an election carried on before a party who is not the returning officer, and I cannot see that it can be good in any possible way. The Legislature says, and I must take it for very good reasons, that the election is to be conducted by a particular officer, and then another person goes and conducts it. Even if I had a discretion, I should not exercise it in supporting such a practice. It is very much the same as if a cause was referred to a barrister, and he were to go away for his own pleasure, and leave it to his clerk, and then it was said that the award was good because it was made just as well as if it had been made by the barrister. Or if a case was to be heard by a judge, and he left it to one of the masters, he might conduct it just as well as the judge, but that would not do. For the reasons that I have stated I think the rule should be made absolute.

*Rule absolute.*

Attorneys for the relator, *Rogerson and Ford.*

Attorneys for the defts., *Lever and Son.*

Tuesday, June 13, 1865.

## REG. v. THE JUSTICES OF THE WEST RIDING OF YORKSHIRE.

*Highway district—Waywarden—Several hamlets in one township—25 & 26 Vict. c. 61, ss. 6 & 7.*

*By 25 & 26 Vict. c. 61, s. 5, justices may make orders for the formation of highway districts. By sect. 3, "parish" is to include any place maintaining its own highways. By sect. 6, the provisional order shall state*

BAIL.] ASSESSMENT COMMITTEE OF THE UNION OF CHAULTON v. OVERSEERS OF CHAULTON. [BAIL.]

the number of waywardens, such number to be at least one, to be appointed by each parish; and by sect. 7, if a parish consists of several hamlets, each maintaining its own highways, the justices may by their provisional order combine them. The justices in their provisional order named only one waywarden for the parish of E. which contains three hamlets each of which maintains its own highways, and no order was made combining them, it never having been brought under the notice of the justices that there were three hamlets:

*Held, that the provisional order was bad.*

This was a rule calling on the justices of the West Riding of Yorkshire, to show cause why a writ of certiorari should not issue to remove a provisional order constituting a number of parishes and hamlets a highway district, with a view to its being quashed.

By sect. 5 of the 25 & 26 Vict. c. 61, justices in quarter sessions assembled are empowered to issue provisional order for forming highway districts.

By sect. 6, clause 4:

The provisional order shall state the parishes to be united in each district, the name by which the district is to be known, and the number of waywardens (such number to be one at least) which each parish is to elect.

By sect. 8:

The word "parish" shall include any place maintaining its own highways.

By sect. 7:

The following restrictions shall be imposed with respect to the formation of highway districts in pursuance of this Act.

Where a parish separately maintaining its own poor is divided into townships, tithings, hamlets, or places, each of which separately maintains its own highways, it shall be lawful for the justices, if they think fit, in their provisional order to combine such townships, tithings, &c., and to declare that no separate waywarden shall be elected for such townships, &c.

The township of Easington, which is included in the provisional order, now proposed to be removed, consists of the hamlets of Lower Easington, Dale Head and Hamerton Mere, each of which maintains its own highways, but the township maintains its own poor. No objection was taken before the magistrates, and it did not appear that they were aware that the township was divided into three hamlets, and they had not combined the hamlets as provided by sect. 7.

*Mellish, Q.C.* and *Quain* showed cause.—They contended that if the facts had been brought under the notice of the magistrates they could have appointed the proper number of waywardens, or combined the hamlets under sect. 7, and that the parties had no right to wait till the order was made and then come to set it aside. How could the magistrates know that there were separate hamlets in this township? The township maintains its own poor, and has its own churchwardens.

*CROMPTON, J.*—They have not made an order combining the hamlets under sect. 7, and that throws me back on sect. 6, which says there shall be one waywarden for each.

*Mellish, Q.C.*—It is a great hardship, if the parties do not go before the magistrates and prove that there are separate hamlets, that the order should be set aside.

*Manisty, Q.C.* and *Prentice*, in support of the rule, were not called on.

*CROMPTON, J.*—I think the rule should be made absolute.

*Rule absolute.*

THE ASSESSMENT COMMITTEE OF THE UNION OF CHAULTON v. THE OVERSEERS OF CHAULTON.

Union Assessment Committee Act 1862, s. 21—Re-deposit of valuation list—By whom to be deposited.

By sect. 17 of the Union Assessment Committee Act 1862, a valuation list is to be made and deposited by the overseers where the rate-books are deposited, and notice is to be given of the deposit. By sect. 21 the assessment committee, when they have altered the list, shall cause it to be deposited, and notice to be given of the re-deposit; but it is not stated who they shall cause to deposit it. On a rule for a mandamus to compel the overseers to deposit, and give notice of the re-deposit of the revised list:

*Held, that they, and not the assessment committee, were the proper persons to do so.*

*Mellish, Q.C.* moved, on the part of the assessment committee of the Union of Chaulton, for a rule calling on the overseers of Chaulton to show cause why a mandamus should not issue commanding them to deposit the valuation list of the parish of Chaulton in the place where the rate-books are kept, and to give public notice of the deposit of such list pursuant to the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 108). By sect. 17 of that Act:

The valuation list for each parish shall be deposited by the overseers in the place in which rate-books are deposited or kept, and the overseers shall give public notice of the deposit of such list on the Sunday next following the deposit in the same manner as in the case of a poor-rate allowed by the justices.

By sect. 19:

The committee are required to hold meetings for hearing objections to the valuation lists.

By sect. 20:

The committee may, whether any objections be or be not made, make alterations in the lists.

By sect. 21, where the committee make any alterations in any such list,

They shall cause such valuation list, with such alteration or insertion, to be deposited for inspection in manner hereinbefore provided concerning the valuation list, made by, or delivered to the overseers, and shall cause the like notice to be given of such deposit as is required in the case of a valuation list so made or delivered as aforesaid, and shall appoint a day . . . for the hearing of any objections to the valuation list as so altered.

The only question raised on the present motion was, whether the assessment committee or the overseers of the parish were to deposit and give notice of the deposit of the revised or altered list.

*McLish, Q.C.* contended that the persons who deposited the original list, viz., the overseers, were the persons to deposit the revised list, and that the only rational construction of the words "shall cause to be deposited," in sect. 21, was, that they shall cause the overseers to deposit the list.

*Bere* showed cause in the first instance.—By the 23rd section the list, when approved by the assessment committee, is to be delivered to the overseers, which shows that it was the intention of the Legislature that it should remain in the custody of the assessment committee from the time of the first deposit. By sect. 31 the committee shall cause a copy of the altered list to be deposited in their board-room, and it cannot be supposed that that is to be done by the overseers, and that explains the meaning of the word "cause." It is perfectly consistent with both sections that the clerk of the committee should deposit the list when altered. The cost of the deposit cannot be charged on the rates, and it could not be intended that the overseers should pay it out of their own pockets.

*CROMPTON, J.*—I do not entertain a doubt on this.



C. CAS. R.]

REG. V. CHARLOTTE SMITH.

[C. CAS. R.]

case. By sect. 17 a valuation list is to be made and signed by the overseers, or the committee may with the consent of the board of guardians of the union make a list and deliver it to the overseers of the parish to which it relates to be deposited. That is a duty which one would suppose the Legislature would throw on the overseers who have the control of the place where the rate-books are kept. Then the overseers are the persons who are to give notice on the Sunday, and the section goes on to say, "As in the case of a poor-rate allowed by justices;" that is by the overseers. Then they are to transmit the list to the committee at the expiration of fourteen days, and the committee are to hear objections and may make alterations; and the Legislature requires them to hold another meeting when they have approved of the list, and by sect. 21 there is to be a re-deposit of the amended list, and an opportunity to the parishioners to come forward again and object. Then the question arises as to the mode in which the second deposit is to be made [The learned Judge read sect. 21 and proceeded.] Therefore it is to be done in like manner as by sect. 17, that is, as in the case of poor-rates. Then there is power to have a fresh meeting for objections. If then, it is to be done in like manner as in sect. 17, and sect. 17 says it is to be done by the overseers, I cannot suppose that the clerk to the committee is to go down and do what is essentially the function of the overseers. Therefore I think there is to be a re-deposit, and it is to be done in the same manner as the first, by the overseers. I think the word "cause" there means cause the overseers, and in another case they may cause some one else. I think the overseers are the persons who have and keep this list, and how the assessment committee are to come and put it in the parish depository, I do not know. It is said that the use of the word "cause" in sect. 31 makes an alteration, but there is no duty on the overseers to do anything in the committee-room. Then the only other argument was that the overseers were to be allowed certain charges, but they were confined to making out the list. But there is no great trouble, I suppose, in putting the list in the chest and on the church-door. I do not see that makes any difference here, as the same argument would apply to the original deposit as to the re-deposit. I think therefore that this is to be done by the overseers, and that this rule should be made absolute.

*Rule absolute.***CROWN CASES RESERVED.**

Reported by J. THOMPSON, Esq., Barrister-at-Law.

Saturday, May 6, 1865.

(Before ERLE, C. J., CHANNELL, B., BLACKBURN, MELLOR and SMITH, J.)

REG. V. CHARLOTTE SMITH.

*Manislaughter—Master and servant—Neglect to provide proper food, &c.—Control and restraint—Dying declaration—Evidence.*

*When deceased was very ill (but there was no evidence that she was then under the belief of approaching death), she made a declaration which two hours afterwards was taken down in writing, the writer putting questions to the deceased as he went on writing. The next day, when deceased knew that she was dying, the declaration was read over to her by another person who put questions to her from the statement, sometimes in a leading form, which she answered:*

*Held, that it was a question for the judge whether the dying declaration ought to be received, and that under the above circumstances it was rightly admitted.*

[MAG. CAS.—VOL. III.]

*A master is not criminally liable for the death of a servant not of tender years, although the death was caused by the insufficiency and badness of the food and lodging provided by him for her, unless the servant was of such weak intellect as to be helpless and unable to take care of herself, or was under such restraint as to be unable to withdraw herself from her master's dominion.*

Case reserved by Montague Smith, J.:

The prisoner was tried before me at the Spring Assizes 1865, at Norwich, for feloniously killing and slaying Martha Turner.

The prisoner kept a lodging-house at Great Yarmouth, and the deceased was her domestic servant.

The case on the part of the prosecution was opened by the statement that the deceased died in consequence of the insufficient food and unwholesome lodging provided for her by the prisoner, or of the combined effect of these things and of a course of ill-treatment of the deceased by the prisoner in beating and otherwise ill-using her. It was also opened that the deceased was a person of weak mind, and had been brought by the acts and threats of the prisoner under her dominion and control.

It appeared in evidence that the deceased Martha Turner entered the prisoner's service in Sept. 1863, remained in it until on or about the 21st Feb. 1865, and died on the 27th of the same month. The deceased was the daughter of a widow too poor to maintain her. She had already been in domestic service, but had for some time prior to her entering the prisoner's service been an inmate of the work-house of the Blofield Union, and left it to go to the prisoner's.

In Sept. 1863, when she entered the prisoner's service, she was twenty-three years old. She was then described to be "a big strong girl." She was described by some of the witnesses as a person of weak mind, by others as of very weak mind. She appeared from the evidence to be of a low order of intellect. There was evidence that the deceased was subjected to great privations and ill-treatment by the prisoner. She was insufficiently fed and badly lodged. She was beaten and otherwise ill-used. The prisoner also used threats of various kinds to intimidate her. She became thin, weak, and ill in the prisoner's service, and towards the end of the service, very thin, weak and ill, and, according to the medical witness, she died from disease of the lungs, produced by want of nourishment, to which damp and unwholesome lodging at night might have conduced.

It became a question on the evidence whether, towards the end of the service, the deceased was reduced to and in such a state of body and mind as to be helpless and unable to take care of herself, and was under the dominion and restraint of her mistress, and unable to withdraw herself from her control. I held there was evidence to go to the jury on these points.

When the deceased first went into the prisoner's service the prisoner was living in Brandon-terrace. At Michaelmas 1864 she removed to a house in Marine-terrace. There were usually lodgers and their servants in the prisoner's house, and the deceased occasionally went out of doors on errands and on other occasions.

The evidence of the witnesses relating to the conduct of the prisoner to the deceased extends from the summer of 1864 to Feb. 1865.

The prisoner's counsel having objected that there was no evidence to go to the jury to sustain the indictment, and the case being peculiar in its circumstances, I have thought it right to annex a copy of the evidence as it was given.

The evidence of the first two witnesses relates to

Z

C. CAS. R.]

REG. V. CHARLOTTE SMITH.

[C. CAS. R.]

thedying declarations of the deceased. The prisoner's counsel objected to the admissibility of the evidence of these dying statements of the deceased proved by Mr. Jary, on account of the manner in which they were taken. I received the evidence and stated that the manner of taking the statements of the deceased by Mr. Jary might properly be considered by the jury in estimating the effect of the evidence.

The prisoner's counsel further objected that, having regard to the relation of mistress and servant which existed between the prisoner and the deceased, there was no evidence to go to the jury to support the indictment; that there was no evidence that the deceased was helpless from bodily sickness or weakness, or that she was under the physical restraint of the prisoner; and he contended that if the deceased were under moral restraint, or the fear of her mistress only, the prisoner would not be criminally responsible for the consequences of the neglect imputed to her. I drew the attention of the jury to the distinction between the cases of children, apprentices of tender years and lunatics under the care of persons bound to provide for their wants, and the case of a mistress and a servant of full age able to take care of herself, and to withdraw herself from the service of her mistress; and I told them that in the latter case the mistress, although bound by contract to provide food and lodging for the servant, would not be criminally responsible on this indictment for the consequences of the mere breach of the obligation to supply proper food and lodging, and I left the case to the jury with the direction in substance, that if they were satisfied upon the evidence that the prisoner had culpably neglected to supply proper and sufficient food and lodging to the deceased as her servant during a time when the deceased being in the prisoner's service was reduced to and in such an enfeebled state of body and mind as to be helpless and unable to take care of herself, or was under the dominion and restraint of the prisoner, and unable to withdraw herself from her control, and that her death was caused or accelerated by such neglect, the prisoner would be criminally responsible, and they might find her guilty; but if they were not so satisfied, to acquit the prisoner, and I told the jury that after the medical evidence the acts of violence proved could not be considered as having caused the death.

No objection was made by the learned counsel for the prisoner to my direction, but I was asked by him after the verdict to reserve for the opinion of the Court the objections above mentioned.

I beg leave to ask the opinion of the Court of Criminal Appeal on the following questions:

1. Whether the evidence of Mr. Jary of the dying statements of the deceased was admissible.
2. Whether, with the evidence of the dying statements, if admissible, or without it if inadmissible, there was evidence to support the indictment which ought properly to have been left by me to the jury.

The jury returned a verdict of guilty, and I passed judgment on the prisoner; but respited the execution of it, and detained the prisoner in custody.

MONTAGUE SMITH.

The following was the evidence on which the conviction was founded.

Richard Bipp, governor of Blofield workhouse.—Friday, 24th Feb., 4 p.m., I received Martha Turner. Coyne, overseer, brought her. She was taken to the sick ward. She had been previously an inmate. She left workhouse two or three years ago. She was then strong and robust. She was 5ft. 5in. in height. I believe she was weak-minded. She looked vacant then. She was so bad when I received her on 24th Feb. that I sent at once for Mr. Kidd, the medical officer. The under part of the right wrist was bruised. There were several weals across the under part. They appeared to have been done some time. The left hand was swollen twice usual size, and two of the fingers quite black. A few hours after she came in she made a statement to me. I took it down in writing. The following day I communicated it to Mr. Jary, the chairman. Mr. Jary went to the workhouse. I heard Mr. Jary read over

the statement I had written. Mr. Jary asked the girl if she knew what state she was in. She said she knew she was dying. She appeared to understand the statement. An alteration was made at Martha Turner's instance. I believe she thought she was dying. She died Monday 27th, at 4 p.m.

Cross-examined:

She made the statement to me at eight o'clock. I wrote it down between two and three hours after she made it. The statement was read over to her on Saturday night, between eight and nine. She was gradually sinking from the time she came in. The statement was all read to her. Something was added in consequence of a question put to her. Usual in union to return persons of weak intellect. This girl was not returned as of weak intellect. She was not bad enough for that. She did not mention she thought she was dying until she said so to Mr. Jary. The mother was living in workhouse. She came in about a few months back. I cannot say whether the girl was in the house up to the time she went to service.

Re-examined:

The mother has been for some time in the house, off and on. Only one question asked by Mr. Jary before he quite read it through. I wrote the statement in the sick room from what she told me, and put questions to her as I wrote. I read it over the same night. She made no observation. After Mr. Jary read it she made no observation, but she did make an observation when he had read about half way, in answer to a question of Mr. Jary. What she said was entered. An interpolation was made.

William Jary, chairman of the Board of Guardians.—Saturday, 26th, I saw Martha Turner. A statement was put into my hand. I first spoke to her to see if she was able to give a statement. I thought she was in. I asked her whether she was aware of the state she was in. She said she felt she was dying, and she satisfied me she thought so. I sometimes put the questions from the statement in a leading way, and sometimes took the girl's words. I sometimes put a question to her, and sometimes she took as it were a step of her own. I put a question to her in the middle. It was, Why did you not run away? and she made an answer. With that exception she made no alteration. She appeared to understand the statement. I put a great many questions and I got a great many answers to those questions. I think she answered every question I put to her. I did not read the statement in its entirety at once. I made observations as I went on. I read it in substance. I read every word of it with observations. She said nothing to induce me to reject any part of it.

Cross-examined:

I read it over putting it partly in questions. She was not asked to make her mark. I tried to get as much of her own statement as I could. She could not make her mark. Her hands were very bad.

Metcalfe proposed to read statement.

Bulwer objected.—It must be a voluntary statement, and not in answer to leading questions.

I consulted the Lord Chief Justice and then held that the evidence of Mr. Jary was admissible of what took place on the occasion of his interview with the deceased.

Mr. Jary further examined by prisoner's counsel as to the manner of his examining the deceased:

I asked if she had lived with Mrs. Smith (prisoner). She said she had. I believe I asked how long she lived there. I cannot say whether she said she was to have 1s. a week and received 1s. in all, or I read it to her. As to "boots, &c." I don't remember whether she stated these things without my putting it to her. I read to her: "I had no meat, pudding, or anything in the shape of food, only dry bread." I then said, Why did you not run away? She said her mistress locked the door.

The witness having been thus tested, it was agreed that the paper should be read, as the substance of what the witness would prove he obtained from the deceased; but Mr. Bulwer still objected to the evidence of the statements of the deceased being admissible at all, having regard to the way in which they were obtained.

The following is the paper:

I have been living at service with Mrs. Smith (of Brandon-terrace, Great Yarmouth), lodging-house keeper. I have been in her service one year and six months. I was to have had 1s. per week for my services. I have only received 1s., one pair of boots and two caps. My mistress gave me only half a slice of bread each day. I had no meat, pudding, or anything in the shape of food—only dry bread. I tried to get away, but my mistress locked the door. I have been sleeping in a damp cellar, with only a coverlid to cover me, and no bed. I slept on the bricks. My mistress, during my illness, only visited me once a day, and that was for the purpose of giving me my day's bread. I got the water I had from a tap in the cellar with a mug for that purpose. I was two

C. CAS. R.]

REG. V. CHARLOTTE SMITH.

[C. CAS. R.]

weeks lying on the damp bricks, and saw no one but my mistress. My mistress wanted me to work, and I could not. She has beaten me with a cane during the time I was sick in the cellar. I have never slept on a bed the whole time I have been with my mistress in the new house, say five months and upwards. Before going to the new house I slept on a straw bed on bricks. I made a bed-tick out of one of my old shawls and filled it with straw: that was my bed. All I had to cover me was an old counterpane. I have always been subjected to my mistress's ill-treatment from the time I first entered her service. My mistress pushed me on one occasion, and I fell against a piece of iron and bruised my eye. She has bruised me by striking me with her fist on the chin and other parts of my body. She would never let me leave the house when I wanted so to do. The charwoman took me to my uncle Williams, in Yarmouth. He would not take me in. He sent me to my uncle Bush's, at Freethorpe; from thence I was taken in a cart to the Union House at Longwood. I have not had my clothes off for two weeks.

Elizabeth Soames, Great Yarmouth, widow.—I go out as nurse. In September last I was sent for by prisoner. I went to her house in Brandon-terrace, and I have been to prisoner's in Marine-terrace. I went in as a visitor. I saw a Martha Turner there. I saw her several times. When I went the last time, a few days before the deceased left, I rang at the door and nobody answered. Whilst I stood there I heard deceased and prisoner talking. The deceased came to the door, and she said her mistress was not within; but I heard her voice. I had seen the girl about three weeks before she left. She looked in a weak state. I noticed her looking pale, not as she had looked before. She was not so fat as when I first knew her. She got thinner by degrees. I was at prisoner's to nurse prisoner three weeks to a month or five weeks before Michaelmas. I went one evening about nine. I found the prisoner ill; she had sent for me; I found her in bed. She slept in a room next the dining-room on ground-floor. On Saturday she was moved down to the kitchen in a shut-up bedstead. She could see store-room from there. She gave me keys and told me to give Martha Turner some dripping and bread. It was morning. She was to have it in the scullery. I gave her instead some tea and some bread and butter. The girl had no dinner. I don't know whether she had anything more. She was working hard all day. I did not say anything to it then. The girl could not take anything for herself, only what came off the drawing-room table. There were lodgers. Prisoner said deceased was a lazy old beast. I did not see the girl get anything next day, but what she got off drawing-room table by stealth. I don't know that the girl had any dinner on Sunday. I did not see whether she had anything. I was there from Friday night to Sunday morning. I know of nothing given her except the bread and butter I gave her and things from the drawing-room table. I did not go into scullery where the girl was. She only came into the kitchen on business. She slept in scullery on straw bed. An old counterpane on it. The floor was bricks and very damp. Things were washed up there. She was taking the bedding one day to the yard, and I told her not to do so. I did not notice bedding was damp, but it was a damp place. After they went to Marine-terrace, prisoner said "she had a nice low kitchen with a fire-place in it." On the Saturday after Martha Turner left, the prisoner came to me. She asked if I would go there to tea on Sunday. She said she would pay me what she owed. I did go to tea. She said I was to come again and she would settle with me. Prisoner said old Anne was gone, and she was afraid she should get into trouble; would I speak on her behalf. I said I could not speak anything on her behalf. I had not been there long. Prisoner being unwell whilst I was there could not get about to attend to the girl. She came again after that. The Tuesday after the girl died she said "the old beast Anne is dead." The prisoner said the police officer had been to say she was dead and asked me to go to speak for her, and I said I could not.

#### Cross-examined:

Prisoner had lodgers in the drawing-room with two servants. They had their meals at prisoner's. I, for prisoner, provided for these servants. They were in front kitchen. Martha was only servant of prisoner, she went out for beer. I went three times to Marine-terrace, &c. Martha opened the door every time. I only went in once. On the other occasions she said her mistress was not at home. On last occasion when I did not see her I heard prisoner's voice telling her to dust table.

Mary Chaplin.—I was in service of prisoner up to a week after Michaelmas last. I was at Brandon-terrace first, and then at Marine-terrace. At Brandon-terrace deceased slept in back kitchen on a straw mattress. The flooring was brick. There was no bedstead. The bricks were damp. She only had a counterpane. No sheets, blankets or pillow. The bedding in day-time was taken up to a knife house in the yard by Martha. That went on all the time at Brandon-terrace. She had bread and dripping to eat each meal. Sometimes two meals a day, sometimes three. She got the first at eleven—sometimes later. She commenced work at six. Sometimes nothing until two o'clock. The other meal just before going to bed at nine. She had only one half slice of bread off a quatern loaf. About as thick as the first joint of my finger. When she had three meals they were at eleven, three and nine. She always had meals at three and nine. Breakfast sometimes omitted. She might have as much dripping as she liked. She helped herself to it. Beef dripping. Prisoner cut the bread and then locked it up. Martha has had a cake

sometimes from prisoner made of flour, dripping and fish. Once or twice. The lodgers' servants brought down remains of dinners and gave to prisoner. Martha had no opportunity of getting that. I saw Martha cleaning a fender. Prisoner kicked her over, and then took her by her arm and chucked her up again. She cried, but I do not think she was hurt. That was at Brandon-terrace. I saw prisoner take hold of her hair in the kitchen and chuck her round. She screamed out very much. Prisoner was in a passion. I have not seen her do anything else. Prisoner asked Martha what she was going to say to her mother when she came. She said, "I shall tell her I have got a good mistress and a good house and home." Prisoner said, "If you do not I will give it you," holding up her finger. I heard her say that twice. I saw Martha cleaning fish. I had been there a fortnight. She took out gills and eat them raw. Her legs were swollen up to the knees. She wore slippers, nothing else. She was always at work from morning till night. Almost always on her feet. She slept at Marine-terrace, in the cellar leading out of the kitchen. A very small place. Brick floor. Very damp. She had the same mattress as at Brandon-terrace. She was a girl of very weak mind, I think. The prisoner used to say she was silly. Her age was twenty-four. She was called "Old Anne."

#### Cross-examined:

There was no tap in the cellar at Marine-terrace. Martha cleaned the door-step outside the door. I got the same to eat as she did, and at the same times. I left because I did not like the place. Things were in confusion at Marine-terrace. It was an ordinary straw mattress for the girl. I slept in butler's pantry on the dresser. Prisoner slept two nights in the back kitchen. Martha was not of dirty habits. Prisoner was always angry and talking.

#### Re-examined:

When I went away I was not thinner. My legs began to swell. We were not allowed soap. I had a sheet to lie on, and one blanket to cover me. There was a tap in the back kitchen at Brandon-terrace.

Caroline Harvey.—I lived in prisoner's service at Brandon-terrace six weeks from June 1864. I have many times seen the prisoner with a whip in her hand. I have seen her whip deceased very much on the arms, back and shoulders many times. She used both ends of the whip. Biting whip. I have seen her arms black and blue. I have heard her cry out. I saw Martha cleaning the knives. Prisoner took a knife and dashed it on deceased's wrist, and made a bad wound. I got sticking plaster and put it on her wrist. Prisoner pulled off the plaster. It was then worse. I stayed three weeks. The wound was not healed when I left. Deceased's hands were chapped, and I got glycerine and the prisoner took the bottle and broke it. She whipped her, and the girl screamed. The prisoner said she would not use her hands for a workhouse girl. I told prisoner I would tell of her conduct. She said she did not give her half as much as she deserved. Martha had bread; half-slice or slice of a quatern loaf. She had none for three days, except what I gave her from the lodgers' table. On one occasion I saw prisoner pull her to the ground by the hair. The girl was weak-minded. I left because I could not bear to see the treatment.

#### Cross-examined:

There were lodgers in the house. Sir Thomas and Lady Seaton and servants, and Mr. Miller and other lodgers. I mentioned to Mr. Miller's servant that prisoner ill-treated Martha. I was upper servant and lived with prisoner. The girl sometimes went out for the beer.

Elizabeth Motta, wife of a baker.—I knew Martha. Martha used to come to my shop very frequently from August to November last. In consequence of information I have given her pieces of bread and remains of what my family had, such as kind of bacon or potatoe peelings, and she would eat them up as a cat or dog would.

#### Cross-examined:

She often came to my house. Three or four times a week and sometimes every day.

#### By me:

I used to talk to her. I never advised her to go away.

Elizabeth Goodwin.—I live at No. 1, Brandon-terrace. Last summer, latter part of July, I heard a shriek of murder. Martha shrieked murder. I saw prisoner with a small stick, or a piece of iron, or a poker. I saw her strike Martha twice on the arms. She shrieked out murder. I heard prisoner distinctly say, "Get in, you old vermin." She pushed her into the house. I saw Martha the next morning. Her arms were bruised in two places.

#### Cross-examined:

I think Sir Thomas Seaton was lodging there. I live at No. 1, prisoner at No. 3. Three houses between. Sunday, noon, people coming from church.

Charlotte Cooper, widow of Thomas Cooper.—We lived at No. 4, Brandon-terrace, next door to prisoner. Latter end of July, on a Sunday, I heard noise in prisoner's. I was in scullery. I knocked at the grate. I heard a fall down stairs as if some one had fallen or been pushed. I knocked twice

at back of grate and got no answer; but heard a voice very like prisoner's say, "Oh, you varmint you." I saw the girl on the following morning cleaning steps. I asked why she screamed. She shook her head and looked hard into the hall. In consequence of being sent for I went to prisoner. She asked why I interfered with her or her servant's business. I said I was justified in so doing by hearing screams of murder. She said it was a mistake of mine. I said I would be on my oath I did. She said the girl was in a shrieking fit. I said that altered the case. She then asked the girl if she did scream murder. I said, "What's the use of your asking her if she was in a shrieking fit? The girl shook her head as if she answered no. Prisoner said the mistress with whom she lived before had beaten her for same thing, and so had her father. I said if I heard it again I should send for the police. The girl had every appearance of weak intellect.

Charlotte Elizabeth Vallina, dressmaker.—I lived at Leicester-terrace. I worked for prisoner from October to April in dressmaking. The deceased was then healthy. She was a very weak-minded person. I saw her at my mother's house in latter part of July or August. She walked up to table and took herring bones and refuse off table and ate them hurriedly. She appeared very hungry. 13th Feb. last I went to prisoner's and saw the girl. She had her hand tied up. Prisoner saw me looking, and said she had fallen down and cut it; that she had been stealing, and in her hurry to get away fell and cut it. Prisoner said she tied it up for her. Prisoner asked me why I did not come and do her work (dressmaking). I said I did not like the way she treated the girl. She said it was very rude to take notice of anything she did to her servants. The said the girl was a great thief. She showed me a book in which she had entered the things the girl had stolen. Prisoner said, if the girl had been worth anything she would have been dead long ago. I called up the girl. She came up some steps from some place under ground. She was very much bent. It was quite dark. She stumbled. I had heard prisoner say some time previously that she would have been transported for stealing the things. On the 13th Feb. prisoner said she was going to send the girl home with a note and that book to tell the governor the things she had stolen, and have her put to gaol for it. She said this in Martha Turner's presence. The deceased rubbed her hands and said she did take the things. She appeared to be alarmed about it.

#### Cross-examined:

I should not call deceased very silly. She was not so clever as some people. She waited upon people, answered in a reasonable manner, and appeared to understand pretty well. Martha let me in and out on 13th Feb. Among the things mentioned as stolen were six pairs of sheets. Prisoner said deceased had taken the sheets to her mother and her mother had made them into petticoats. I went on 13th Feb. for my bill, 1s. 6d.; I have never got it.

Frances Turner, mother of deceased.—Sept 1843 she left union to live with prisoner. She was a stout girl. She had been in service before in two or three places. She was always weak-minded. A month before Michaelmas last I went with Mrs. Bush to prisoner's. I gave prisoner a month's warning. Prisoner said if I let her stay the month she would pay her wages up. At Michaelmas I went to take the girl away. Prisoner told me the girl was old enough to arrange for herself. That I had no place to take her to but the union, and she was fit for her service, and my daughter consented to stay. I thought she did not look in good health, but she said she was, in prisoner's presence. She was not looking so stout, she was looking thinner. My daughter never made any complaint, she was not allowed. I never saw her without the prisoner being present.

#### Cross-examined:

I heard prisoner had been ill-treating her. Mrs. Bush lives in Yarmouth. There was nothing to prevent my taking her away. I did not take her away because she had no place to go to but the union, and I thought she had better remain with prisoner. She had been in service in two or three places and always able to do her work, but she wanted some one to show her about her work. I lived at Freethorpe, in a small cottage, with three young children. It was too small to take her in, two small rooms. She had a bad thumb (right hand) before she went to prisoner's. She was obliged to leave her place, Mrs. Carver, on New Year's Day, 1863. She was very ill when in union. She was at Mrs. Carver's, and Mrs. Bligh's, and Mrs. Howard's. She was ill when living with Mrs. Bligh, her first place. She left Mrs. Bligh's because of ill-health. She left Mrs. Carver's because of bad thumb. She left Mrs. Howard's because she did not like the place. She looked after a woman who was dying for five weeks. I did not like to take her because I was afraid I should have to go to union.

#### Re-examined:

She was well when she went to prisoner's. Prisoner said she would write to the governor to say she was fit for her service.

Mary Ann Bush, the aunt.—The deceased was in health when she went to prisoner's. A stout, big girl. In August I met her in Jetty-road. She showed me her arm. She showed me two marks on her left arm, weals as if done by a stick. She made a complaint. Hand was not then swollen. The mother and I went to the house. I told prisoner we had come to take girl away, because she had kept her without food and

beaten her. She said, "Oh, Mrs. Bush, do you think I did such a thing?" I said, "We are come to take her away." She said she had lodgers and could not spare her then. I gave her a month's warning. The girl said, "Aunt, look down (pointing to bricks) to where I sleep." At end of month I went. I saw the girl. I told prisoner we were come to take her away. Prisoner said the girl had made an agreement to stop. The mother took it up. I said, "If she is going to stop, I hope you are not going to beat her or keep her without food." About a month after Michaelmas I went again. I saw the girl. She was looking thin. I told prisoner she was getting thinner. I said, "You remember the remarks I made." The deceased got gradually thinner. I can't say whether she was getting weak. 21st Feb. she was brought to my place. She was then much thinner. She looked very dirty and was very weak. Mrs. Higgins brought her. I could not take her in, and prisoner had been down and said she had stolen a quantity of things and I had taken them in.

#### Cross-examined:

I lived half-a-mile from prisoner. The deceased once came to tea. I understood Mrs. Higgins was going to take her back to prisoner. When I saw her in Jetty-road she looked dirty—no bonnet—but not ill.

This witness was afterwards recalled by me, and said that when the deceased was brought to her by Mrs. Higgins they were both on foot.

George Berry, police constable.—I went to prisoner's. I told her she must go with me to police-office, on suspicion of having caused the death of Martha. Prisoner said, "I did not cause it." Sunday, 5th March, I went to see cellar of prisoner's. It was about 5 feet 8 inches high; about 9 feet long and 7 feet wide. Brick flooring, very wet. I found an old mattress, two old sheets and a counterpane. They were very damp. No door. The entrance is under the staircase. About fourteen steps down. There was a bin. There were ashes and refuse in it. There was a window two feet square with glass in it looking into the yard.

#### Cross-examined:

There was nothing to prevent any one going from cellar to door of house. There was no tap in cellar. There was in the kitchen.

George Tewsley, superintendent of police.—1st March, I went to prisoner and asked if Turner had left. She said she had in consequence of illness. She said she had a bad hand in consequence of chilblains, which she had stupidly put into a pail of cold water. I asked her if she knew if Turner was dead or alive. She said, "No." I told her she was dead, and that she had made a statement before death, that she had slept in a cellar. She said that was false; she was a great liar and a thief, and had no idea where her soul was going to. I asked if she had had sufficient food. She said always sufficient food whilst with her. I asked her to show me the cellar. On examining the cellar I found a camp bedstead leaning against wall of cellar; on a chair an old mattress folded up, two dirty sheets and a counterpane. The whole very dirty. Some soapstone on shelf over. I asked prisoner if that was the bed and bedding of Turner. She said, "Yes." She said she had occasionally slept in the cellar, but against her (prisoner's) will. She wished her to sleep in the kitchen. She was a very dirty girl, and she was compelled to let her sleep in the way I had seen.

#### Cross-examined:

She said the camp bedstead was the deceased's. That she had always told her to sleep in the kitchen. That the bedstead was to be put in the cellar during the day, and her directions were, that in the night the deceased was to bring it up and sleep in the kitchen, but she was too lazy to do so. I heard Mr. Costerton promise coroner that she should appear before him on following Thursday to give her explanation of what had happened. Tuesday night I took her up and had her taken before justices. She was deprived of opportunity of appearing before coroner. Mrs. Gaze, Mrs. Higgins and her daughter gave evidence before coroner. I am conducting prosecution.

#### Mrs. Higgins was not called.

William Cufande, Surgeon, Acle.—24th Feb. I saw M r s Bush at Rampant Horse, Freethorpe. She was in a most enfeebled emaciated state, in bed in a back room, without a fire. I examined her. I noticed her left hand was swollen and in a gangrenous state. Mortification had set in. The fore-arm and arm even to shoulder much swollen. Back of the left hand was more discoloured. On right hand the skin was chapped and cracked. I observed she was very thin, and her bones prominent. I directed her to be removed to the workhouse with every care. She died 27th Feb. 23th, I assisted at post mortem examination. On opening the chest the right pleural cavity contained a pint and a half or two pints of serum. The right lung was hepatic (rendered more like liver than lung), and rendered impervious to air. The upper lobe of the left lung contained two tubercles. Consumptive deposits hard and uninfamed. Remainder of the lung was inflamed. The heart was thin, pale and flabby. No appearance of fat about heart. On opening the abdomen the stomach was greatly distended by gas: containing beef tea and port wine. The intestines

C. CAS. R.]

REG. v. CHARLOTTE SMITH.

[C. CAS. R.]

were flat, collapsed, and their coats very thin. The kidneys had no fat surrounding them. The bladder small, empty, and the coats thin. Brain was healthy in appearance. The appearances indicated that the deceased died from the state of lung described. The gangrenous hand showing a low type of inflammation conducted and produced by innutrition—insufficient nourishment. Insufficient nourishment would produce the peculiar state of inflammation of the lung from which she died, as any exhaustive disease would produce it. Every other organ being healthy, especially those connected with the digestive functions, convinces me that she suffered from insufficient nourishment. The appearances when alive and the *post mortem* examination satisfied me she had for some considerable time suffered from insufficient nourishment. Exposure to cold and wet would conduce to the state in which I found the lungs. Sleeping in a damp place would so conduce.

#### Cross-examined:

Congestion is the first onset of an inflammatory disease. In one lung there were tubercles, which were consumptive symptoms. She died of inflammation of the pleura and of the substance of the lung. Both the pleura and the lungs may be implicated and cause death from taking a violent cold. This has been a very trying season. Yarmouth is cold and trying. Chilblains proceed from slow circulation. A neglected chilblain may become gangrenous. Gangrene might arise from many causes. Mr. Kidd made the examination.

#### Re-examined:

The tubercles were hard and innocuous. She did not therefore die of consumption. In a common cold I should have expected to find both lungs inflamed. I think the symptoms are not consistent with death from a cold, and that they are all consistent with insufficient nourishment.

*Bulwer, Q. C.* for the prisoner.—First, the dying declaration of the deceased was not admissible in evidence. It was improperly obtained; and many parts of it are not evidence at all. The admissibility in evidence of a dying declaration is an anomaly. It rests on the presumption that the solemnity of the approach of death impels the party to speak the truth and supplies the obligation of an oath: (Taylor on Ev. 587, 3rd edit.) In 2 Hume's Com. Laws of Scotland, 407, it is said "Such a declaration is admissible also, although not authenticated in the same full and formal way as a panel's declaration, if it is proved by credible witnesses to have been freely given and fairly taken down, and to have come from a person who was in his sound senses and knew the serious nature of what he was engaged in." Applying that test, the declaration here was not freely given and fairly taken down. It does not appear that when deceased made the declaration she knew that she was dying, and the answers she gave to Mr. Jary were to leading questions suggested by the previous statement; in short, the answers were extracted, not given voluntarily. A dying declaration stands on a similar footing to the deposition of a deceased witness in this respect, that the declaration is liable to any objections that the deposition of the deceased witness is, and, therefore, any answers to illegal questions may be objected to: (*Hutchinson v. Bernard*, 2 Moo. & Rob. 1.) Secondly, the case for the prosecution was not made out. The cause of death was the insufficient supply of food and the bad lodging. That is not sufficient in this case, for the deceased was a girl of full age, and it is only in the case of a child of tender years that a master or mistress is criminally responsible for neglect to supply proper and sufficient food and lodging:

*Rex v. Ridley*, 2 Camp. 650;  
*Friend's case*, Russ. & Ry. 22;  
1 Russ. on Crimes, 46, 489;  
*Smith's Master and Servant*, 180.

It was said that the deceased was a girl of weak intellect under the control of the prisoner, and that she was under such restraint and terror that she could not exercise her free will. The evidence does not bear this out. Before Michaelmas 1864 she complained to her mother and friends; but still she remained. She also was allowed to answer the door, and on the 21st Feb. visited her aunt. She was therefore not confined to the house. Threats

are not sufficient (*Reg. v. Pitts*, Car. & M. 264); there must be personal restraint:

*Biffin v. Bignall*, 81 L. J. 189, Ex.

*Metcalfe* for the prosecution.—The conviction is good. The deceased was so under the coercion and control of the prisoner as to be unable to withdraw herself. Coupling the threats and the beating they establish the coercion. And from her dying declaration it appears that the deceased was so ill during the latter part of her time as to be unable to withdraw.

*ERLE, C. J.*—I am of opinion that this conviction was wrong. The prisoner was indicted for feloniously causing the death of her servant, and the unlawful act relied upon was neglecting to supply proper and sufficient food and lodging to the deceased at a time when the deceased, being in the prisoner's service, was so enfeebled in body and mind as to be helpless and unable to take care of herself and unable to withdraw herself from the prisoner's control and dominion. The law is undisputed that, if a person having the care and custody of another who is helpless, neglects to supply him with the necessities of life and thereby causes or accelerates his death, it is a criminal offence. But the law is also clear, that if a person having the exercise of free will chooses to stay in a service where bad food and lodging are provided, and death is thereby caused, the master is not criminally liable. The question therefore is, whether the deceased Martha Turner was so helpless in mind and body as to be unable to take care of herself and to withdraw herself from the prisoner's dominion. It is clear on the evidence that the deceased was not in a literal sense so helpless and enfeebled in body and mind as to be a prisoner of the debts, for she was accustomed to go out of the prisoner's house on errands, to act as servant and perform all the ordinary services required of her. She had sense enough to act as servant, and was not a prisoner or under any physical restraint. We come to the last question. Was she by reason of threats and ill-treatment of the prisoner deprived of the exercise of her free will? The jury found that she was under the dominion and restraint of her mistress and unable to withdraw herself, and there is much evidence of maltreatment by beating. Now, her death occurred in Feb. 1865, and the latest evidence of beating is in the summer of 1864; and after that the deceased gave notice on Michaelmas 1864 that she was going to leave, but subsequently continued voluntarily in the prisoner's service. I do not, therefore, think that what took place in the summer of 1864 is proximately connected with the death, and the prisoner is not responsible in law, except for matters proximately connected with the death. The deceased could have left her mistress's service and returned to the workhouse, but she did not choose to do that; or it may be that her mistress had threatened to inform against her for stealing if she left her service, and in that way it may be said her mistress had control over her; but beyond that I can see no evidence that she was so under her mistress's control, or unable to withdraw, as to make her mistress criminally liable for the neglect. I therefore cannot say that the deceased had so lost the exercise of her own free will as to be under the dominion and restraint of her mistress, so as to make her mistress criminally responsible. The conviction, therefore, cannot be sustained.

*CHANNELL, B.*—I am of the same opinion. Two points are reserved for our decision. The first is, whether the dying declaration of the deceased was properly received in evidence. *Prima facie*, a declaration not on oath is not admissible in evidence;

C. CAS. R.]

REG. v. REYNOLDS—BLADES v. HIGGS.

[H. OF L.]

but the law has allowed it to be admitted when it relates to the cause of the death, if made by a person in a dying state and who believes himself to be dying. It is a question for the judge, and not for the jury, whether the declaration was made by a dying person in the belief of his impending death. What the declaration is, is a distinct question, and that is for the jury. I do not think that the learned judge could have come to any other conclusion, than that the deceased, at the time she made the declaration, was well aware of the condition in which she was. The next question arises upon the merits. The summing-up of the learned judge was, I think, strictly correct; but he did not sufficiently define in what sense dominion and restraint were to be understood—whether moral or physical restraint was intended. It became necessary to distinguish whether the neglect took place when the deceased, being in the prisoner's service, was reduced to such an enfeebled state of body and mind as to be unable to take care of herself, or whether she was under the dominion and restraint of the prisoner and unable to free herself from her control. The question for us is, whether there was evidence proper to be left for the jury to support the verdict, and I am of opinion that there was not. There was an entire absence of evidence to support the first alternative; and upon the second I think that there was not evidence of that degree of dominion and restraint which could have prevented the deceased from leaving the service of the prisoner had she been so disposed. Nor can I see that there was any evidence of such influence as would compel her to return, when she left the house on errands or for other purposes. I think, therefore, that this conviction cannot be sustained.

BLACKBURN, J.—I am of the same opinion. I agree with my brother Channell on the first point, and think that the learned judge could not have come to any other conclusion than that the deceased knew of her dying state at the time she made the declaration. The question then arises on that declaration, what is it the deceased states was the cause of her death, and whether that was the cause. Now, it appears on the evidence that, though active violence was used, it was not the cause of the death, but that the death was caused by insufficient food and bad lodging. It cannot be denied that the direction of the learned judge was right. The contract of the master to supply his servant with sufficient and proper food and lodging makes him civilly, but not criminally, liable for the breach of it. In order to make him criminally responsible for neglecting to do so, it must appear that the master has got the servant so under his control and dominion as to be helpless, like a lunatic or infant, and consequently unable to take care of himself. Now, was there in this case sufficient evidence that the deceased stood in such a relation to the prisoner that, although there were no bars, locks, or bolts, she was so terrified by the prisoner that she was in effect as much restrained from withdrawing herself as if she had been so confined? If there had been such evidence, I think that it would support the conviction. But though there is some scintilla of evidence, that ought not, especially in a criminal case, to be left to the jury; and I think the evidence, upon the whole, does not amount to more than a mere scintilla.

MELLOB, J.—I agree that the conviction cannot be supported. I think that there was some evidence to support the direction of the learned judge, but, on full consideration, I think that it was not sufficient to be left to the jury. Having regard to the circumstances of the case, and its importance, I think the learned judge was right in not stopping it.

SMITH, J.—I reserved the case for this Court because I felt great doubt whether the evidence was sufficient to sustain the conviction. I thought there was very little on the only ground on which the conviction can be supported, namely, that the deceased was entirely under the dominion and control of the prisoner, so as to be unable to withdraw herself from her service. I thought then, and think now, that I could not have withdrawn the case from the jury. I am, perhaps, more impressed with the evidence than my learned brothers are, but I do not dissent from their decision.

Conviction quashed.

## BAIL COURT.

Reported by W. GRAHAM, Esq., Barrister-at-Law.

Wednesday, June 14.

REG. v. REYNOLDS.

*Indictment found at sessions—Felony—Certiorari.*

*The court will not remove an indictment for felony found at the quarter session on the grounds of local prejudice and difficulty in obtaining a jury, the proper course being for the recorder to send the case to the assizes.*

An indictment against the deff. for embezzlement had been found by the grand jury at the quarter sessions for the borough of Tewkesbury, but in consequence of the number of challenges by the deff. the panel was exhausted and a jury could not be procured.

J. J. Powell, Q. C., now moved on behalf of the prosecutor for a certiorari to remove the indictment into this court on the grounds of local prejudice and the difficulty in obtaining a jury in consequence of the number of challenges.

CROMPTON, J.—In any case of difficulty the recorder can send the case to the assizes. We have power to remove anything, but we do not generally remove felonies, as there is an entirely different course of procedure on the Nisi Prius side, and there is no means of taking the opinion of the Court of Criminal Appeal. I think it would be much better if the recorder were to send the case to the assizes.

J. J. Powell, Q. C. thereupon withdrew his motion.

## HOUSE OF LORDS.

Reported by JAMES PATTERSON, Esq., of the Middle Temple, Barrister-at-Law.

Tuesday, June 13, 1865.

BLADES v. HIGGS.

*Game — Property — Right of owner of soil — Wild animals — Right of trespasser.*

*The doctrine of Holt, C. J., in Sutton v. Moody, 1 Ld. Raym. 250, confirmed, first, that if P., a trespasser, start and capture a hare or wild animal on the soil of A., the property in the animal continues all the while in A., who can recover it by an action of trover; secondly, that if P. start game in the forest or warren of A., and hunt it into the soil of B., and kill it there, the property also continues in A. ratione privilegii; thirdly, that if P. start game on the soil of A., and pursue and catch it on the soil of B., then the property is neither in A. nor B., but in P., the trespasser.*

*Semble, the reason why poachers are not indictable for larceny is, that the game, while alive, is in the same category as fruit, and is part of the soil, which is not at common law the subject of larceny.*

William Blades, the plt., was a fishmonger and

H. OF L.]

BLADES v. HIGGS.

[H. OF L.]

licensed dealer in game at Stamford, in the county of Lincoln, and the defts., William Higgs and Thomas Percival, were, the former the steward, and the latter a servant in the employ of the Marquis of Exeter. Between seven and eight o'clock in the morning of the 16th Oct. 1860 the plt. bought of a man named Yates two bags, containing about ninety rabbits, and ordered them to be consigned to him at the Midland station at Stamford. The plt., upon the purchase, paid 4*l.* 15*s.* for the rabbits. A few minutes before nine the same morning the plt. went to the Midland station with a barrow, for the purpose of bringing the rabbits away to his shop. The bags arrived, directed to the plt., with one of his own printed labels, and the plt. paid 4*s.* for the carriage of them to Stamford, and they were delivered to him. As he was proceeding to put the two bags in the barrow, and before he had got them on, the deft. Higgs came up to the plt. and said he wanted to see what was in the bags, to which the plt. said he should not allow him, and with the assistance of a porter the plt. lifted the bags on the barrow. The deft. Higgs remained there until two policemen came, and then he directed them to see what the bags contained. The plt. said he might. One of the policemen looked into them, and seeing that they contained dead rabbits he allowed the plt. to take them, and assisted him in putting them back on the barrow. The other deft., Percival, then came up and said, "I shall take these rabbits, they are mine;" and the deft. Higgs said also, "They are the Marquis of Exeter's." The defts. then attempted to get possession of the bags, and the plt. resisted for some time, until at length, one of the policemen saying to him it was no use his struggling any longer, he discontinued his resistance, and the defts. took possession of the bags and their contents. Another game-dealer in the town, called Pollard, was fetched to the spot to buy the rabbits, and they were sold to him by the defts., the plt. protesting against the sale of his property. The two bags were directed to the plt., and had been sent from the Ketton station on the Midland Railway.

The counsel for the defts. proposed to prove, on their behalf, that the persons who transmitted the rabbits to the plt. went upon the Marquis of Exeter's land and took the rabbits, and killed them and put them into the bags there, and then carried them to the railway-station at Ketton, and contended that the property in the rabbits was in Lord Exeter, and that the defts., acting under his authority, were justified in the course they adopted.

The learned Judge, Willes, J., who presided at the trial, after observing that a man's property in the land does not give him any right of property in animals of a wild nature upon the land after they have become old enough to escape off the ground proceeded as follows: "According to the old passage in the Institutes (Coke's Institutes), you have no possession in a wild animal when it is no longer in your power to restrain it. There are a great many curious decisions on that branch of the law, as for instance—whether you have your hawks so long as you can use them, you must have power to get them back. As to young animals, you have greater property in them, for they cannot escape, and you may take them out of the nests. But when they grow up and can run away into other people's land, you cannot follow them and bring them back. You have no more right to a rabbit than to a sparrow—you cannot follow it and bring it back. He might kill it, of course, on his own land. It is, I own, very difficult to make a distinction, and for myself, I never could see the distinction between a pheasant and a fowl which I choose to encourage and rear on my land. I never could see the distinction between the pheasant preserved and fed on my land and the barn door family, but there is that dis-

tinction in the law, and I am bound to administer the law as it is. The whole theory of the game laws is founded on there being no permanency in property of this description. The doctrine has been followed as laid down in Coke upon Littleton. A person entering on your land is a trespasser no doubt, and on his taking the thing out of or off the land he is a trespasser. The proofs may be as large as the defts. wish, but if a person goes into a close and kills a rabbit, or ninety rabbits or Lord Exeter's grounds, which comes to the same thing, and goes off and sells them to a fishmonger, then Lord Exeter's people have no right to go to the fishmonger's, and take them from him, as coming out of Lord Exeter's grounds; the right would be in him though taken by trespass, and he is only subject to the game laws, and not to the ordinary rules of property. Suppose he kills the ninety rabbits and puts them into his bag, it is not like felling a tree and coming back for it: it is all done there and then." The learned judge then directed the jury as follows: "If the rabbits were the property of Lord Exeter at the time, the defts. would have had a right to take them, but were they Lord Exeter's? The learned counsel for the deft. says he takes them to have been so, and that he would show that certain poachers were in Lord Exeter's grounds, and took the ninety rabbits and sent them away from Ketton to Stamford, and therefore they were that nobleman's property, and that he had a right by the hands of his servants to take them back. That depends upon this, whether persons going on the property of another and taking rabbits there, not taking them in a hutch, but wild, and killing them, are they to be recovered back? I think not. The learned counsel for the defts. suggests the law is the other way, and he has suggested a passage from a book of repute by which he thinks he is supported, but certainly the bent of my opinion is too strong, and has existed too long a time to enable me to come to that conclusion, or to induce me to have any doubt about it. My notion is, that a person who kills wild animals, such as rabbits, is liable to a trespass at the instance of the owner of the ground where he kills the game, under what are called the game laws. I repeat, I never could understand why such a law should exist, because, if a man has land and chooses to rear pheasants and what not upon it, and goes to the labour and expense of having them preserved, and of feeding them at much more cost than a farmer's barn-door fowls, I never could understand why the law as to larceny did not apply as to that. According to all principle and reason they should belong to the man who created the property just as much as the cock and hen. The sum and substance of it is, in point of law I rule that plt. was entitled to the rabbits and that the defts. were not entitled to take them from him.

The jury found a verdict for the plt. with 6*l.* 10*s.* damages.

The Court of C. P. afterwards made absolute a rule for a new trial on the ground of misdirection, inasmuch as the judge had told the jury that the facts relied on by the defts. did not constitute evidence of the right of possession being in the Marquis of Exeter.

On appeal the Court of Ex. Ch., consisting of Pollock, C. B., Martin, B., Wilde, B., Blackburn, J. and Mellor, J. affirmed the judgment of the court.

The present appeal was then brought.

Hayes, Serjt. and Beasley, for the app., contended that the courts below had wrongly held that the right of possession to these rabbits was in the Marquis of Exeter. By the civil law, and the law of nature, which was of universal application, whoever first caught a wild animal was entitled to the property in it: (Sand. Just. 172; Instit. ii. 1, 12.) Here it was a fact in the case, that the app.



had obtained the rabbits lawfully from those who had caught or reduced them into possession. Whatever right the captors had was thus transferred to the app. It is said that the owner of the soil is entitled to the wild animals caught thereon, but it was impossible to discover any reason for that doctrine. It is true that Holt, C. J. delivered a *dictum* to that effect, in *Sutton v. Moody*, 1 Ld. Raym. 250; 5 Mod. 375; 2 Salk. 556; 12 Mod. 145, which, he said, was to be found in the Year-books or old authorities: (43 Edw. 3, p. 23, pl. 2; 2 Bract. 1; Fitz. N. B. 87; Case of the Swans, 7 Rep. 26; Com. Dig. "Biens" F.) But no such doctrine was there to be found, and even if it were there found it was contrary to sound principle. Holt's doctrine was, moreover, inconsistent, for while he says a trespasser who starts and kills a hare on A.'s land has no right to the hare so caught, because it belongs to A., Holt also said that if the trespasser started the hare on A.'s land and hunted it into the land of B. and there killed it, it then belonged neither to A. nor to B., but to the trespasser. It was impossible to discover any reason for holding the trespasser to be entitled in one case to the hare and not entitled in the other. Therefore, as the doctrine was a *dictum*, and is unfounded in reason and inconsistent, and also at variance with the law of nature, it ought to be overruled. This may now be done, for the House has never recognised the doctrine, though the courts below had to some extent recognised it in

*Churchward v. Studdy*, 14 East, 249;

*Graham v. Ewart*, 11 Ex. 346;

*Rigg v. Earl of Lonsdale*, 11 Ex. 671; 1 H. & N. 923.

Holt's doctrine was also inconsistent with principle, because, if the wild animal belongs to the owner of the soil on which such animal is at the moment, then it must be larceny to take it. But no case ever decided that a poacher was guilty of larceny. On the contrary, the theory on which the whole of the game law was founded is, that larceny is not committed by the poacher; but he is punishable summarily for the trespass merely, because there is no other mode of punishing him. And the game laws do not alter the right of property in game, except in some exceptional circumstances which do not affect the present case. The general rule still remains that a poacher is entitled to the property of the wild animals he catches, even though he incur several penalties in catching them. If the game caught belonged to the owner of the soil there would have been no need of game laws at all, for in each instance the poacher might have been indicted:

2 Russ. Crimes, 84;

2 East Pl. Cr. 607.

Macaulay, Q.C. and Field, Q.C., for the resps., contended, that whatever may have been the civil law on this subject, the law of England was clear that the property in all wild animals, so long as they are on the soil, is in the owner of the soil. This is especially the case with regard to animals which are fit for food. The property is always in some one. It is true the property is not absolute, but qualified, for it may be divested by the animal voluntarily quitting the soil. At all events a trespasser acquires no title. This has been the law of England from the time of the Year-books. It was clearly laid down by Holt, C. J., and has often been acted on since. These authorities are as follows:

Year-book, 12 Hen. 8, p. 10; 22 Hen. 6, p. 54; 11 Hen. 7, c. 17;

Manwood's Forest Laws, 198, edit. 1741;

*Huddesden v. Gryssel*, Cro. Jac. 195;

*Case of the Swans*, 7 Rep. 17;

*Sutton v. Moody* (*supra*);

*Keble v. Hickeringill*, 11 Mod. 74;

*Churchward v. Studdy* (*supra*);

*Graham v. Ewart* (*supra*);

*Rigg v. Earl of Lonsdale* (*supra*);

*Case of the Coney*, Godb. 122.

It is said that if the property in the game caught belong to the owner of the soil, it necessarily follows that the poacher must be liable to an indictment for larceny. This is not a necessary consequence, for there are several instances of the property of things being in an individual, and yet the party who takes such things is not indictable for larceny. Such instances are taking fruit from trees, or trees from the soil, or fixtures from a freehold. Whatever, therefore, may have been the principle on which Holt, C. J. laid down the *dicta* in *Sutton v. Moody*, it is too late now for the courts to alter it, as it has been so often acted upon.

Hayes, Serjt. replied.

*Cur. adv. vult.*

The LORD CHANCELLOR said:—When it is said by writers on the common law of England that there is a qualified or special right of property in game—that is, in animals *feræ naturæ*, which are fit for the food of man—while they continue in their wild state, I apprehend that the word "property" can mean no more than the exclusive right to catch, kill and appropriate such animals, which is sometimes called by the law a reduction of them into possession. This right is said in law to exist *ratione soli* or *ratione privilegii*, for I omit the two other heads of property in game which are stated by Lord Coke—namely, *propter industriam* and *ratione impotentie*—for these grounds apply to animals which are not, in the proper sense, *feræ naturæ*. Property *ratione soli* is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil. Property *ratione privilegii* is the right which by a peculiar franchise anciently granted by the Crown, by virtue of its prerogative, one man may have of killing and taking animals *feræ naturæ* in the land of another; and, in like manner, the game, when killed, or taken, by virtue of this privilege, becomes the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil. The question in the present case is, whether game found, killed, and taken upon my land by a trespasser becomes my property as much as if it had been killed and taken by myself or my servant by my authority. Upon principle there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act; for it would be unreasonable to hold that the act of the trespasser—that is, of a wrong-doer—should divest the owner of the soil of his qualified property in the game, and give the wrong-doer an absolute right of property to the exclusion of the rightful owner. But in game, when killed and taken, there is absolute property in some one, and therefore the property in game found and taken by a trespasser on the land of A. must vest either in A. or the trespasser; and if it be unreasonable to hold that the property vests in the wrong-doer, it must of necessity be vested in A., the owner of the soil. This view of the case is supported by a series of decisions. In the case of *Sutton v. Moody*, 1 Ld. Raym., Holt, C. J. deduced several conclusions from the Year-books on the subject of the property in game. Among them are the following propositions: "If A. starts a hare on the ground of B. and hunts and kills it there, the property continues all the while in B." In this case, thus put, it must, of course, be taken that A. has hunted and killed the hare without the leave or licence of B., and there-

H. OF L.]

BLADES v. HIGGS.

[H. OF L.]

fore that it is a wrongful act by A., which enures for the benefit of the true owner, viz., the owner of the soil. Another proposition is, that if A. starts game in the forest or warren of B., and hunts it into the ground of C., and there kills it, the property remains all the while in B. the proprietor of the chase or warren, because the privilege continues, and, consequently, B. is entitled to the absolute property in the dead game so chased and killed by A., who, from the statement of the case, must be taken to have acted without the licence of B., and therefore to have been a trespasser. A third proposition is, that if A. starts a hare in the ground of B., who is entitled *ratione soli* only—for that is plainly implied—and hunts it into the ground of C., and there kills it, the property is in the hunter, for it cannot be in A., who is entitled *ratione soli* only, and not *ratione privilegii*, for the hare is not killed upon his land, and it cannot be in C., for the game was not originally found in his possession, but was driven upon his ground by the chase and pursuit of the hunter. These propositions appear to me to prove clearly that game found and killed by a trespasser under such circumstances as that it would be the absolute property of the owner of the soil or of the owner of the right of free warren if it had been found and killed by such owner instead of by the trespasser, does in law become the absolute property of the proprietor of the soil or privilege immediately on its being so caught and killed by the trespasser. The law so laid down in *Sutton v. Moody* is consistent with several cases decided subsequently to the Year-books, of which I will mention one, *Coney's case*, Godb. 122; and it has been recognised and acted upon in several subsequent decisions. Of these I may mention *Churchward v. Studdy* (14 East, 249), *Graham v. Ewart* (1 H. & N. 7; H. L. C. 331), and *Earl of Lonsdale v. Rigg*, in the Court of Q. B. and Ex. Ch., on which so much reliance was placed by the Courts of Q. B. and Ex. Ch. in their decision of the present case. With respect to this case of *Lonsdale v. Rigg*, I entirely concur in the observations of Blackburn, J., and consider the case as a conclusive authority upon the point before us, which it is not desirable to question or disturb. The case, when condensed, amounts to this, that grouse were shot and taken away by a trespasser upon and from the land of the plt., who brought trover for the dead grouse, and it was clearly held by the judges of the Court of Ex., and afterwards by all the judges in the Court of Error, that the grouse, as soon as they were killed and fell upon the land of the plt., became and were his absolute property in respect of his ownership of the soil. This conclusion would not be affected, even though it be true that an indictment at common law will not lie against the trespasser for killing and carrying away of game if it be one continuous act, inasmuch as the ownership of the game is considered as incident to the property in the land; but this consequence is the result of a peculiarity in the law of larceny, which holds that the act of severing and taking away things attached to the freehold is not a felonious taking, a result which does not affect the existence of the right of property. I am, therefore, of opinion that the learned counsel for the defts. on the trial at Nisi Prius were right in requiring the evidence to be admitted which they proposed to give, in order to prove that the property in the rabbits was in Lord Exeter, and that the learned judge was wrong in his direction to the jury that such evidence was immaterial, and ought not, therefore, to be admitted. I am, therefore, of opinion that the order for making the rule *nisi* for a new trial absolute was right, and that the present appeal ought to be dismissed with costs.

Lord CRANWORTH.—My Lords, I think it is safe

and just to adhere to the law as laid down by Lord Holt. He had evidently considered the subject carefully, and according to his view of the law the rabbits killed by a trespasser on the lands of Lord Exeter certainly belonged to his Lordship. Lord Holt's opinion was followed in *Churchward v. Studdy*, 14 East, 250. There the hunter (who was a poacher) was eventually held to be entitled to the hare, but that was because he started it on the land of a third person and followed it on to the ground of the deft. and there caught and killed it. It was in strict conformity with Lord Holt's view of the law to hold that in these circumstances the hare belonged to the poacher. The rule *nisi* was granted by the Court of K. B. on the supposition that the hare had been caught on the land of the deft. by his servant acting as his agent, in which case the Court clearly thought it would have been the property of the deft., whereas in fact the deft.'s servant was assisting the hunter and his dogs. This case was followed by that of *Lord Lonsdale v. Rigg*, 11 Ex. 669, afterwards affirmed in the Ex. Ch., where the subject was carefully considered. It was there decided that grouse killed by a poacher belong to the owner of the soil on which they are killed, strictly following Lord Holt's doctrine. There was not a formal plea in that case traversing the property in the birds; but it was agreed to waive that objection in point of form, and to dispose of the case as if such an issue had been expressly raised. It was argued before this House that if game killed by a poacher is the property of the owner of the soil, then every poacher is guilty of larceny. But this is a fallacy. Wild animals whilst they are living are not his personal chattels, so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, like growing fruit, considered as part of the realty. If a man enters my orchard and fills a wheelbarrow with apples which he gathers from my trees, he is not guilty of larceny, though he has certainly possessed himself of my property, and the same principle is applicable to wild animals. It was further said that the late Game Act, which authorised the stopping of a poacher having game in his possession, and the selling of the game for the benefit of the parish, shows that the Legislature could not have understood the game to be the property of the person on whose land it was killed, for in that case it was said it would have been an unjust appropriation of the property of another. But this arrangement was probably made because it might often be impossible to know on whose land every particular head of game had been killed, and was considered to be on the whole an arrangement beneficial to the landowner. On the whole I see no reason for disturbing the decision of the court below, and think that there ought to be a new trial.

Lord CHELMSFORD.—My Lords, the question to be determined on this appeal is, whether animals *feræ naturæ*, killed or reduced into possession by a trespasser on the land of another, become the property of the owner of the land. The case was very learnedly argued on both sides, and all the authorities with respect to property in wild animals, either in a state of nature or reclaimed, were fully examined, and both the civil and the common law were referred to for doctrine on the subject. By the civil law the person who took or reduced into possession any animal *feræ naturæ*, although he might be a trespasser, in so doing acquired the property in it. This appears from the following passage in the Institutes, cited in the argument: "*Feræ igitur bestię et volucres et pisces, id est omnia animalia quę mari et terrā nascuntur simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt quod enim ante nullius est id naturali ratione occupanti con-*

H. OF L.]

BLADES v. HIGGS.

[H. OF L.]

ceditur, nec interest feras bestias et volucres utrum in suo fundo quisque capiat an in alieno." If the same rule prevails in our law, then the rabbits in question were not the property of Lord Exeter, but of the poacher who took and killed them upon his land. This doctrine, however, as to the right of property in wild animals captured seems never to have prevailed in our law to its full extent. With respect to animals in a wild and unreclaimed state there seems to be no difference between the Roman and the common law. A distinction was suggested in argument between wild animals, which are unprofitable and regarded as vermin, and those which are fit for food, and therefore profitable; and it was said of the latter, that by the law of England there is always a property in game, whether alive or dead, in somebody. But this is not reconcilable with the authorities. In the case of *The Swans*, 7 Co. Rep., Lord Coke says: "A man had not absolute property in anything which is *feræ naturæ*. Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain in two ways, by industry, or *ratione impotentie et loci*. But when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, &c., he hath not any property in the deer, or coney, or pheasants, or partridges; and therefore in an action *quare parcum, warrenum, &c., fregit et intravit et tres damas, lepores, cuculos, phasianos, perdices cepit et asportavit*, he shall not say "*suos*," for he hath no property in them; but they do belong to him *ratione privilegii*, for his game and pleasure, so long as they remain on the privileged place." *A fortiori*, therefore, where a person is merely the owner of land, without any other privilege attached to it than that which the ownership confers, he can have no property in the wild animals upon the land so long as they are in a state of nature and unreclaimed. Indeed, this notion of the existence of property in wild animals is inconsistent with the whole current of the authorities from the Year-books downwards, which almost invariably show that no action lies merely for taking away hares, coney, pheasants, and partridges, and that where the taking animals of this description is stated in the writ in addition to the trespass upon the land, the plt. shall not say "*lepores, &c., suos*." With respect to wild and unrestrained animals, therefore, there can be no doubt no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property, absolutely when they are killed, and in a qualified manner when they are reclaimed. So far everything is clear, and the only difficulty which arises upon the subject of property in wild animals is that which the present case presents. As animals *feræ naturæ* when killed or reduced into possession by the owner of land where they are found, or by his authority, become instantly his property, does the unauthorised act of a trespasser by the very act of killing them convert them at once to the use of the owner of the land? To this question Lord Holt, according to the case which he puts of *Sutton v. Moody*, would have given a distinct answer, that provided the game was both started and killed on the ground of the same owner, the property would be in him. I think Lord Holt must have been of opinion that as long as the game continued upon the land there was a species of property, or rather, perhaps, a right to take it, existing in the owner of the land which was sufficient to make it his, the instant when by being killed or taken it became the subject of property. But I cannot so easily discover the principle upon which he proceeded when he said that, "If A. starts a hare in the

ground of B., and hunts it into the ground of C. and kills it there, the property is in A. the hunter, but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C." I have some difficulty in understanding why the wrong-doer is to acquire a property in the game under the circumstances here supposed. If the animal had left the land of B. and passed into the land of C. of its own will, and had been, immediately it crossed the boundary, killed by C., it would unquestionably have been his property. Why then should not the act of a trespasser to which C. was no party have the same effect as to his right to the animal as if it had voluntarily quitted the neighbouring land? And why not only should B. lose his right to the game, and C. acquire none, but the property, by this accident of the place where it happened to be killed, be transferred to the trespasser? It would appear to me to be more in accordance with principle to hold that the trespasser, having deprived the owner of the land where the game was started of his right to claim the property by unlawfully killing it on the land of another, to which he had driven it, converted it into a subject of property for that owner and not for himself. But the first proposition stated by Lord Holt with respect to game started and killed on the land of the same owner is free from all difficulty, and is sufficient to dispose of the present question. The case of *Sutton v. Moody* has always been regarded as an authority upon this point, and, as far as I can ascertain, has never been questioned. It was recognised in *Churchward v. Studdy*, 14 East, 249; in *Graham v. Ewart*, 11 Ex. 346; by Martin, B., in *Rigg v. Lord Lonsdale*, 11 Ex. 671. And in this last case, when before the Court of Error (1 H. & N.), Coleridge, J. said, "The grouse shot on the land of the plt." (*i.e.*, shot by the deft., a wrong-doer) "belonged to him, according to all the authorities." It certainly would not be right to disturb a principle of law so long established, unless it could be clearly shown to be erroneous. And it appears to me not only to be well founded, but that very strange consequences would follow from adopting the view contended for by the app. If he is right in saying that the owner of the land has no property in game unless it is killed by him or by his authority, it will necessarily follow that a poacher reducing the game into possession, and thereby as possessor, though a wrong-doer, having a right to it against all the world but the true owner, there being no owner to challenge his possession, might maintain an action against the owner of the land for taking the game from him, even upon the land itself where it was killed. It is much more reasonable to hold that the trespasser having no right at all to kill the game, he can give himself no property in it by his wrongful act; and that as game killed or reduced into possession is the subject of property, and must belong to somebody, there can be no other owner of it, under these circumstances, but the person on whose ground it is taken or killed. This view of the case will render the distinction suggested in the course of the argument between killing and carrying away the rabbits as parts of one and the same continuous act, and killing them and leaving them upon the land, and coming back for them, wholly immaterial. For the act of killing being at once that which made the rabbits the subject of property and reduced them into possession, whether they were for an instant or for hours upon the land, they equally belonged to the owner of the land. For these reasons I think that the judgment of the Court of Ex. Ch. affirming the judgment of the Court of C. P. was right, and ought to be affirmed.

Judgment affirmed.

H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.]

Thursday, June 22, 1865.

JONES v. MERSEY DOCKS AND HARBOUR BOARD.

MERSEY BOARD v. CAMERON.

*Poor-rate—Meaning of beneficial occupation—Public statutory trustees—Charity trustees—Crown and servants of Crown—Exemption from rateability.*

A beneficial occupation sufficient to render the occupier liable to poor-rate means an occupation of property that yields, or is capable of yielding, a net annual value above the average annual cost of repairs, insurance and other expenses necessary to maintain the property in a state to command such rent. The property need not be beneficial to the occupier, provided it is beneficial to some one. The Crown (occupying by itself or its immediate servants), not being named in the Poor-Law Acts, is alone exempt, but mere trustees of charitable or public funds, though bound to apply the proceeds to certain specific purposes, are not exempt though having no personal interest.

Hence, when valuable property capable of yielding a net rent above what is required for its maintenance is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown.

There is nothing in the words or in the spirit of the Act of Elizabeth exempting from liability the occupier of valuable property merely because the profits of the occupation are not to be enjoyed by him or by any one in whose behalf he is occupying, but are to be devoted to the benefit of the public.

The courts in the time of Lord Kenyon, if not in that of Lord Mansfield, and subsequently in the time of Lord Ellenborough and Tenterden, made the mistake of confounding occupation for what are called public purposes with occupation by the Crown, but those decisions are henceforth overruled.

JONES v. MERSEY BOARD.

Error on a special case.

The action was replevin brought by the Mersey Docks and Harbour Board against William Jones, and others, the churchwardens and overseers of the poor of the parish of Liverpool, for the taking and detaining of certain goods and chattels of the pits.

The Mersey Board was assessed to the poor by a rate made on the 2nd June 1858 in a sum of 20,580*l.* 18*s.* 8*d.* in respect of the annual value of the dock estates. There was no appeal against the rate, and the distress was levied for nonpayment of the rate. The pits. entered into the usual replevin bond, and then brought the present action.

The dock estates were originally vested in the mayor, aldermen, and common council of the borough of Liverpool as trustees of the docks and harbour by several Acts of Parliament. The corporation had voluntarily granted part of the estates to the trustees. The statutes from the time of Queen Anne were twenty-two in number. Before the construction of the docks part of the land was shore, but the greater part consisted of lands and buildings then in the occupation of individuals, and assessable to the poor-rate.

The statutes describe the estate of the docks as a public trust. The board was bound by statute to apply the moneys received by them in defraying conservancy and pilotage expenditure, and save as the statutes provided, no moneys receivable by the board were to be applied to any purpose, unless the same conduced to the safety or convenience of ships frequenting the port of Liverpool, for facilitating the shipping or unshipping of goods, or in discharg-

ing debts contracted for such purposes. The board managed the whole estates by means of its servants. The dock duties were to be applied to building and repairing and maintaining the docks and paying off debts, and when all debts were paid the rates were to be reduced as far as could then be done.

The board was bound to apply its funds as the statutes directed, and no member of the board derived any private advantage or emolument from the execution of the trusts.

All the dock sheds, &c., were used solely for the purposes of the dock business.

By the 4 Vict. c. 30, s. 52, the trustees were empowered to build certain new warehouses, and by a section of that Act these were expressly made subject to the parochial and other rates.

But as to other property the statutes were silent.

The question for the opinion of the court was, whether the Mersey Board was rateable to the poor in respect of its property generally.

The Court of C. P. held that the board was not rateable. That decision was affirmed by the Ex. Ch.

MERSEY BOARD v. CAMERON.

In this case the action was also replevin, by Cameron and others, overseers of the township of Birkenhead. The Mersey Board now represented the original Birkenhead Dock Commissioners and the Birkenhead Dock Company, which two bodies transferred their powers and estate to the Liverpool Corporation; but in 1857 an Act consolidated the dock estates on both sides of the Mersey in one body, called the Mersey Docks and Harbour Board. Previously to the consolidation the docks on the Birkenhead side of the river were rated to the poor.

The questions for the opinion of the court were, whether the Mersey Board was now rateable in respect of these Birkenhead Docks.

The Court of C. P. gave judgment for the defendants, holding the Mersey Board rateable in respect of the Birkenhead Docks; and the Ex. Ch. affirmed this judgment.

The point involved was substantially the same as that in *Mersey Board v. Jones*.

The following learned Judges attended the argument to assist the House: Pollock, C.B., Williams, Byles, Blackburn and Mellor, J.J., and Pigott, B.

Sir F. Kelly, Q.C. and Quain (with them Parker), for the plaintiffs, the Mersey Board, contended that the point was *res judicata*, that the Mersey Board was not rateable in respect of the Liverpool Docks, it being so decided in *R. v. Liverpool*, 7 B. & C. 61, and that the law exempting public statutory trustees from rateability where the statutes made it obligatory on the trustees to apply the funds to specific purposes, and no power was given to apply the funds towards payment of poor-rates, had often been acted on and cannot now be overturned.

Bovill, Q. C., Mellish, Q. C. and C. Hutton for the overseers.

The following cases were referred to and commented upon:

*R. v. St. Lukes*, 2 Burr. 1058;

*R. v. Commissioners of Salter's Load Ships*, 4 T. R. 780;

*R. v. St. Bartholomew*, 4 Burr. 2485;

*R. v. Mayor of London*, 4 T. R. 21;

*R. v. Woodward*, 5 T. R. 79;

*R. v. Liverpool*, 7 B. & C. 61;

*R. v. Trustees of Weaver Navigation*, 7 B. & C. 70;

*Governors of Bristol Poor v. Waite*, 5 A. & E. 1;

*R. v. Mayor of Liverpool*, 9 A. & E. 435;

*R. v. Guardians of Wallingford*, 10 A. & E. 259;

*R. v. Exminster*, 12 A. & E. 2;

*Tyne Commissioners v. Clinton*, 1 E. & E. 516;

*R. v. Badcock*, 6 Q. B. 787;

*R. v. St. George, Southwark*, 10 Q. B. 867;

H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.]

*R. v. Longwood*, 18 Q. B. 116;  
*R. v. Harrogate Commissioners*, 15 Q. B. 1012;  
*Overseers of Birkenhead v. Trustees of Birkenhead*,  
 2 E. & B. 148;  
*Crease v. Saul*, 2 Q. B. 885;  
*R. v. Baptist Missionary Society*, 10 Q. B. 884;  
*R. v. Ponsonby*, 8 Q. B. 14;  
*Lord Amherst v. Lord Somers*, 2 T. R. 872;  
*Smith v. Birmingham*, 7 E. & B. 488;  
*R. v. Stewart*, 8 E. & B. 860;  
*Justices of Lancashire v. Shelford*, 2 Q. B. & E. 280;  
*Hodgson v. Local Board of Carlisle*, 8 E. & B. 280;  
*R. v. Manchester*, 8 E. & B. 886;  
*R. v. Shepherd*, 1 Q. B. 170;  
*R. v. Stapleton*, 33 L. J. 17, M. C.; 9 L. T. Rep. N. S.  
 322.

At the conclusion of the arguments the House put the following questions to the learned judges:

First, Are the Mersey Docks and Harbour Board "occupiers" of the docks vested in them within the true meaning of the word "occupier," in the stat. 48 Eliz.?

Secondly, If they are occupiers within the statute are they exempted from liability to be rated for relief of the poor by the operation or effect of the stats. 4 Vict. c. 30, 9 & 10 Vict. c. 119, 11 Vict. c. 10, 18 & 19 Vict. c. 174, and 21 & 22 Vict. 92, or any of them, or by reason of the purposes for which they occupy the same, or on any other ground appearing in the special case?

Thirdly, Does the Act of 20 & 21 Vict. c. 162 (the Act of 1857) impose upon the board a liability to poor-rate in respect of the docks, estate, and property vested in the board, or any and what part thereof, by virtue of the 26th and 27th sections of the last-mentioned Act?

*Cur. adv. vult.*

After time taken to consider, the learned Judges differed in opinion, Byles, J. dissenting from the rest. The opinion of the majority was delivered as follows by

BLACKBURN, J.—My Lords, the opinion which, with your Lordships' permission, I am about to read, contains the joint answers to your Lordships' questions of the Lord Chief Baron, Williams and Mellor, JJ., Pigott, B. and myself. To the first question put to us by your Lordships in these causes we answer, that in our opinion the Mersey Docks and Harbour Board are occupiers of the docks in question within the true meaning of that word as used in the stat. 48 Eliz. c. 2. Our reasons for that opinion are as follows:—Stat. 48 Eliz. c. 2, s. 1, requires the overseers of every parish to raise by "taxation of every inhabitant, parson, vicar, and other, and of every occupier of" various kinds of real property, and *inter alia* of "lands in the parish, in such competent sum as they shall think fit," a stock for setting the poor of the parish to work, and for the relief of the poor of the parish. Though the words of this enactment might seem to give the overseers a discretion to tax each inhabitant in such arbitrary sum as they might think fit, it has long been settled that the taxation of the different persons must be equal and in proportion to the value of their respective means. It would appear, from the passages cited at your Lordships' bar from Dalton's Country Justice, that this was determined very shortly after the statute was passed. It has always been so held, and the Legislature, by the Parochial Assessment Act (6 & 7 Will. 4, c. 96), has affirmed this principle by enacting that no rate shall be valid unless made "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs,

insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." In order, therefore, that a valid rate may be imposed, it is essential that the occupation be of value beyond what is required to maintain the property; for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent, or a rent which, after deducting the average annual expense of the maintenance, would leave no overplus, there is nothing to rate. The question whether replevin lies has been waived, and therefore it is not necessary further to consider whether in such a case the more proper expression would be that the person in possession of the property was not any occupier at all within the meaning of the statute of Elizabeth, so that the overseers had no jurisdiction to make the rate, and consequently that the levying of it might be resisted in replevin of trespass, or whether, as seems to have been the opinion of the Court of Q. B. in *Overseers of Birmingham v. Shaw*, 10 Q. B. 868; and *Reg. v. Bradshaw*, 29 L. J. 176, M. C., he is an occupier, whom as such the overseers have jurisdiction to tax, though on appeal the rate must be reduced to nothing. But that question having been waived, this is now immaterial. Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation be such as to be of value, and if the words "beneficial occupation" are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the bar), it is clear that a beneficial occupation is essential as the foundation of the rate; but it is equally clear that, if the phrase be understood in this limited sense, the Mersey Docks and Harbour Board have a beneficial occupation, for they actually occupy land as docks, and in virtue of that occupation receive payments from the shipping using the docks; at present greatly in excess of what is necessary to maintain the docks. Hereafter the charges on shipping may be reduced so as greatly to diminish the revenue derived from this occupation; possibly at some future time to render it no greater than the sum requisite to maintain the docks; but whilst the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks as at present enjoyed by the Mersey Docks and Harbour Board a rent greatly in excess of what would be necessary to maintain the docks in a state to command that rent. Where there is an actual demise of property to an occupier who pays rent to the owners of the property, the tenant, if a subject, is rateable, without any regard to the purpose to which the rent is applied. It is immaterial whether the landlord enjoys the rent himself, or is obliged to pay it away as interest to mortgagees, or even (as is the case with tenants of Crown property) pays it into the Consolidated Fund, or the privy purse of the Sovereign. The occupier in each case is rateable. And if the matter were now for the first time to be determined without reference to the decisions, it would seem that where the owners of the property are themselves in occupation and receive the value, the amount of which is measured by the rent which the hypothetical tenant would give, the purposes to which that amount is applied ought to be as immaterial as if there had been a real demise at that rent; and the occupiers, if subjects, ought to be rated, whatever be the object for which the property is occupied, unless some special enactment exempted them. But the decisions have now settled that there is an exemption; and the important question in the present case is, what is the nature of the occupation and of the purposes which bring the occupiers' case within that exemption. And on this

H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.]

question the decisions are to some extent inconsistent, and it is necessary to examine them. The Crown, not being named in the statute of Elizabeth, is not bound by it; and consequently the overseers cannot impose a rate on the Sovereign in respect of lands occupied by Her Majesty, nor on those occupied by her servants for Her Majesty. The exemption depends entirely on the occupier and not on the title to the property. The tenants of Crown property, paying rent for it, are rateable like all other occupiers; and it has even been determined that where apartments in Hampton Court, a Royal palace, were gratuitously assigned to a subject, who occupied them by the permission of the Sovereign but for the subject's benefit, the subject was rateable in respect of her occupation of this royal property: (*R. v. Lady E. Ponsonby*, 3 Q. B. 14.) On the other hand, where a lease of private property is taken in the name of a subject, but the occupation is by the Sovereign or her servants on her behalf, the occupation being that of Her Majesty, no rate can be imposed: (*Lord Amherst v. Lord Sommers*, 2 T. R. 372.) So far the ground of exemption is perfectly intelligible, but it has been carried a good deal further and applied to many cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation. A long series of cases have established that where property is occupied for the purpose of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of state, such as the Post-office (*Smith v. Birmingham*, 7 Ell. & Bl. 483), the Horse Guards (*Lord Amherst v. Lord Sommers*, 2 T. R. 372), or the Admiralty (*R. v. Stewart*, 8 Ell. & Bl. 360), in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police (*Justices of Lancashire v. Shelford*, Ell. Bl. & Ell. 230), to county buildings occupied for the assizes, and for the judges' lodgings (*Hodgson v. Local Board of Carlisle*, 8 Ell. & Bl. 280), or occupied as a County Court (*R. v. Manchester*, 3 Ell. & Bl.), or for a gaol (*R. v. Shepherd*, 1 Q. B.) In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the sovereign, might be considered in *consimili casu*. And the decisions are uniform, and were not disputed at the bar, that the exemption applies so far; but there is a conflict between the decisions as to whether the exemption goes further. There are several cases relating to charities which were mentioned at your Lordship's bar, but were not much pressed, nor, as it seems to us, need they be considered now; for, whatever may be the law as to the exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption. There is, however, one case on this subject, that of *Rex v. St. Luke's*, 2 Bur. 1053, which it is necessary to notice on account of the effect which in *Rex v. Commissioners of Salter's Load Sluice* 4 T. R., was attributed by Lord Kenyon to part of what fell from Lord Mansfield in that case. In *Rex v. St. Luke's* the question before the court was, whether Joseph Mansfield was rateable as occupier of St. Luke's Hospital; but the court entered into the larger question, whether there was any one who could be charged as occupier, saying very truly that unless there was some one who could be so charged no rate could be im-

posed. Lord Mansfield as to that is reported to have said, "As to the lessees, mere nominal trustees cannot be esteemed occupiers or rated as such." In the subsequent case of *Rex v. St. Bartholomew*, 4 Bur. 2435, Lord Mansfield says that the corporation of London "are not *de facto* the occupiers of St. Bartholomew's Hospital; the poor are the occupiers, but they are not rateable." This may perhaps show that Lord Mansfield only meant to lay down the position that those in whom the legal estate is vested are not necessarily the occupiers; which is no doubt true. No one could contend that the person in whom a term assigned to attend the inheritance had vested, could be rated as occupier, in point of law, of the estates *de facto* occupied by his *cestui que trust*. But if Lord Mansfield meant (as it rather seems that Lord Kenyon thought he did), that the persons in actual valuable occupation of property are not rateable if they occupy in a merely fiduciary character, it is a position which cannot be maintained. The counsel for the Mersey Dock and Harbour Board at your Lordships' bar did not attempt to maintain any such general position, they limited themselves to contending that such was the law where it was a public trust; for which they cited authorities which they said must be overruled unless that position was maintained. And we think they were justified in so saying; but we also think that there are conflicting decisions which must be overruled if it is maintained. The first case in which the position was advanced that trustees occupying valuable property, but prohibited from taking any individual benefit from it, were not rateable, seems to have been *Rex v. Mayor of London*, 4 T. R. 21., decided in 1790. There Buller, J., in his judgment, says: "Now it has been objected that they are not liable to this rate, because they hold it on a public trust; but, in the first place, it does not appear to be the case of a trust at all; and if it did, perhaps the consequence contended for would not necessarily follow." It certainly seems that the doctrine contended for was not at that time, 1790, considered as established. *Rex v. The Commissioners of Salter's Load Sluice*, 4 T. R. 780, was decided in 1792. In the argument the clauses of the Act under which the commissioners held were referred to and argued on; but Lord Kenyon's judgment does not appear to have proceeded on the ground that their effect was to prohibit the payment of poor-rate. He says: "The trustees have a bare naked trust, not coupled with any interest. If any interest resulted either to the commissioners or to the owners of the adjoining land after the public purposes of the Act were answered, these tolls might have been rated. But it is admitted that all the money which is collected under this Act of Parliament must be expended for the purposes of the Act, and therefore, upon the ground upon which the court proceeded in *Rex v. St. Luke's Hospital*, namely, that there was no occupier, these commissioners are not liable to be rated." The counsel for the parish and township in the cases at your Lordships' bar did not attempt to deny that this decision was in favour of their opponents; they admitted (and we think quite properly admitted) that the decision was against them, but they denied that it was law. The counsel for the Mersey Board were fully justified in relying on this case, as entitling them to the benefit of Lord Kenyon's judgment; but we think that when they proceeded to argue that the decision acquired additional authority because it was acquiesced in, they fell into a fallacy. When the Court of Q. B. has decided in favour of a rate, those who are rated may, if they are so advised, bring replevin, and (subject to the question whether replevin lies in such case) may carry the case up to the H. of L.; and, therefore, where a decision in favour of a rate is not disputed further, it may pro-

H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.]

perly be said to be acquiesced in. But when the Court of Q. B. has decided against a rate and quashed it, there is no way whatever in which the parish officers can raise the question again; and acquiescence in a decision cannot add any weight to it, when there is no possible way of disputing it. The next cases to be found in the reports in which any similar point arose were those of *Rex v. Liverpool*, 7 B. & C. 61, and *Rex v. Weaver Navigation*, 7 B. & C. 70, in 1827. It appears from the papers in the appendix to this special case (Appendix, p. 38) that in 1806 the Liverpool sessions made an order excluding the Liverpool docks from a rate for the relief of the poor of the parish of Liverpool, subject to a case intended to obtain the opinion of the K. B. on the question whether the Corporation of Liverpool were rateable as occupiers of the docks; and that in 1808 the order of sessions was confirmed, but under what circumstances does not appear. The late Lord Abinger was counsel for the parish, both in that case and in the case of 1827; and the attorneys of the Corporation of Liverpool in 1827 could not be ignorant of the circumstances attending the confirmation of the order of sessions in 1806. Yet on the argument in the case reported in 7 B. & C. neither side alludes to what, if a decision at all, must have been precisely in point. It seems, therefore, probable that, though the rule confirming the order in 1808 is not drawn up as by consent, the former case was compromised, and that there was no decision of the court in 1808. However this may be, there can be no doubt that the Court of K. B. in 1827 acted upon the authority of *Rex v. Salter's Load Sluice*, 4 T. R. 730; Lord Tenterden saying, in *Rex v. Liverpool*, "Here the trustees were not occupiers in the ordinary 'sense of the word, and no profit was received for the use of any person;" and Bayley, J. saying, "The principle of this decision is applicable to the case of *Rex v. Trustees of the River Weaver Navigation*. There the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes; and as no part of the moneys received could be applied to private purposes, those moneys were not rateable in the hands of the trustees." There is no dispute that those two decisions, if they are to be followed, are decisive in favour of the Mersey Docks and Harbour Board, at least in the first of the cases at your Lordships' bar, and reduce the case of the overseers of Birkenhead to that point mentioned in your Lordships' third question. The next case to which it is necessary to call attention is that of the *Governors of the Bristol Poor v. Waite*, 5 A. & E. 1, decided in 1836. In that case the governors of the Bristol poor had taken property for the purpose of putting out their poor there. A rate had been imposed on them in respect of this occupation and was levied by distress. The governors of the Bristol poor brought replevin for the purpose of questioning the validity of this rate. In the judgment of the court the point raised is said to be "whether the pits. were such occupiers of the property as to be rateable to the poor." And the decision was that they were. The judges who decided this case probably did not suppose that they were deciding anything inconsistent with the decisions in *Rex v. Salter's Load Sluice*, and *Rex v. Liverpool*, and *Rex v. Trustees of the Weaver Navigation*, which appear not to have been cited on the argument or brought to their notice. But we do not see how the cases can stand together. The governors of the poor of Bristol were as much bare naked trustees having no personal interest in the occupation of this property as the commissioners of Salter's Load Sluice, and if the one set of trustees were on that ground not occupiers, we do not see how the others could be occupiers; and if the application of

the surplus funds of the Weaver navigation to the bridges and highways of Cheshire, so as to be in relief of the county rate, was a public purpose rendering the trustees of that navigation not rateable, it is difficult to see why the application of whatever value was derived from the lands occupied by the governors of the Bristol poor to the maintenance of the poor of Bristol, and so in relief of the poor-rate of the city of Bristol, was not a public purpose also. We think that in this case the Court of K. B., probably without being aware of it, came to a decision inconsistent with, and therefore shaking the authority of, *Rex v. Salter's Load Sluice*, *Rex v. Liverpool*, and *Rex v. Weaver Navigation*. The decision in *The Governors of Bristol Poor v. Waite* has been repeatedly acted upon, and never questioned that we know of. As the decisions in this case and those which followed it were decisions in favour of the rate, and consequently might have been questioned in replevin, the acquiescence in them does add something to their authority. The Municipal Corporation Act (5 & 6 Will. 4, c. 76) restricted the power of the municipal corporations named in schedules A. and B. to that Act over what had been their private estates, and compelled them to pay the net proceeds into the borough fund, which was applicable first to the payment of the existing debts of the corporation, and then to the corporation expenses, and the surplus (if any) for the public benefit of the inhabitants and the improvement of the borough. The Court of Q. B. in *Reg. v. The Mayor, &c. of Liverpool*, 9 A. & E. 435, decided in 1839 that the effect of this enactment was to render the corporations no longer liable to be rated in respect of any property occupied by them. The reason given by the court for this decision was that they found "the principle settled by the decisions already made, and felt it to be their duty to act upon them, and not upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority." They proceed to state the cases of *Rex v. Liverpool*, 7 B. & C. 69, and *Rex v. Trustees of Weaver Navigation*, and say that "We feel it to be impossible substantially to distinguish these cases, and especially the latter from the present. The extent and approximation to something like national benefit are in kind, and almost in degree, the same. The public in the one case is the same town of Liverpool, in the other, the county of Chester." The court do not explain why the same argument did not avail in *Governors of Bristol Poor v. Waite*, where the city of Bristol was held not to be the public; but they did not intend to depart from that decision, and in the same year acted upon it in *Reg. v. Guardians of Wallingford*, 10 A. & E. 259, in which latter case an attempt, but, as it seems to us, not a successful one, is made to reconcile the decision with that in *Reg. v. Mayor, &c. of Liverpool*. Crompton, J. in *The Tyne Commissioners v. Chirton*, 1 E. & E. 516, stated that the decision in *Reg. v. The Mayor, &c. of Liverpool* created at the time great surprise. We think, however, that the conclusion came to by the court in that case does logically follow from the decisions in *Rex v. Liverpool*, and *Rex v. Trustees of the Weaver Navigation*, and that the court in that case had to choose whether they would consider it a *reductio ad absurdum*, and say that decisions leading to such a conclusion must be wrong in principle, or to say that the decisions being binding on them, they must hold that the conclusion was not wrong. They adopted the latter course, apparently not at that time perceiving that it was inconsistent with the principle of their own decision in *The Governors of the Bristol Poor v. Waite*. A few years later the Court of Q. B., in several cases to be presently cited, adopted the former course, and



H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.]

the question now pending in your Lordships' House seems to us to be in substance which set of decisions are to be followed in future? The effect of the decision in *Reg. v. The Mayor of Liverpool* was immediately nullified by the Act 4 & 5 Vict. c. 48; but that enactment did not declare the decision erroneous. On the contrary the Act was couched in language which, though not declaring the decision to be law, indicates that the framers of the Act thought that it was law; and the fact that an Act couched in such terms was passed by the Legislature affords an argument of more or less weight, that the error of the court, if it was one, was acquiesced in and had become *communis error*. This is, we think, the latest authority in point of date relied on by the counsel for the Mersey Docks and Harbour Board. The next case in order of date was *Reg. v. Badcock*, 6 Q. B. 787, in 1845. In the judgment of the court, the conflicting cases are cited. The court does not attempt to reconcile them, but observes that in all the cases where the occupation was held to be of such a public nature as to exempt the property from rateability, "the public, as such, unlimited by the bounds of county, borough, or parish, had a direct interest in the benefit which the application of the funds produced," and that the case then before them did not come within that principle. The passage here cited has been repeatedly quoted with approval as giving the true principle of exemption. It does include all the cases already cited, in which the occupation was for the purposes of government. But the principle thus laid down cannot be made to embrace either *Reg. v. The Trustees of the Weaver Navigation*, where the funds were applicable to the relief of the county rate of Cheshire, or *Reg. v. The Mayor of Liverpool*, where the funds were brought into the borough fund in relief of the borough rate in that particular borough. In *Reg. v. Longwood*, 13 Q. B. 116, in 1849, the Court of Q. B., acting upon the principle laid down in *Reg. v. Badcock*, held that the commissioners of the Huddersfield Waterworks were rateable to the relief of the poor. All the cases which we have hitherto cited were decided before Lord Campbell took his seat upon the bench. It is right to notice this, for it has often been supposed, and indeed was said in the argument at your Lordships' bar, that the decisions in his time, on the subject of the exemption from rates, were innovations introduced in consequence of his strong individual opinion that the exemptions from rateability had been carried further than was warranted by law or reason; but we think that the cases which we have cited show that before he came upon the bench that opinion had been entertained and acted upon, and that in consequence the decisions had got into such a state as to be inconsistent with each other; so that it had become necessary to overrule one set of the inconsistent decisions, unless the law was to be administered without any reference to principle, deciding each case as it arose, according as the facts might be supposed to approximate more nearly to those in the one set of decisions or the other. Several cases were decided in Lord Campbell's time which closely resembled that of the Huddersfield commissioners (*R. v. Longwood*), and which were decided in the same way without rendering it necessary to go further than had been done in that case, until, in 1852, the case of *The Overseers of Birkenhead v. Trustees of Birkenhead*, 2 E. & B. 148, arose. Crompton, J. was a party to that decision, and in *The Tyne Improvement Commissioners v. Chirton*, 1 E. & E. 516, he has given some account of the deliberations on that case (though his observations were misunderstood by the reporter), and he repeated it during the argument in the Ex. Ch. of the case at bar. It appears that this learned judge was at first startled at being called upon to

act on a principle in direct opposition to the considered decision of the Court of Q. B., in *Reg. v. Mayor, &c. of Liverpool*, 9 A. & E. 485, though he had always thought that decision wrong; and that he was the more unwilling to act in direct contradiction to that case, because the Legislature in 4 & 5 Vict. c. 48, when enacting that the decision should no longer be practically operative, did not express any disapprobation of the principle of the decision, but rather used language seeming to assume that it was good law; and he doubted whether the case should not be followed though not approved of, leaving it to the Legislature to correct it. The rest of the court thought that the time had come when the court could no longer halt between two sets of decisions, but must follow that which was law; and Crompton, J. ultimately agreed with them. Lord Campbell in his judgment (perhaps out of deference to the doubts which Crompton, J. had at first entertained), seeks to avoid expressly overruling the previous decisions; and suggests that, perhaps, *Reg. v. The Commissioners of Salter's Load Sluice, T. R.*, and *Reg. v. Liverpool*, 7 B. & C., may be distinguishable on the ground that the private Acts in those cases were construed by the courts as amounting to a prohibition to pay poor-rate. But the counsel on both sides at your Lordships' bar agreed that no such distinction could be maintained, and we think that neither Lord Kenyon nor the Court of K. B. in Lord Tenterden's time proceeded on any such ground. And in the subsequent cases of the *River Lea Navigation*, cited in the Appendix, x, and *The Tyne Improvement Commissioners v. Chirton*, 1 E. & E. 516, in 1859, no such distinction was made. The Court of Q. B. in that last case acted upon the broad principle that though, where the property was occupied for public purposes, "such as," says Lord Campbell, "a post-office or a military store depôt, where the purposes for which the property is occupied are purposes created by the Government of the country," there was no rateable occupier, the occupation of a public dock was not an occupation for such public purposes, and that the commissioners occupying such a dock were rateable in respect of the value of that occupation, estimated according to the rule laid down in the Parochial Assessment Act, unless an exemption was conferred by some subsequent statute: and that the enactments in the Tyne Improvement Acts as to the applications of the rates received (which are in substance the same as those in the Liverpool Acts), did not amount to such an exemption; and Crompton, J., after stating his former doubts when the *Birkenhead* case was argued, said that he now thought that case laid down the proper rule. This, we think, must be considered as the rule now acted upon in practice in the Court of Q. B. Such being the state of the authorities, it seems to us no longer possible to support the decisions relied on by the counsel for the Mersey Docks and Harbour Board. We quite agree that it is very desirable to adhere to decided cases, though this principle may be carried too far. It has been forcibly remarked by an American author of repute (1 Phillips on Insurance, 393, note g), that where the objection to the decisions "is inconsistency with admitted fundamental principles, it is an adhering to an inconsistency and contradiction, and tends to reduce jurisprudence from a science to an aggregation of dogmas." Still the inconvenience caused by the unsettling the law and disturbing what was quiet is so great, that we agree that even a court of error should be slow to reverse decisions which, though originally wrong, have long been uniform. When such is the case, it may often be proper to persevere in the error and leave the remedy to the Legislature. It may be that, if the attention of the Court of K. B. had in 1836 been

H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.

called to the case of *Rex v. Liverpool* and *Rex v. Weaver Navigation* before they decided *The Governors of the Bristol Poor v. Waite*, this principle, which is strongly laid down in *Crease v. Saul*, 2 Q. B., would have led them to decide *The Governors of the Bristol Poor v. Waite* otherwise than they did. But all this inconvenience has been already incurred, the recent decisions have been such as to disturb the quiet state of things, and a decision of your Lordships' House affirming *Rex v. Liverpool* and the non-rateability of the Liverpool docks must reverse the decision in *Tyne Commissioners v. Chirton*, and render the docks in the Tyne rateable. And such a decision, though not necessarily reversing the numerous decisions based on *The Governors of the Bristol Poor v. Waite*, by which poor houses and gas-works and waterworks in the hands of public trustees have been held rateable, must greatly shake their authority and disturb a principle of rating now generally adopted throughout the country. The balance of convenience, if that be a legitimate consideration, is now in favour of adhering to the more recent decisions. And if we view the case on principle, without regard to the decisions either way, it seems to us clear that the Mersey Docks and Harbour Board ought to be rated. The counsel referred to many expressions in the local Acts, showing that the Mersey docks were thought likely to confer great public benefit, and to be very advantageous to the commerce of this country; and there is no doubt that that expectation has been realised, and that these docks are of great public benefit; but not more so than the docks in the river Thames, all of which are in the hands of private companies, and are undoubtedly rateable. The rate is imposed, not in respect of the value of the benefit conferred on the public, or that portion of it which uses the dock, but is on the occupiers of the docks in respect of the value to them derived from the payments taken for that use. And we think it impossible to point out any real distinction in this respect between the occupation of a dock formed by a company under an Act of Parliament incorporating the Companies Clauses Act and the Harbours, Docks and Piers Clauses Act 1847, and the occupation of the Mersey Docks by the Mersey Docks and Harbour Board. A company forming a dock under an Act of Parliament incorporating these Acts is bound to maintain the docks, and to keep harbour masters and other officers there, and to allow the public to use the dock on payment of the rates, and to allow Her Majesty's vessels to use it without making any payment; and by these means they confer a benefit on the public. The company, by virtue of its occupation, receives the rates on shipping using the docks, and the amount thus received is applicable to keeping up the docks, and then to paying interest on the loans, the amount of which is limited, and then in paying dividends on the share capital, and it is common to have a maximum limit put on the rate of the dividend; when that maximum dividend is reached the rates must be lowered. It is indisputable that a company thus occupying a dock is an occupier, and rateable as such. Now if, without in any way altering the mode in which the docks are enjoyed by the public, or altering the rates leviable, or changing the harbour masters and others who manage it, we change the name of the body who occupy it from that of "the company" to that of "the board," and if, instead of "the company" paying to the shareholders a maximum dividend on their capital, the "board" pay to the same individuals the same identical sums, but call them "interest on bonds," instead of "maximum dividend on share capital," what difference does this make? If *Rex v. Liverpool*, 7 B. & C., 69, is to be supported, it makes this difference, that what was formerly an occupation in respect of which the

company was rateable has by this change of name, without any change in the thing, become an occupation for public purposes, for which the board is not rateable. If the decision in *The Tyne Commissioners v. Chirton*, 1 E. & E. 516, is to be supported, the change in name makes no difference in the rateability. We think the latter the correct view of the law, and therefore we answer your Lordships' first question in the affirmative. We now proceed to answer the second question put by your Lordships. And we are of opinion that there is nothing in the matters referred to in your Lordships' question to exempt the board from being rated in respect of their occupation. We have already, in answering your Lordships' first question, given our reasons for thinking that the purposes to which the rates are applicable are not such as to exempt them from rateability; and we are further of opinion that the effect of the statutes applicable to the Liverpool docks is not such as to exempt them from the payment of poor-rate. There are no negative words prohibiting the application of the rates to payment of the poor-rate. And we think, in conformity with the decision in *The Tyne Commissioners v. Chirton*, 1 E. & E. 516, that enactments directing that the revenue shall be applied to certain purposes and no others are directory only, and mean that, after all charges imposed by law on the revenue have been discharged, the surplus or free revenue, which otherwise might have been disposed of at the pleasure of the recipients, shall be applied to these purposes. We have only, therefore, to consider the reasons on which the Court of Ex. Ch. based their decision in the second of the present cases; and, with very great respect for those who concurred in that judgment, we think that they acted on a principle sound in itself, but not applicable to the case before them. Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act *in pari materia* uses the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put upon the same words before; and, unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise. And if the decision in *Rex v. Liverpool*, 7 B. & C. 69, had been that certain words used in the former Acts had amounted to an exemption from poor-rate, and those same words had been repeated in the subsequent Acts, it would, on this principle, have been a fair inference that the Legislature intended by using the same words to give the exemption. But this is not the case here. The Legislature had by former Acts conveyed to the trustees the docks to be held for certain purposes. The Court of Q. B. had decided that, as an incident of law, those who held land for such purposes were not rateable to the relief of the poor. When the Legislature again in fresh Acts used the same language, it showed that they intended to convey the land to be occupied for the same purposes; and that if the law did annex non-rateability as an incident to such an occupation the Legislature had no objection. But it did not afford any argument that the Legislature intended to annex that incident in case it should be discovered that it was not annexed by law. And the clauses enacting that the warehouses should be rated carry this argument no further. During the course of the argument at your Lordships' bar the L. C. put the case of an express recital in the Act, to the effect that it had been decided in *Rex v. Liverpool*, that the dock trustees were not liable to poor-rate in respect of land occupied by them, and that it was expedient that no such exemption should be given to them in respect of the occupation of new ware-

H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.]

houses acquired under the new Act, and then after that recital an enactment in the terms in which it is now expressed. And he asked the counsel at your Lordships' bar two questions. First, whether such a recital could be construed to amount to a declaratory enactment that the decision in *Rex v. Liverpool* was good law? Secondly, whether the Acts framed as they were could have a greater effect than they would have had if framed with such an express recital? The counsel for the Mersey Docks and Harbour Board were not able to give any answer to those questions that would support the decision of the Court of Ex. Ch. Blackburn, J. (the only judge who, being a party to the decision in the Ex. Ch., was also present at the argument at your Lordships' bar) admits that he cannot answer them, and his inability to do so has led him to change the opinion which he entertained when in the Ex. Ch. We have no reason to believe that the other judges who joined in that judgment have changed their opinion. We have most sincere deference for their judgment, and as we have had no opportunity of hearing what answer they would have made to the way the case has been put in your Lordships' House, it is with diffidence that we have formed our opinion that they have misapplied the ground of their decision; but, entertaining that opinion, we are bound to express it. We therefore answer your Lordships' second question in the negative. The answers which we give to the first and second questions put by your Lordships in effect answer the third question. In our opinion the liability to poor-rate is imposed on the board by the general law, and not by virtue of the sections of the Act referred to. We therefore answer your Lordships' last question in the negative.

Cur. adv. vult.

THE LORD CHANCELLOR.—My Lords, the questions raised in this appeal depend in a great measure on the inquiry, what is the occupation of real property which is liable to be rated under the 1st section of the Act of 43 Eliz. c. 2, independently of the decided cases, several of which are irreconcilable with each other. It would seem to be easy to answer this inquiry, and having regard to the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, it may be said in answer that occupations to be rateable must be of property yielding, or capable of yielding, a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain the property in a state to command such rent. It is in this sense that I understand the words beneficial occupation, wherever it is said that to support a rate the occupation must be a beneficial one. For on principle it is by no means necessary that the occupation should be beneficial to the occupier. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings. The only occupier exempt from the operation of the Act is the King, because he is not named in the statute. And the direct and immediate servants of the Crown whose occupation is the occupation of the Crown itself also come within the exemption. But this ground of exemption does not warrant many decisions which have held that property used for public purposes is not rateable. So also trustees who are in law the tenants or occupiers of valuable property upon trusts for charitable purposes such as hospitals or lunatic asylums are in principle rateable notwithstanding that the buildings are actually occupied by paupers who are sick or insane. If the matter were *res integra* I could not concur in the decision of Lord Mansfield in the case of *St. Luke's Hospital*, in which he is reported to have said that mere trustees cannot be esteemed

occupiers, or rated as lessees, or with his conclusion in the case of *Rex v. St. Bartholomew's*. But with a slight verbal alteration, I entirely agree with the remark of the learned judges in the present case, that if Lord Mansfield meant that the persons in the legal occupation of valuable property are not rateable if they occupy it in a merely fiduciary character, it is a position which cannot be maintained. To these observations and decisions of Lord Mansfield, that which appears to me to be the erroneous doctrine of several subsequent decisions is to be attributed. This is plain on an examination of Lord Kenyon's judgment in the subsequent case of *Rex v. The Commissioners of Salter's Load Sluice* as reported in 4 T. R. Lord Kenyon refers to the decision in the case of *St. Luke's Hospital*, and adopts the position that trustees who have a bare naked trust not coupled with any interest are not liable to be rated, and he uses language which, with the decisions of Lord Mansfield, has introduced the notion that if valuable property be in the possession of trustees who are bound to apply the whole of the proceeds to public but not government purposes, that is, in works or purposes for the better accommodation or use of the public, they are not liable to be rated. There is nothing in the Act of Elizabeth or in the reason of the thing to warrant this conclusion. No exemption is thereby given to charity or to public purposes, beyond that which is strictly involved in the position that the Crown is not bound by the Act. And it is a remarkable fact that whenever these opinions of Lord Mansfield and Lord Kenyon have not been presented to the Court of Q. B., the judges have adopted the correct view of the statute. Thus, in *Rex v. Liverpool*, decided in the year 1823, and the case of *Rex v. The Trustees of the Weaver Navigation*, decided in 1827, the *Salter's Load Sluice* case was cited and relied on, and the Court of Q. B. adopted the language of Lord Kenyon and followed his decision. But in the case of the *Governors of the Bristol Poor v. Waite*, decided in 1836, the *Salter's Load Sluice* case does not appear to have been referred to; and the Court recurred to the correct view of the statute of Elizabeth, and held that the governors of the Bristol poor who have taken some buildings and land on lease for the occupation of their poor, although they were bare trustees, and held for a public purpose only, were such occupiers of property as to be liable to be rated to the poor. This case in its turn has been followed in other decisions as an authority, and it might have been supposed that the authority of the *Salter's Load Sluice* case and its two satellites, *Rex v. Liverpool* and *Rex v. The Trustees of the Weaver Navigation*, had come to an end. But in the year 1839 the Court of Q. B., in the case of *Reg. v. The Corporation of Liverpool*, returned to its old allegiance, and again set up the authority of *Rex v. Liverpool* and *Rex v. The Weaver Navigation*. This last case of *Reg. v. The Corporation of Liverpool* was decided on the principle, that since the Municipal Corporation Act the property of a municipal corporation is held upon trust for the purposes of the borough fund, and therefore, that the Corporation of Liverpool were bare trustees for the property in question for public purposes. The mischief of this decision was remedied by the Act of 4 & 5 Vict. c. 48, but unfortunately that Act did not declare the law. Some subsequent decisions of the Court of Q. B. have been marked with much timidity. They have in effect departed from the grounds of the decisions in the *Salter's Load Sluice* case and its attendant cases, but have at the same time attempted by very questionable distinctions to save whole the authority of those cases. Thus in the cases of *Reg. v. Badcock* and *Reg. v. Longwood* there is an attempt to distinguish between the interest of the unlimited public and the interest of

H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.]

the public limited by the bounds of a county, borough, or parish. At last, in the case of the *Tyne Improvement Commissioners v. Chirton*, the Court of Q. B. recurred to that which is, in my opinion, the true principle, namely, that the only ground of exemption from the statute of Elizabeth is that which is furnished by the rule that the Sovereign is not bound by that statute, and that consequently when valuable property capable of yielding a net rent above what is required for its maintenance is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown. If this be the true criterion of exemption from rateability where the property is valuable, it is clear that the Mersey docks are liable to be rated. In this country many works tending greatly to the convenience and benefit of the public—and, in that sense, public works—are the result and creation of private enterprise, being made or performed by money subscribed by the public on the terms or in the hope of receiving such interest out of the proceeds of the works as will in the judgment of the subscribers make the investment a profitable one. Such is the condition of the Mersey docks, which are in truth property used and occupied for the profit and benefit of a number of persons, and it is the same thing in substance as if the docks had been demised by the subscribers to the trustees on the terms of maintaining the docks and paying to the subscribers a rent equivalent to the interest on their bonds. I am, therefore, clearly of the same opinion with the majority of the learned judges, that the Mersey Docks and Harbour Board are occupiers of the docks and harbour within the true meaning of the word "occupier" in the Act of Elizabeth. The answer to the second question put to the learned judges is in effect a mere consequence of the answer to the first question, for it cannot be pretended that the statute of Elizabeth has been repealed, either expressly or impliedly, by any of the statutes which apply to the Liverpool docks, or that the liability of the trustees or occupiers, which is the result of the true interpretation of the Act of Elizabeth, has been discharged or altered by anything contained in the local statutes. On this head it is unnecessary to say more than that I concur with the observations of the majority of the judges in their elaborate opinion delivered by Mr. Justice Blackburn. The result is, that I humbly move your Lordships to reverse the order of the Court of Ex. Ch. in the case of *Jones v. The Mersey Docks and Harbour Board*, but to affirm it in the case of *The Mersey Docks and Harbour Board v. Cameron*.

LORD CRANWORTH.—My Lords, I concur with my noble and learned friend in thinking that judgment ought to be given for the plts. in error. I have given full attention to the opinions of the learned judges who assisted us at the hearing, and concurring as I do in that delivered by Blackburn, J., on behalf of himself and four of the other five judges, I do not feel it necessary to go into the question at length. That very able opinion seems to me to exhaust the subject. By the statute of Elizabeth the overseers are directed to raise the money necessary for the relief of impotent poor by taxation of (*inter alios*) every occupier of lands in the parish. That the defts. in error are occupiers of land in the parish of Liverpool cannot be doubted, and so, unless there be something to exempt them, they are rateable. The argument on their behalf has been, that though they are occupiers their occupation is not a beneficial occupation, and the statute, it was contended, contemplated only such an occupation as is

beneficial to the occupier, or to some other person or persons for whose behoof the occupier is occupying. If by beneficial occupation is meant any occupation of something valuable—something in its own nature beneficial to some one—I think it is fair to consider that word is impliedly included in the statute. It was not meant to impose the duty of contributing to the relief of the poor on any one merely because he might be the occupier of a barren rock neither yielding nor capable of yielding any profit from its occupation. But I can discover nothing either in the word or in the spirit of the Act exempting from liability the occupier of valuable property merely because the profits of the occupation are not to be enjoyed by him or by any one in whose behoof he is occupying, but are to be devoted to the benefit of the public. In the opinion of the five judges delivered by Blackburn, J., that learned judge has traced with great care and accuracy the progress of the decisions on this subject, and I should be merely wasting the time of the House if I were to proceed to go over again what has been so well done by him. The court seems to me to have fallen into error in the time of Lord Kenyon, if not in that of Lord Mansfield, in proceedings which unfortunately were incapable of being questioned in a court of error. The decisions so made were followed in similar proceedings in the time of Lord Ellenborough and Lord Tenterden. The doctrine on which they rested was shaken in some cases which occurred when Lord Denman was Chief Justice, and eventually were in substance overruled when Lord Campbell presided in the Court of Q. B. In these circumstances, thinking as I do that there is nothing in the statute of Elizabeth expressly or impliedly exempting from rateability the occupiers of valuable property merely because the benefit of the occupation is to go to the public, I think your Lordships ought not to consider yourselves fettered by any decisions of the court below, but that you ought to lay down the law as you think it ought to have been laid down if this question had arisen before any of those decisions had been pronounced. I therefore concur in the motion of my noble and learned friend on the woolsack. To avoid all misconception I wish to add, that there are certain cases to which the observations I have made do not apply. The Crown not being named is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown for the purposes of the Crown, are not liable to be rated; and I conceive that it is from confusion between property occupied for public purposes and property occupied by the Crown or servants of the Crown that the mistake has arisen. This principle exempts from rates not only Royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post-office, and many similar buildings. On the same ground, police-courts, County Courts, and even county buildings occupied as lodgings at the assizes for the judges, have been held exempt. These decisions, however, have all gone on the ground, more or less sound, that these might all be treated as buildings occupied by servants of the Crown, and for the Crown, extending in some instances the shield of the Crown to what might fitly be described as the public government of the country. In none of these cases was exemption conceded on the ground contended for in the present case. And I cannot but think that the error which has crept into the decisions has arisen from confusing cases like the present with those in which the interests of the Crown or its servants were concerned.

LORD CHELMSFORD.—My Lords, it is impossible, in entering upon the consideration of these appeals, to refrain from an expression of surprise that there

H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.]

should arise at the present day, after more than two centuries and a half from the time of the passing of the Act, a necessity for interpreting any part of the 43 Eliz., and yet, from the numerous cases which have been cited in argument at your Lordships' bar, it is evident that the exact meaning of the important word "occupier" in the rating clause of that Act must be regarded as hitherto an unsettled question. Those who have to establish the liability of the docks to be rated to the poor-rate have, with respect to the Liverpool docks, to contend against the authority of a decision probably in 1808, but certainly in 1827, upon the very subject in question. In one of the appeals the latter decision was expressly founded upon a case determined more than thirty years before, and which has since been regarded and acted upon as an unquestionable authority. Under these circumstances the counsel for the parishes might expect that the House would feel the same reluctance to disturb these decisions as was expressed by Tindal, C. J., in *Crease v. Saul*, 2 Q. B. 885, and would say with him, "It would be extremely inconvenient, and, indeed, mischievous, to overrule a class of cases which have been much discussed and sanctioned by many eminent judges, and which are now constantly acted upon, because we might not feel perfectly satisfied with the reason assigned for their decision. If we could permit ourselves to disregard these authorities on that account, we might feel disposed on the same ground to reject others which have put a construction on the 43 Eliz. c. 2, which we were by no means sure it ought to bear if we were now for the first time called upon to explain the meaning of its language. Crompton, J., in delivering the judgment of the Court of Ex. Ch. in the case of *The Mersey Docks and Harbour Board v. Jones and others*, said, with reference to the former decisions, "I think that neither a court of co-ordinate jurisdiction nor a court of error ought to interfere in such a case. If there is any hardship it must be left to the Legislature." By this last observation the learned judge seems to have considered that this House, as well as the courts of original and appellate jurisdiction ought to yield implicitly to the authority of long-established decisions. But, the same reasons for acquiescence did not apply to the different tribunals. The courts rightly abstain from overruling cases which have been long established, because, if they did so, they would only disturb, without finally settling, the law. But, when an appeal from any judgment is made to this House, however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of *stare decisis* refuse to examine the foundation upon which they rest. It would, in my opinion, have been the duty of your Lordships, even if the current of the decisions had been uniform; but as various cases have been decided, which, with all the endeavours to reconcile them, must still be regarded as conflicting and contradictory, it is absolutely necessary to determine what for the future shall be considered to be the law with reference to rating docks and works of a similar character. The 43 Eliz. c. 2, enacts that the overseers are to raise by taxation of every inhabitant, &c., and of every occupier of lands, houses, &c. in such competent sums as they shall think fit, according to the ability of the parish, the requisite fund for the purposes of the Act. The words, "to rate in such sum as they shall think fit," do not mean, as Tindal, C. J. says in *Marshall v. Pitman*, 9 Bing. 601, that they are to have a power to rate arbitrarily, but to rate the occupier according to the value of his occupation, the inhabitant according to his visible personal property, or as was said in *Early's case*, 2 Buls. 854, the

overseers are to make their taxations and assessments well and truly, and in an equal manner, according to the visible estates, real and personal, of the inhabitants within their town. *Prima facie*, therefore, a liability to the rate would seem to attach upon every occupation from which benefit is derived, and no occupier can claim an exemption unless he can find it in the Act itself, or it arises from some principle of law applicable to all cases. With respect to exemption arising from the Act itself, it is obvious that as the occupier is to be assessed according to his ability, if he derives no benefit of any kind from his occupation, he has no ability in respect of it, and consequently cannot be rateable. The other exemption, which does not arise from the Act itself, but which is found on a general principle of law, applies only to the Crown, which, not being named in the Act, is not bound by it. I am unable to find any ground of exemption from liability to the poor-rate either in the Act itself, or in any principle of law apart from the Act, except the two which I have mentioned; and there is nothing to indicate the intention of the Legislature, that lands and houses occupied for what in some of the cases is rather loosely called public purposes, as contradistinguished from private benefit, should not be liable to the rate. Lord Campbell, in the case of *The Birkenhead Dock Trustees v. Birkenhead Overseers*, 2 El. & Bl. 157, says that the exemption on the ground of public purposes takes its origin from the marginal note of the report of the case of *Rex v. Commissioners of Salter's Load Shute*. If this is so, it is a remarkable fact, that in following that case as an authority, the courts should have been misled, by confining their attention to the marginal abstract, which certainly conveys a very imperfect if not inaccurate idea of the grounds of the decision. The term "public purposes" is only employed by Lord Kenyon in the *Salter's Load Shute* case incidentally. The reason given for the judgment is the absence of beneficial occupation. His Lordship says, "the commissioners have a bare naked trust not coupled with any interest." And again, upon the ground upon which the court proceeded in *Rex v. St. Luke's Hospital*, there was no occupier, by which he must have meant no beneficial occupier, for he adds, "the commissioners were mere trustees to superintend the execution of the act without any personal advantage. This reference to the case of *St. Luke's Hospital* shows that the leading idea in the mind of the court was the want of a beneficial occupier, although there does not seem to be a very close analogy between the case of an hospital supported by voluntary subscriptions from which no person who could be regarded as an occupier derived any pecuniary benefit, and the receipt of tolls as a compulsory incident to the occupation by the commissioners of the *Salter's Load Shute*. The first case in which an occupation for public purposes was expressly stated as the ground of exemption from liability to poor-rate is *R. v. Trustees of the River Weaver Navigation*, 7 B. & C. 70, n., to which the principle of the decision in the case of *R. v. Inhabitants of Liverpool* (the judgment brought into question by this appeal) was held to be applicable. In the case of *R. v. Liverpool* Lord Tenterden proceeded upon the ground of there being no beneficial occupation with respect to which he said the case of *R. v. Commissioners of Salter's Load Shute* is decisive. But in *R. v. Trustees of Weaver Navigation*, Bayley, J. said, "the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes, and as no part of the moneys received could be applied to private purposes, these moneys were not rateable in the hands of trustees." In *R. v.*

H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.]

*Mayor of Liverpool*, 9 B. & E. 435, the Court followed the cases of *R. v. Liverpool* and *R. v. Weaver Navigation*, without expressing any opinion as to the grounds of these decisions, observing "that they felt it to be impossible substantially to distinguish the case before them from those cases, and especially from the latter, and that if they found the principle settled by decisions already made, they felt it to be their duty to act upon them, and not, upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority. In the case of *R. v. Exminster*, 12 A. & E. 2, the Court adhered to the decision in *R. v. Mayor of Liverpool*, without any further explanation of the grounds of their judgment. But in a more recent case, *R. v. St. George's, Southwark*, 10 Q. B. 864, Lord Denman said, whether a person is rated as occupier, holder, or possessor of the premises, or as using them, the occupation, holding, possessing, or using them must be beneficial to the parties so rated. It has been settled by several cases that the possessors or occupiers, as trustees of property otherwise rateable, the profits of which they were bound by Act of Parliament to apply to public or charitable purposes, were not rateable to the poor in respect of such property. Now, although Lord Denman, in the case of *R. v. The Mayor of Liverpool*, seems to hint at some distinction between the cases of *R. v. Liverpool* and *R. v. Weaver Navigation*, yet it would appear (especially from his last-mentioned observations) that he considered them to rest upon the same foundation, and that the counsel on both sides at your Lordships' bar were correct in saying that there was no case decided upon the ground of public purposes which was not resolvable into beneficial occupation. But if this is so, it will be impossible to accept the explanation by which decisions apparently inconsistent with the judgment in *R. v. Salter's Load Stairs* and the cases which followed it have been attempted to be reconciled with them. To these cases it is necessary now to turn. The first of them which broke in upon the series of decisions hitherto considered is the case of *The Governors of the Poor of Bristol v. Waite*, 5 A. & E. 8. In deciding the case as they did the judges were probably not aware that they were disregarding the authority of previous decisions, as the *Salter's Load Stairs* case and the other cases founded upon it are not noticed in the argument or in the judgment. But in *R. v. Guardians of Wallingford Union*, 10 A. & E. 259, where those cases were cited, the Court followed the case of *The Governors of the Poor of Bristol v. Waite*, without any attempt to reconcile it with what had been previously decided. In the case of *R. v. Badcock*, 6 Q. B. 787, however, Lord Denman in giving judgment reviewed the authorities which appeared to be conflicting on the one side, the series which followed *Reg. v. The Inhabitants of Liverpool*, and on the other that which commenced with the *Governors of the Poor of Bristol v. Waite*, and observed that in all the first class the public as such, unlimited by the bounds of county, borough, or parish, had substantial and direct interest in the benefit which the application of the funds produced; in the latter the ratepayers, or at most the inhabitants of certain parishes, were alone concerned in the benefit direct or indirect. The distinction was afterwards approved of and adopted by Coleridge, J., in the case of *R. v. Harrogate*, 15 Q. B. 1020. The attempt thus to reconcile the discordant decisions will be regarded as having been completely unsuccessful when it appears that in the first class, instead of all the cases being instances in which the public at large unlimited by the bounds of county, borough, or parish, had an interest, there are found the cases of *R. v. Trustees of the Weaver Navigation*, in which the surplus funds were applied

for the general purposes of the county of Chester, and of *R. v. Mayor of Liverpool*, and *R. v. Exminster*, in which the public beyond the bounds of the borough had no interest in the benefit produced by the application of the funds. And the distinction fails altogether if the term "public purposes" as distinguished from private purposes is to be resolved into the question of beneficial occupation, because it would then appear to be immaterial whether the public purposes which exclude the idea of private benefit were of a local or of a general character. The desire of the court, however, not to be bound by the former decisions and yet not to be compelled expressly to overrule them is exhibited in a very striking manner in the case of *R. v. Commissioners of Harrogate*, 15 Q. B. 10, where it was held, that in order to exempt property from liability to poor-rate on the ground of its occupation for public purposes, the benefit must be exclusively public, and that if the occupation was in some degree beneficial to the whole public, yielding additional benefit also to a limited district or community, the property was rateable; as if it could make any difference in point of principle when the occupation is for public purposes, that one portion of the public derived a greater benefit from the application of the funds produced than the rest. After these fruitless endeavours to reconcile the decisions a case arose in which it seemed absolutely necessary to determine whether *R. v. Inhabitants of Liverpool*, and the cases which followed it, were to be submitted to as authorities for the future, or were to be set aside and disregarded. In the case of *The Trustees of the Birkenhead Docks v. The Overseers of Birkenhead*, 2 E. & B. 148, the question to be decided was, whether the commissioners of the Birkenhead docks were liable in respect of their occupation to be rated to the poor-rate. It certainly requires some ingenuity to discover any difference between the Birkenhead docks and the Liverpool docks, the latter of which had been decided, in the case of *R. v. Inhabitants of Liverpool*, not to be rateable. But Lord Campbell held that the cases were distinguishable. He said that the decision in *R. v. The Commissioners of Salter's Load Stairs* could be rested only on the clause in the local Act, which directed the tolls to be applied and disposed of for the several uses and purposes of the said Act, and to no other use and purpose whatsoever. The question was, whether this amounted to a prohibition to apply the tolls to the payment of the poor-rate. And adopting this construction, he added, "We think that the decision in the Liverpool case can only be supported by similar reasoning." It is clear, however, that the cases in question were not decided on any such ground, and it could have been assumed by Lord Campbell only from his desire to escape from the necessity of submitting to them by suggesting a distinction without denying their authority. That distinction was, that in the Birkenhead case the obligation to lower the tolls, which was much relied upon in the Liverpool case, was entirely wanting. It might have been supposed that the decision of the Birkenhead case having proceeded upon this ground, when the subsequent case of *The Tyne Improvement Commissioners v. Overseers of Chirton*, 1 E. & E. 516, was brought before Lord Campbell and the Court of Q. B., in which case the local Acts for making a dock expressly required the commissioners in the event of any surplus remaining after the appropriation of the rates to the purposes of the Act to lower the rates to the extent of such surplus, he would have adhered to the distinction and have held the case to be governed by the authority of *R. v. Inhabitants of Liverpool*. But instead of taking this course, he said that, to hold the dock exempt from rateability, they should have to overrule *Birkenhead Dock Trustees v. Birkenhead Overseers*, and that the



H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.]

only distinction between the cases was that in the Birkenhead case the commissioners had power to raise the rates again after having reduced them. In this unsatisfactory state of the authorities, it is evident that the two classes of decisions which have been subjected to this examination cannot stand together, and that it is necessary for your Lordships to determine which of them is agreeable to law. It must not be overlooked that in favour of the exemption of the docks from liability to poor-rate, there is the recital in the Act of 4 & 5 Vict. c. 48, which strongly indicates the opinion of the Legislature that the cases which had held the property of municipal corporations not to be liable to poor-rate had been rightly decided. But, as Lord Campbell said in *Reg. v. Inhabitants of Houghton*, 1 E. & B. 516, a mere recital in an Act of Parliament either of fact or of law is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital. The question of course depends upon the true meaning of the word "occupier" in the 48 Eliz. c. 2. The words of the Act are as general as possible, "every occupier according to his ability." And Lord Denman, in the case of the *Governors of the Poor of Bristol v. Waite*, 5 A. & E. 1, seems to give a correct description of the effect of those words when, after adverting to the meaning of the term "beneficial occupation," he says, without affecting the precision of an exact definition, it would probably be nearer the truth to say that a presumptive liability arising from occupation is to be explained away in each case. It is impossible not to agree with the observations made by his Lordship in *R. v. Sterry*, 12 A. & E. 92, that no one can review the numerous decisions (which cases somewhat like the one then before him had occasioned) without regretting that the court was ever induced to depart from the simple test which the subject-matter of occupation would in every case have afforded. Whether the occupation was in respect of private or public, or charitable purposes, it would have been wiser to have disregarded, and whenever the subject-matter was found productive to any one to have rated the actual occupant in respect of that produce, I cannot help thinking that the test here suggested was the one intended by the Legislature. By the Act the taxation is to be on every occupier "according to the ability of the parish." The productive occupation of the several occupiers within the parish make up its aggregate ability. If an occupier derives no benefit of any description from his occupation, it forms no part of the general ability of the parish; but if it is productive (although not profitable), there is nothing in the Act which requires the overseers to follow the produce in its subsequent application. The receipt of it constitutes the visible ability of the occupier. As was said by Lord Tenterden in *R. v. Inhabitants of St. Giles, York*, 3 B. & A. 579, if any profit be made the application of it when made is immaterial as to the question of rateability. This seems to be the true distinction which ought to have guided the decisions, and not that between private benefit and public purposes, from the adoption of which all the contrariety in the cases on the subject of beneficial occupation has arisen. It is to be observed that the term beneficial occupation is nowhere to be found in the Act of Elizabeth, and it must have been used in the different cases as synonymous with ability. In this sense, the decisions with regard to St. Luke's and St. Bartholomew's Hospitals, and to chapels and rectory houses, where no pew rents are received, are perfectly intelligible. In none of them could any person in the character of occupier be said to derive any benefit from the occupation. But that the absence of private benefit is no ground of exemption

appears from the cases in which trustees of chapels, who received profit from letting the pews, although they applied it entirely to the purposes of the chapel, were held rateable. And in the recent case of *R. v. Sterry*, 12 A. & E. 84, the trustees of a school, purchased from funds raised by charitable subscriptions and bequests, were held rateable in respect of the school, because no child was admitted to the school without an annual payment of 12l., although the average annual expense with respect to each child was 20l. The case of *Salter's Load Sluice* gave the key-note to all the subsequent decisions, which held that the *prima facie* liability of an occupier no longer existed when it was shown that the profits connected with his occupation were applicable to public purposes. Lord Kenyon, in founding his judgment upon *R. v. St. Luke's Hospital*, must have intended to decide that in the case before him there was no beneficial occupier, although he did not advert to the distinction that in the case of St. Luke's there was nothing received by any one by reason of the occupation, while the commissioners of the Salter's Load Sluice were empowered to take tolls for the navigation, which was vested in them. The exemption of an occupier, whose occupation is applicable to public purposes, was thus almost identically introduced, and having been so, it was accepted without much consideration in the subsequent cases. At last, some decisions having taken place which were hard to be reconciled with each other, it became necessary to define with some precision the true principle which ought to govern cases of this description. The distinction was then proposed between general and local public purposes. The difficulty, not to say the impossibility, of reconciling the cases by a distinction of this sort has been already shown. If, as before observed, the ability of the occupier means the personal benefit derived from his occupation, it is as much excluded where the profits of his occupation are applicable to limited public purposes as where they are to be applied to the benefit of the public at large. I am of opinion that, under the words of the 48 Eliz., every occupier of a tenement yielding profit is within the rating clause of the statute, although the tenement be a public work for the general good of the realm, and the profit be directed to be applied exclusively to its maintenance. Having thus expressed my opinion that the Mersey Docks and Harbour Board are liable to be rated for the Liverpool as well as for the Birkenhead docks, it is unnecessary to consider the effect of the different Acts of Parliament by which the trustees were expressly made liable to parochial rates in respect of warehouses to be built, in like manner as the same are or would be payable in respect of warehouses the occupancy of which is beneficial. The provisions of these Acts certainly appear to indicate the opinion of the Legislature that, without them the warehouses would have been exempt from liability to poor-rate as part of the docks enjoying that exemption. But if this liability existed before, the Acts cannot have the effect of taking it away (not by express enactment, but) by mere implication. It is quite true, as Byles, J. has said, that the Act of 20 & 21 Vict. having consolidated the docks at Liverpool and Birkenhead into one estate, and vested the control of them in one public trust, it would be singular if one portion of the property should be rateable and one not rateable under precisely similar circumstances. This undoubtedly would be the result if the decisions of the two cases appealed against were to stand. And the remark exhibits in a striking manner the impossibility of reconciling the decisions which, on the one hand, have exempted the Liverpool docks from liability to poor-rate, and, on the other, have rendered the Birkenhead docks liable to it. By reversing the judgment in the case of the Liverpool



V.C. W.] CONSERVATORS OF RIVER THAMES v. MAYOR, &amp;c. OF KINGSTON-ON-THAMES. [V.C. W.]

docks, and by affirming the judgment in that of the Birkenhead docks, the decisions will at last be brought into uniformity, and the statute 43 Eliz. will, in my opinion, receive its proper construction and have its consistent effect and operation.

LORD KINGSDOWN.—My Lords, I concur with my noble and learned friends in the opinions they have expressed.

*Judgment for app. in Jones's case.*

*Judgment for resp. in Cameron's case.*

Solicitors for Mersey Board, Wright and Venn.

Solicitors for Jones, Swift, Wagstaff and Blenkinsop.

Solicitors for Cameron, Chester and Urquhart.

### V. C. WOOD'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs.,  
Barristers-at-Law.

June 2, 9, 10 and 13, 1865.

THE ATTORNEY-GENERAL at the relation of THE CONSERVATORS OF THE RIVER THAMES v. THE MAYOR, ALDERMEN AND CORPORATION OF KINGSTON-ON-THAMES.

*Injunction—Nuisance—10 & 11 Vict. c. 84—Drainage into a public river.*

*The corporation of Kingston-on-Thames having adopted a new scheme of drainage, whereby a largely increased amount of sewage would be poured into the Thames :*

*Held, on a suit by the Thames Conservancy Board, that the court, having regard to the Towns Improvement Clauses Act 1847, ought not to grant an injunction where there was not evidence of the actual existence or immediate probability of a nuisance, and the suit was dismissed without costs, without prejudice to any future bill when a sufficient case should arise.*

This was a suit by the Attorney-General on the information of the Conservators of the Thames to restrain the defts. the Mayor and Corporation of Kingston-on-Thames from emptying an increasing quantity of sewage into the Thames, so as to create a nuisance to the persons navigating the river or dwelling near it.

By the Thames Conservancy Act 1857 twelve conservators of the Thames were appointed, and all the estate and interest of the mayor and corporation of London in the bed, soil and shores of the river Thames from Staines to Teddington, and all the estate and interest of Her Majesty in the bed, soil and shores of the river Thames from Teddington to Yantlett Creek in Kent (except certain portions) were vested in the conservators.

The 54th section of the Act declared that it should not be lawful for any person to erect, build, or make any embankment, or any erection, building, or work in or upon the bed or shore of the river Thames, or to drive any piles thereon or in the said river, without the permission of the conservators.

The 93rd section gave the conservators authority to cut the banks for the purpose of making and enlarging sewers, and for other purposes, and to permit other persons so to do under such restrictions as the conservators should think proper to impose.

The 166th section enacted that nothing in that Act contained should extend to prejudice, diminish, alter or take away any of the rights, power, or authorities with respect to the regulation of sewers vested in the Commissioners of Sewers within the limits of the Act, or in any person under or by virtue of any Act of Parliament, or to render any person liable to any penalty under the Act for allowing ordinary sewage to flow into the river

Thames; but all such rights, powers, and authorities vested in such commissioners, or person, should be as good, valid and effectual as if the Act had not been passed.

By a lease dated the 26th Dec. 1861, the Mayor and Corporation of Kingston demised to the conservators a slip of ground, therein described as a towing-path, adjoining the river Thames, situate in the parish of Kingston, and containing 858 yards or thereabouts, for the term of seven years from the 20th March 1860, at the yearly rent of 80*l.*, with a covenant by the corporation for the quiet enjoyment.

At the date of the lease, and for some time previously, there had been a drain which (after passing under a part of the towing-path demised by the lease) discharged its contents into the river. The drain (where it passed under the towing-path) was a barrel drain, about two feet only in diameter, and its outfall did not extend into the bed of the river, but was in the bank.

According to the statements in the bill, the drainage of Kingston was, up to April 1864, collected in cesspools, which were from time to time emptied, and only a small quantity of sewage found its way into the Thames through the above-mentioned drain.

On the 31st March 1864 the secretary of the conservators received notice from Mr. Wilkinson, town clerk of Kingston, that the corporation proposed to make certain alterations in the outfall of the drain.

On the 7th April 1864 Mr. Wilkinson sent to the conservators a plan of the proposed alterations; and on the 11th April 1864 four of the members of the conservancy board, with their engineer, went to Kingston, and by appointment met some of the members of the corporation, with their engineer, and received from them a verbal statement of what the corporation proposed to do.

It appeared from the plan sent to the conservators, and from what passed at the meeting of the 11th April, that the corporation proposed to lower the outfall of the drain, and to extend it thirty feet further into the bed of the river, and also to increase the capacity of the drain and outfall, and that they proposed, by means of the drain and outfall (as so enlarged), to discharge into the river a very large quantity of sewage.

The scheme (as determined upon at a meeting of the corporation in April 1864) was to remove the existing cesspools and construct nine miles of new sewers, to connect these sewers with the above-mentioned drain, and so to discharge all the sewage of Kingston into the river.

It appeared from the statements in a schedule to the deft.'s answer, that there were, in April 1864, 1345 houses in the whole of the borough, that 685 of these were drained exclusively by cesspools, without overflow drains, and that 225 were drained exclusively by cesspools with overflow drains into the public sewers; and that 435 houses only were drained exclusively by means of drains that ran into the Thames, or into a stream called Hog's Mill River (also running into the Thames), either directly or by means of the public sewers in the borough.

It appeared also that there were twelve public sewers carrying sewage from the borough into the Thames, but that of these five had been made within the last twenty years, and that there were also a number of private sewers, and that only 110 houses were drained into the river exclusively by means of the above-mentioned drain under the towing-path.

On the 15th April 1864 a meeting of the conservators was held, for the purpose of considering the application made to them on behalf of the defts. as to the alteration of the outfall of the sewer. The conservators considered that the plan of drainage

V.C. W.] CONSERVATORS OF RIVER THAMES V. MAYOR, &amp;C. OF KINGSTON-ON-THAMES. [V.C. W.]

proposed by the defts. would be very injurious to the public, and determined to refuse to allow them to alter and extend the outfall as proposed.

Accordingly, on the 19th April, the secretary of the conservators wrote to Mr. Wilkinson, in reference to the proposed new scheme, as follows :

I am instructed to inform you that as the conservators are of opinion that such a discharge would be most damaging to that part of the river, making it rather a filthy drain than a means of healthy enjoyment to a large portion of the public, they will feel it their duty to offer the proposed measure every opposition in their power.

No reply was sent to this letter, but the bill alleged that on the 20th May the conservators were informed for the first time that a large number of men were employed by the defts. in deepening and enlarging the drain near the spot where it passed under the towing-path comprised in the lease of the 26th Dec. 1861, and that thereupon the conservators instructed their solicitors to take such proceedings as might be necessary to prevent any alteration in the banks of the river, or of the towing-path, or any increase in the discharge of sewage into the river.

Although the corporation did not appear to have used the compulsory powers given them by sect. 35 of the Towns Improvement Clauses Act 1847, in constructing drains for all the houses in the borough, yet junctions were placed in the new services opposite nearly every house, so as to give the owners every facility for connecting their drainage with them, and the following notice was placed about in July 1864 :

**House Drainage.**

All owners of property desirous of draining into the main sewers or otherwise improving the sanitary arrangement of their property as the work proceeds, will oblige by giving the contractor an early intimation thereof, in order that he may provide the necessary junction and arrange for such drainage.

(Signed)

S. SHURSEOLA, Contractor.

The bill alleged, that owing to the weir at Teddington, the current of the river was very sluggish, and that the increased quantity of sewage, discharged into the river by the enlarged drain, would, in time, cause an offensive deposit in the river near Teddington, and would also seriously pollute the water of the river, and would be injurious to the health of persons navigating or using the river at or below Kingston, or dwelling on or near the banks of the river at or below that place, and would destroy the fish in the river, and in this and other respects be a great and serious nuisance.

The prayer of the bill was, that the defts. might be restrained from cutting through any portion of the towing-path comprised in the lease of Dec. 1861, or of the banks, bed, or soil of the river Thames, and from erecting or making any sewer, outfall, or other works upon the bed or banks of the river, and in particular from deepening, or enlarging, or extending into the bed of the river Thames, the outfall of the drain, without the permission of the conservators.

That the defts. might be restrained from connecting the new sewers, intended to be constructed by them, with the outfall of the existing drain, and from causing or permitting any sewage which had not theretofore been discharged into the river Thames by means of the aforesaid outfall, to drain or pass into the river Thames by means of the aforesaid outfall or otherwise.

The defts., in their answer, admitted that they proposed, by means of the said new system of drainage, to collect into one sewer (being the drain in question) the sewage which had before been discharged by different sewers, but they stated that by means of flushing, they intended so to dilute and deodorise the sewage, that it would not be a nuisance, and they denied that they intended to enlarge the outfall drain, or to interfere with the towing-path.

The defts. also submitted that, under the Towns Improvement Clauses Act 1847, they had a right to drain the sewage of the borough into the river, that if it was collected and emptied by one sewer into the river as proposed, it would not be a nuisance to the conservators or any other persons.

They also maintained that the corporation of Kingston had for the period of twenty years next before the commencement of the suit, enjoyed as of right, and without interruption, the right as occasion required of their own free will of discharging into the river by means of the outfall of the drain in question all such sewage as they thought fit so to discharge from all or any of the houses within the limits of their borough, as it existed previous to the enlargement thereof by the Kingston-upon-Thames Improvement Act 1855, and that they had enjoyed the like right for the period of forty years next before the commencement of this suit, and that they had a right to discharge into the river by means of such sewers, drains, or openings as they thought fit from time to time to use or make for that purpose, all such sewage as they thought fit so to discharge from all or any of the houses within the aforesaid limits of the borough as it existed previous to the enlargement thereof by the Kingston-upon-Thames Improvement Act 1855.

The defts. also urged the heavy loss which would result to them from any interference with the contract entered into for the construction of the new sewers for 8800*l.*, and stated that the only mode in existence of draining the town was by using the river.

Evidence was adduced on the part of the conservators to show that, owing to the weir at Teddington, the current of the river was very sluggish at and above the place where the outfall drain entered the river, particularly in summer; that the population of Kingston was upwards of 16,000; that at Walton (where the population was only 4000) the stench from the sewer was very offensive; that the population of Kingston was rapidly increasing, showing an increase of 50 per cent. between 1851 and 1861; that the whole of the land in the borough was building land; and that the demand for houses exceeded the supply.

Dr. Letheby, the analytical chemist, stated, in his affidavit, his opinion that, if the proposed scheme were carried out, it would be attended with serious consequences to the quality of the water above Teddington Weir; that it would cause the accumulation of a large quantity of highly offensive mud; that in summer it would render the surface of the water in all probability from the outfall to the weir extremely offensive, and that the emanations from the putrefying mud might have a serious effect on the health of those exposed to its influence; that it would render the water of the river entirely unfit for domestic purposes; that it would most likely destroy the fish, and that the discharge of sewage from the proposed works would become a great public nuisance.

There were also affidavits from gentlemen living on the banks of the river, stating that the proposed new sewage scheme would be a serious nuisance to themselves and those of their neighbours residing on the banks.

Dr. William Odling, in his affidavit, stated that it was his opinion that the proposed discharge of sewage would lead to a large accumulation in the river of highly putrescible mud, which becoming heated by the sun would evolve most offensive emanations prejudicial to the health and comfort of the neighbourhood.

Evidence was also adduced to show that the springs relied upon by the defts. for flushing the sewers were land springs of no great extent, and inadequate for the purpose, and that most probably

## V.C. W.] CONSERVATORS OF RIVER THAMES v. MAYOR, &amp;C. OF KINGSTON-ON-THAMES. [V.C. W.]

the refuse of gasworks and other manufactures would be discharged into the river, and that, if so, it would have a very prejudicial effect; and that, in consequence of the sewage being discharged in one volume by one sewer outlet, instead of by a number of small drains, the nuisance would be considerably greater than at present; and that the sewer already existing at Surbiton (about a mile above Kingston) rendered the water offensive.

The affidavits filed by the defts. went to show that the greater part of the drainage of the town already went into the river by the public sewers; that owing to the depth of water and the rapidity of the stream, no nuisance would arise from the new scheme of sewage; that the quantity of sewage discharged would, even in the summer months, amount only to 1-400th part of the volume of the river; that the drainage at Surbiton had not created any nuisance; and that many old sewers had been discovered during the recent works, and these were relied upon as showing that the corporation had a prescriptive right to drain into the river.

Dr. Letheby, in his affidavit in reply, stated that he had examined the condition of the river at and below the Surbiton sewer on the 20th July 1864; that where cesspools were used, they retained the most offensive part of the sewage, namely, the solid sedimentary matters which formed the deposits in rivers; that by the proposed plan, more than two tons and a half of solid excrementitious matter would be discharged into the Thames daily, besides the whole of the trade and kitchen refuse of the borough, the drainage from the stables, and the washings of the streets; that the effect would be to cover the stream with such of the excrement as floated, and to form a deposit of black matter which had a tendency to ferment; that the practice of making the rivers of England the receptacle of all the filth of the towns was becoming a monstrous evil, and would be, if not checked and corrected, a national disgrace; for that, although the effect at first was not very marked, yet little by little the solid part of the excrementitious matters accumulated, and in a longer or shorter time became excessively offensive, killing the fish of the stream and destroying the vegetation.

He referred to the diminution of water in the Thames in recent times, in consequence of improved drainage, and said that it was not impossible that, in a dry season, there would be no water to flow over Teddington weir; and that, if this were to occur, the whole of the water at Kingston and Surbiton would soon become a mass of putrefying filth. That he had traced the course of the sewage from the outfall of the Surbiton sewer to a considerable distance below it, and that the effect was to render the water black and turbid, to deposit a large quantity of fetid mud, and to cover the aquatic plants with the well-known sewer-fungus.

The material clauses of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34) were

## Sect. 24:

The commissioners shall from time to time, subject to the conditions herein contained as to the notice to be given and the plans and estimates to be prepared, cause to be made under the streets such main and other sewers as shall be necessary for the effectual draining of the town or district within the limits of the special Act, and also all such reservoirs, sluices, engines and other works as shall be necessary for cleaning such sewers; and, if needful, they may carry such sewers through and across all underground cellars and vaults under any of the streets, doing as little damage as may be, and making full compensation for any damage done; and if, for completing any of the aforesaid works, it be found necessary to carry them into or through any inclosed or other lands, the commissioners may carry the same into or through such lands accordingly, making full compensation to the owners and occupiers thereof; and they may also cause such sewers to communicate with and empty themselves into the sea or any public river, or they may cause the refuse from such sewers to be conveyed by a proper channel to the most convenient site for its collection and sale for agricultural or other pur-

poses, as may be deemed most expedient, but so that the same shall in no case become a nuisance.

Sect 35, which empowers the commissioners to construct drains from houses where such houses are not

Drained by a sufficient drain or pipe communicating with some sewer, or with the sea, or some public river to the satisfaction of the commissioners.

## Sect. 36, which directs that

No house or building within the limits of the special Act shall be built upon a lower level than will allow of the drainage of the wash and refuse of such house or building into some sewer belonging to the commissioners . . . or into the sea, or some public river into which the commissioners are empowered to empty their sewers.

## Sect. 107:

Nothing in this Act contained shall be construed to render lawful any act or omission on the part of any person which is, or but for this Act would be deemed to be, a nuisance at common law, nor to exempt any person guilty of nuisance at common law from prosecution or action in respect thereof, according to the forms of proceeding at common law, nor from the consequences upon being convicted thereof.

Sir H. Cairns, Q. C. and Cotton, in support of the information, said that the pits appeared in two capacities. First, as lessees under the corporation of Kingston they asked the interference of the court to protect their property; secondly, on behalf of the public they asked the court to prevent the defts. from polluting the river. They contended that it was shown by the evidence that the increased amount of sewage from the additional number of houses intended to be drained into the river, and the concentration of the sewage and the discharge of it in one place would be most injurious to the river, and cause the greatest discomfort to those navigating the river and dwelling on its banks, even if it did not result in actual danger to their health. As Lord Mansfield observed in *Reg. v. White*, 1 Burr. 337: "It is not necessary that the smell should be unwholesome, it is enough if it renders the enjoyment of life and property uncomfortable." As to the prescriptive right asserted by the corporation to drain into the river whatever sewage they pleased, there was no evidence that the drains in question were made by the corporation, and at any rate there could be no prescription for a nuisance: *Fouler v. Saunders*, 2 Coke, 446.

They also cited

*Cater v. The Lewisham District Board of Works*, 34 L. J. 74, Q. B.; 10 L. T. Rep. N. S. 235;

*The Attorney-General v. The Town Council of Birmingham*, 4 K. & J. 528;

*Elliot v. The North-Eastern Railway Company*, 10 H. of L. Cas. 338; 8 L. T. Rep. N. S. 337.

*Rolt, Q. C., Giffard, Q. C. and Ramadge* for the defts.—The question as to the rights of inhabitants on the banks of navigable rivers to discharge their sewage into them was a most important one, and was now raised for the first time. In all cases where the court had interfered with the powers vested in the commissioners for draining towns, it had been on the ground of some private nuisance. Here there was no nuisance. But assuming that the discharge of sewage into a navigable river was a nuisance, they contended, first, it was a nuisance expressly authorised and directed by the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, which directs the construction of sewers to empty themselves into the sea or into some public river, and that no house should be built without drainage into such sewers, or into the sea, or into some public river. It was the business of the corporation to see that this was done. The discharge of sewage into a river was no nuisance at common law—the right of discharging sewage into the sea, or into a navigable river, was universal. There was a conflict of evils upon the sewage question, but the health of the inhabitants of the towns must be considered; it would be seriously injured

V.C. W.] CONSERVATORS OF RIVER THAMES v. MAYOR, &amp;C. OF KINGSTON-ON-THAMES. [V.C. W.]

unless proper drainage was provided for the town. Secondly, that a right of sewage is a thing which may be prescribed for, and evidence had been given of their prescriptive right to discharge sewage into the river. Thirdly, that no act was done or threatened by the defendants which would create such serious mischief as would entitle the plaintiffs to the interference of the court. The evil, both actual and prospective, was greatly exaggerated in this instance; the amount of solid sewage poured into the river, when compared with the volume of water in the river, was almost infinitesimal in amount. At any rate, the court ought to allow time for ascertaining the actual effect of the proposed scheme before granting the application, which at present was altogether premature. They cited

*Attorney-General v. The Luton Board of Health*,  
2 Jur. N. S. 180;

*The Wandsworth District Board of Works v. London and South-Western Railway Company*, 8 Jur. N. S. 691;

*Biddulph v. The Vestry of St. George's, Hanover-square*, 8 L. T. Rep. N. S. 544; 9 Jur. N. S. 434;

*The Trustees of the Birkenhead Docks v. Laird*, 4 De G. M. & G. 732;

*Wood v. Sutcliffe*, 2 Sim. N. S. 163;

*Earl of Ripon v. Hobart*, 8 My. & K. 169;

*Haines v. Taylor*, 2 Phill. 209;

*Hale De Jure Maris*, c. 8.

Cotton in reply.

The VICE-CHANCELLOR said the question raised was whether a system of drainage like that contemplated by the defendants could be an annoyance which the Attorney-General had a right to complain of on behalf of the general public. He thought it was the first time such a question had been raised with regard to a river of the magnitude and importance of the Thames. Large navigable rivers were not formerly recognised with much interest by the Legislature, except for the purpose of navigation, and as the means of draining the surrounding country and thus preventing inundations. These were the two great objects to carry out which the Commissioners of Sewers were established, and so very little could be found with reference to the subject of nuisance that it would be necessary to look to usage to find out to what other uses large navigable streams were adapted. There was the use made of it by individuals for domestic purposes and manufacturing operations, and some of these operations requiring water in a great degree of purity. Then the river was used for watering cattle, and persons living on the banks used the water for drinking. Then the river was used for fishing. As to the right of the public to have the river kept in a fit state for bathing it was not very material to consider that, as it never could be injurious to bathing without being at the same time injurious to much higher rights. Not only had the drainage of the surrounding country been carried into the river, which might have had, to a certain extent, the effect of silting up the bed of the river, but persons had for all time *de facto* used the water for the purpose of carrying off the filth which must be got rid of for the benefit of human health. In saying this he did not intend to imply that the corporation had established any such prescriptive right to discharge the sewage into the river as that set up by their answer. There was no evidence of any such right. On the other hand, there was the fact that the inhabitants of Kingston had been in the habit of getting rid of their superfluous filth by draining it into the river. What, then, was to be done in a case where that filth would be multiplied at least twofold, with an aggravation of the evil from the circumstance that, instead of its being carried into the river by numerous outlets, it would all be collected together

in one sewer. He had no hesitation in saying that if it had been established before him by sufficient evidence that the water had been rendered unfit for cattle to drink or for domestic purposes, then, notwithstanding the Act of 1847, a nuisance would have been created which ought to be arrested by injunction. His Honour then read the 24th section of the Towns Improvement Clauses Act 1847, and said he could not accede to the argument that the words "become a nuisance" were to be confined to the latter alternative of collecting the sewage for sale. Two alternatives were pointed out, discharge into a river or the sea, or collection and sale for agricultural purposes; and in neither case was a nuisance to be created. The effect, therefore, of sect. 24 was, that the commissioners were not to be permitted to drain into a navigable river or the sea so as to create a nuisance. Having stated thus much, what he had to consider was, whether there was in the present case evidence of an actual nuisance committed, or evidence of the extreme probability of a nuisance if that which was being done was allowed to continue. He felt that the difficulty in the way of the plaintiffs was that it was necessary for them to establish the existence of an actual immediate nuisance, and not a mere case of injury some hundred years hence, when chemical contrivances might have been discovered for preventing the evil. Here there was a river which had been used for a variety of purposes, for drainage, for land drainage, for navigation, for domestic purposes and for watering cattle. In a large public river everybody had a right to employ the water as he thought fit for any or all of these purposes. There must necessarily be annoyance to the inhabitants on the banks, which was distinguishable from legal nuisance, and must be submitted to a certain extent. Steamers, for instance, no doubt caused great inconvenience to persons in wharves, but no one thought that that constituted a nuisance. So with respect to bathing or fishing, though persons might be inconvenienced in particular parts of the river, yet such inconvenience would not amount to a nuisance. The question was one of degree, and some slight degree of inconvenience in navigable rivers would not justify the interference of the court. [The V.C. then referred to *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *The Attorney-General v. Sheffield Gas Consumers Company*, 3 De G. M. & G. 304, which showed that where the nuisance was continual, though small, the court would interfere.] Of course, where the evil was of such a magnitude that it affected the health of the inhabitants, as in the case before the court of the river Lea, where sewage equal in amount to the volume of water in the river was being daily poured into the river, and scarlet fever had actually broken out, everything of that kind would be a nuisance, whether the river was navigable or not, and he should at once have interfered: (*The Attorney-General v. The Metropolitan Board of Works*, 9 L. T. Rep. N. S. 189.) His Honour then commented on the evidence, and said that there was nothing very definite as to the present injury, and that what injury there was seemed to be of a slight character. With regard to the Surbiton sewer, the evidence only went to show that for 300 or 400 yards a discolouration of the water could be traced, but not extending over the whole river, as the other side still remained bright and clear. The grievance that was pointed to in the evidence, particularly that of Dr. Letheby and Dr. Olding, was one that was likely to occur hereafter. If the case was really one of immediate danger, what important evidence might have been given. But here there was none of the usual evidence which was always forthcoming in cases of river nuisance, as to death of fish, cattle refusing to drink the water, or bottles

C. P.]

JEFFRIES v. EVANS.

[C. P.]

of water produced in court. Nothing of this kind had taken place. There had been considerable exaggeration on both sides, but looking at the great interests of the water companies, who drew their supplies from the Thames at Kingston, in having the water of the river pure, what important evidence on the subject, if the case was really one of immediate danger, might have been looked for from them. Not a single witness, however, from any one of the water companies had come forward to say that he anticipated any injury. No one said that the water had been rendered unfit for cattle to drink, no one had said that he had been unable to use the water for domestic purposes. When it was found that what had been done at Surbiton was very like what would be done here, and that it had not produced any of those ordinary descriptions of nuisance in which the court had been in the habit of interfering, he should hesitate very much before coming to the conclusion that what had been done at Kingston would produce a nuisance which ought to be interfered with by this court. Though he wholly put aside any idea of prescriptive right in the corporation of Kingston, yet he thought there was evidence of a usage by a considerable portion of the town of draining some of their filth into the Thames. The provisions of the Act of 1847 showed that the mere fact of draining into a navigable river was not in itself to be considered a nuisance, since it was authorised to be done provided no nuisance was thereby occasioned. Besides some means of defecating or deodorising the sewage might be applied before the nuisance actually arose. The Court could not look forward to a lengthened prospective period as to when a possible nuisance might arise. The most he could have done on the present occasion—but he did not think it right to do it—would have been to let the case stand over till Hilary Term, and then have seen whether what was being done would create the evil anticipated. But he did not see any probability of the evil being created in that time, and the court would have full power to deal with the matter when any case of actual nuisance arose. On the present occasion he should dismiss the information, but without costs, as the corporation had set up a strange claim of prescription, and had, or threatened to, cut through the towing-path, and had declined to give any satisfactory answer as to their intention when written to by the plts.' solicitor. He should make the following order:—The Court, being of opinion that the evidence does not establish the existence of any nuisance with respect to the works executed, or intended to be executed, by the defts., or any case for the interference of the court in respect to nuisance to be apprehended if such works be carried into effect, let the information be dismissed, without prejudice to any proceedings on the part of the Attorney-General or the plts., in the event of such works occasioning a nuisance.

Solicitors: *Frere, Cholmeley and Co.; Wilkinson and Matthews.*

#### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Monday, June 5, 1865.

JEFFRIES v. EVANS.

*Game—Right of shooting—Cutting down underwood—Quiet enjoyment.*

*The plt. leased a farm to R. with a reservation to himself of the right of "hunting, shooting, fishing, and sporting" over it, and subsequently granted "the exclusive right of shooting and sporting over, and taking the game, rabbits, and wild fowl upon it," with the quiet enjoyment of such right to the plt.:*

*Held, that this grant included all the animals which were by ordinary usage the subjects of shooting and sporting, and therefore that R., in killing the rabbits, committed a wrongful act, for which the deft. was not liable in an action for breach of covenant for quiet enjoyment.*

*R., whose occupation consisted of between 300 and 400 acres, cut down and grubbed up about forty acres of furze and underwood on his farm:*

*Held, that although the tenant did cut down and grub up the underwood, nevertheless there was no eviction of the plt. from his right of shooting over the land, and therefore that the deft. was not liable for a breach of covenant for quiet enjoyment.*

The declaration set out an indenture, whereby the deft. demised to the plt. a dwelling and lands for a term of seven years (unexpired at the time of action brought), and also the exclusive right of shooting and sporting over, and taking the game, rabbits and wild fowl upon the said premises and upon other lands, with a reservation to the deft., his heirs and assigns, all timber and other trees, underwood, thorns and bushes growing on the premises, with liberty of entering upon any part of the lands, and doing all necessary and convenient acts for the preserving, pruning, felling and carrying away the said timber, &c., making reasonable compensation for all consequential damage or loss to the plt., the plt. paying a certain rent for the same; and the deft. covenanted that the plt. should peaceably and quietly enjoy the said premises without any interruption by the deft. or any persons whomsoever lawfully claiming by or from him. Whereupon the plt. entered, &c.

#### Breach:

That during the said term one Mr. Rees, then lawfully claiming the right to shoot the rabbits in and upon the said manors and lands, through and under the deft., and having a good title to the same through and under him, entered into and upon the said lands, and shot and killed and carried away large quantities of rabbits there, and evicted the plt. from the enjoyment of the said exclusive right of shooting and sporting, and taking the said rabbits, so to him demised and granted as aforesaid; and the plt. further says that the said Mr. Rees, then also lawfully claiming and, in fact, having, through and under the deft., the right to cut down divers furze, covert, woods, and plantations in and upon the said manors and lands, over which the plaintiff had, under and by virtue of the said indenture, the exclusive right of shooting and sporting as aforesaid, cut down and carried away and destroyed divers quantities of the said furze, covert, woods, and plantations, and thereby evicted the plt. from, and disturbed him in, the enjoyment of the said right of shooting and sporting in and over the manor and lands.

#### The pleas were:

1. To first breach, that Rees did not enter the lands and kill the rabbits and evict the plt. from the enjoyment of the said exclusive right of shooting and sporting and taking the rabbits, as alleged. 2. That Rees did not lawfully claim the right, nor had he a good title to shoot the said rabbits upon the manor, as alleged. 3. To second breach, that Rees did not cut down and carry away and destroy the furze, covert, &c., and thereby evict the plt. from, and disturb him in, the enjoyment of the said right, as alleged. 4. That Rees had not, through and under the deft., the right to cut down the furze, covert, &c.

#### Issue thereon.

The cause was tried before Blackburn, J., at the Pembrokeshire assizes, when the learned judge left the following questions for the jury:

1. Did the plt. suffer damage in consequence of Rees having exercised the right to shoot the rabbits; and, if so, how much?
2. Did Rees injure the plt.'s right of shooting by cutting furze and underwood; and, if so, what were the damages?

The jury answered in favour of the plt. on both questions, with 18l. damages.

The verdict was then entered for the plt. on the first issue, and for the deft. on the second, leave being reserved to move to enter the verdict for 18l. on that issue, if, on the true construction of the

C. P.]

THE VESTRY OF MARYLEBONE (apps.) v. VIRET (resp.)

[C. P.]

lease, Rees had from the deft. the right to shoot the rabbits; and on the third and fourth issues for the deft., with leave to enter the verdict on them for 18*l*. if the court should be of opinion that the issues in fact were proved.

A rule having been obtained to set aside the verdict on the second issue, on the ground that, on the true construction of the lease from the deft. to Rees, Rees had the right to kill rabbits; and to set aside the third and fourth issues, and enter them for the plt. for 18*l*., with leave to move on the ground that the issues were in fact proved, and that on the construction of the said lease Rees had the right to cut furze and underwood, the deft. being at liberty to contend, if necessary, upon the argument of the rule, that the second breach was bad, on the ground that the acts complained of did not amount to any breach of the deft.'s covenant, the final judgment therein should be stayed.

*Hardinge Giffard, Q. C., H. G. Allen, and G. B. Hughes* showed cause against the rule; and

*Bowen and C. Coleridge* appeared in support of it.

The following cases were referred to in the course of the argument:

*Wickham v. Hawker*, 7 M. & W. 633;  
*Hanman v. Mockett*, 2 B. & C. 984;  
*Birkbeck v. Paget*, 81 Beav. 408;  
*Graham v. Ewart*, 11 Ex. 826;  
*Spicer v. Barnard*, 1 E. & E. 874;  
*R. v. Yates*, 1 Ld. Ray. 151;  
*R. v. Thompson*, 2 T. R. 18;  
*Padwick v. King*, 7 C. B., N. S., 60; 1 L. T. Rep. N. S. 98;  
*Thomas v. Fredericks*, 10 Q. B. 775.

ERLE, C.J.—I am of opinion that this rule should be discharged. The action is brought for breach of a covenant for quiet enjoyment, extending to the shooting which the plt. was to have over the deft.'s farm in the occupation of Rees. The declaration states that Rees held the farm by a lease prior to the grant to the plt., and had a right under that lease to kill the rabbits, which he did, and therefore that the plt. had not quiet enjoyment of his right of shooting. The great point made by the plt. is, that Rees had a right to shoot the rabbits, which right is traversed. Now, I am of opinion that he had no such right; the demise to him was of the farm, with a reservation to the deft. of the exclusive right of hunting, shooting, fishing, and sporting over it; and the deft. has granted that right to the plt. The reservation was in absolute and unqualified terms, and it can hardly be contended that the deft. under it had no right, as he went over the farm, to shoot a rabbit, and I think the ordinary usage in sporting and shooting must be taken to have been granted and reserved to the deft. The question in dispute is, whether the reservation extended beyond what is strictly called "game." That is a word capable of various extensions and restrictions; it is an indefinite word, and has had different meanings at different times, in the earlier statutes including rabbits, but excluding them in the later ones. Had this been a reservation of "game," we might have construed it by the light of the later statutes, which exclude rabbits; but the word "game" is not mentioned in the lease. I would add, that when a tenant takes a farm, with a reservation of game to the landlord, and the landlord increases it to too great an extent, the keeping it down must be a matter of arrangement between him and the landlord. Here there was no such stipulation, and no evidence that the rabbits had increased to any extent. The other point is, whether the deft. has committed a breach of an implied covenant, that his tenant should not cut down the underwood or grub up the furze, such implied covenant being said

to be comprised in the covenant for quiet enjoyment of the shooting. Rees certainly cut down and grubbed up the furze, but that did not, to my mind, constitute an eviction of the plt. from his right of shooting over the thirty or forty acres so dealt with, over which he has the same right as before. It would be absurd to say that there was a breach of such a covenant, if a farmer, who had been in the habit of growing turnips, clover, and other things suitable for partridges, were to give them up and change the nature of his crops. I limit this, however, to the case of a tenant turning thirty or forty acres out of 300 or 400 into cultivation, because if a lessor planted a wood, and stipulated that the lessee should have the shooting in that wood, and then cut it down, it seems to me that there would then be a breach of covenant.

WILLES, J.—I am of the same opinion, and I can see no reason why the words of the reservation should not be understood as applying to all things which generally come within its terms, and shooting rabbits does generally come within them. With regard to the judgment in *Graham v. Ewart*, I have spoken to my brother Martin, in whose words it is expressed. "Game commonly so called" there applies to such things as are usually sported after in contradistinction to animals and small birds, not of that description, such as sparrows, &c. It is clear, therefore, that Rees had not the right to kill the rabbits, and, consequently, on the first point, the plt. fails. Then, as to the other point, the argument for the plt. would have had much weight if the grant had been of wood or underwood, though even then, as at present advised, I should say that the tenant might cut the underwood in the ordinary way. This, however, is only a simple grant in general terms to take such game, rabbits, and wild fowl as might be from time to time on the land, and that does not hinder the landowner from using the land in the ordinary way, and changing from time to time the use to which he puts it. I think, therefore, the cutting of the underwood was not a breach of any covenant implied in the deed of 1860. On both points, therefore, I am of opinion that our judgment should be for the deft.

BYLES and MONTAGUE SMITH, JJ. concurred.

Rule discharged.

Friday, June 23, 1865.

THE VESTRY OF MARYLEBONE (apps.) v. VIRET (resp.)

*Sewers*—New sewer—Cost of constructing house drains—*Metropolis Local Management Act* (18 & 19 Vict. c. 120), ss. 69, 78.

By sect. 69 of the *Metropolis Local Management Act*, where the vestry alter any sewer, or provide a new sewer in substitution for one discontinued or closed up, they may close up the private drains and provide new drains in lieu thereof. By sect. 78, if a house be found not to be drained by a sufficient drain communicating with some sewer to the satisfaction of the vestry, and if a sewer of sufficient size be within 100 feet of any part of such house, on a lower level than such house, the vestry may give notice to the owner of the house to construct a drain and such works as shall appear to the vestry requisite, and if the owner of such house neglect or refuse during twenty-eight days after such notice to begin to construct such drain, &c., the vestry may cause the same to be constructed, and recover the expenses incurred thereby from the owner.

Several houses drained into an old sewer, there being a new sewer within 100 feet, and the vestry passed a resolution that they were not drained by sufficient

C. P.]

THE VESTRY OF MARYLEBONE (apps.) v. VIRET (resp.)

[C. P.]

*drains communicating with a sewer to their satisfaction, and served notices requiring the owner to construct drains to the new sewer. The owner of one of the houses having refused to do this, the vestry constructed the drains and summoned the owner to show cause why he should not pay the expenses.*

*On a case stated by the magistrate, it was*

*Held, that the alteration of the drains was an alteration in the system of drainage which fell within sect. 69, and that the vestry were liable for the expenses and not the owner of the house.*

This was a case stated by the Marylebone police magistrate. After setting out a summons commanding the resp. to appear and show cause why an order should not be made under the provisions of the Metropolis Management Act 1855 and 1862, for the payment by him to the vestry of the sum of 17l. 7s. 4d., the case proceeded as follows:

On the hearing of the summons the following facts were proved. John Stephen Viret was the occupier of the said house and premises. Complaint having been made to the vestry of the parish of St. Marylebone as to the drainage of the house and premises, No. 17, Edgware-road, the surveyor of the said vestry, by their direction, examined the drains of the said house and premises, and made a report to the vestry, and the vestry, on the 30th July 1863, after duly considering the matter, came to the following resolution, which was duly entered on their minutes:

Resolved, that the premises Nos. 13, 14, 16 and 17, Edgware-road, and Nos. 33 and 34, Upper Seymour-street, not being drained by sufficient drains communicating with a sewer, and emptying themselves into the same to the satisfaction of the vestry, notices be given to the owners of the respective premises, 13, 14, 16 and 17, Edgware-road, requiring them, pursuant to the 73rd section of the Local Management Act, to drain their premises by separate drains into the front sewer in Edgware-road; and that like notices be given to the owners of the respective premises Nos. 33 and 34, Upper Seymour-street, to drain by separate drains into the sewer in Upper Seymour-street; and that the old drain or sewer at the rear of the above premises in Edgware-road, and under the houses 33 and 34, Upper Seymour-street, be discontinued.

On the 21st Aug. 1863 the following notice was duly served on the said J. S. Viret.

(As nothing turned on the form of the notice, it is not necessary to set it out at length. It gave the resp. notice that his house and premises, No. 17, Edgware-road, were not "drained by a sufficient drain, communicating with a sewer and emptying itself into the same, to the satisfaction of the said vestry, and that there was a sewer within 100 feet of some part of his house and premises on a lower level than the same;" and required him within twenty-eight days to make a covered drain from his house into the sewer in Edgware-road, to the satisfaction of the vestry.)

This notice not having been complied with, the builder, with other persons employed by the vestry, went to the premises in Dec. 1863 for the purpose of doing the work, and the said J. S. Viret refused to allow them to enter such premises.

The following correspondence then took place between the said J. S. Viret and Mr. Greenwell, the vestry clerk:

(The case then set out the letters; the first was from Viret to the vestry, stating that he declined giving them permission to enter his house to make any alterations as to his present mode of drainage, unless the vestry would hold him harmless from all expenses attending the execution of such works. Mr. Greenwell, in his answer, stated that the payment of the expenses the vestry might be put to, in consequence of his non-compliance with the notice, would be required from him as the occupier, pursuant to the provisions of the Metropolis Management Act 1862.)

Shortly after the said J. S. Viret withdrew his opposition, and allowed the agents of the vestry to

enter, who in the said month of December did the work mentioned in the said resolution and notice.

On the 1st Jan. 1864, and also on the 19th Jan. 1864, the following demand was duly served on the said J. S. Viret:

(The notice stated that the drainage works at the resp.'s premises had been completed by the vestry, and that the expense incurred amounted to 17l. 7s. 4d., and pursuant to the Metropolis Management Act 1862, s. 96, the vestry required the immediate payment of such amount from him.)

The said J. S. Viret refused to comply with the said demand, although there was sufficient rent due to the owner of the said premises No. 17, Edgware-road, out of which he might have deducted the same; he also refused, on application being made to him under the 25 & 26 Vict. c. 102, s. 96, for the same, the name and address of his landlord and the amount of the rent due.

The sum of 17l. 7s. 4d. was a reasonable charge for the work done.

The house and premises in question, No. 17, Edgware-road, together with eighteen other houses, form a block of buildings, seventeen of which drain into a sewer, being a main sewer for the purposes of this case, called the Edgware-road sewer, running in front of the said block of houses along the Edgware-road, and constructed by the Commissioners of Sewers in the year 1839. At the time of the said resolution and notice, and thenceforward until the completion of the work by the vestry as aforesaid, two of such houses, the said house No. 17 being one, did not drain into the Edgware-road sewer, but into an old drain or sewer, for the purposes of this case called the "old drain," which ran at the back thereof and under two of the houses forming such block, and then discharged itself into one of the main sewers.

This old drain was sixty or seventy years old, and decidedly objectionable; it was formerly used for carrying off the drainage of the whole block of houses before mentioned, and in 1859 one Butcher drained into it from a tenement in Adam's-mews at the back of the said block of houses, with the permission of the vestry. It had also been cleansed and flushed by the Commissioners of Sewers in the years 1849 and 1850 upon the representations made by their surveyor.

The effect of the said works of the vestry was to drain the said house and premises No. 17 by a sufficient covered drain, having the branches, the size, the level, the fall and the other properties and incidents required by the 73rd section of the 18 & 19 Vict. c. 120, communicating with and emptying itself into the said Edgware-road sewer, which is of sufficient size within the meaning of the said section, and within twenty-six feet of the front wall of the said house, and is on a lower level than such house and premises.

The vestry also removed and filled up all the drains leading from the interior of the said house and premises, No. 17, Edgware-road, to the old drain, and then cut off all communication therewith from the said premises by bricking up the same.

It was contended before me on behalf of the resp.:

1. That the alteration in his drains was an alteration in the system of drainage, and did not come within the 18 & 19 Vict. c. 120, s. 73, but under sect. 69 of that Act, and that such alteration ought to have been executed at the expense of the parish and not of the resp.

2. That under the 73rd section the vestry is only authorised to require the resp. to make sufficient drains communicating with the old drain or sewer at the back of the said house and premises, that being, as he contended, a sewer, and being nearer to his house and premises than the sewer in the



C. P.]

THE VESTRY OF MARYLEBONE (apps.) v. VIRET (resp.)

[C. P.]

Edgware-road. The apps. contended that the old drain was not a "sewer" within the meaning of the statutes, and that if it was, the vestry had nevertheless the right to make the alterations.

3. It was contended, on behalf of the resp., that I had jurisdiction to review the decision of the vestry, and to determine whether or not, before the alterations, the resp.'s house was drained by a sufficient drain communicating with some sewer.

I was of opinion that I had no power to review the decision of the vestry. I also held, that the "old drain" running behind the block of buildings in which the resp.'s house is comprised is a sewer within the meaning of the interpretation clause, 18 & 19 Vict. c. 120, s. 250. That the Commissioners of Sewers had exercised control over it. That the rights of the said commissioners passed to the vestry by the operation of sect. 68 of the same Act, and that in one instance the vestry had used such rights. That the apps. were bound by sect. 69 of the same Act to supply private drains necessary to enable the resp.'s house to drain into the sewer in Edgware-road, and that the app.'s having so done, the resp. was not liable to them for the expenses thereby incurred.

All formal matters were duly proved, and it was solely on the last-mentioned ground that I refused to make the order for the payment of 17*l.* 7*s.* 4*d.*

The apps., being dissatisfied with my decision as being erroneous in point of law, duly gave the notice in writing to state a case, &c.

I have therefore to pray the judgment of the court upon this case.

(Signed)

J. S. MANSFIELD.

*Keane, Q. C. (Poland with him)* for the apps.—The earlier parts of sect. 73 of the Act (18 & 19 Vict. c. 120) are satisfied by the facts of this case. The vestry have found that this is not "a sufficient drain communicating with some sewer and emptying itself into the same" to their satisfaction, and the magistrate cannot review that decision, as it is on a matter which is left to the vestry by the statute, which gives an appeal to the Metropolitan Board of Works. It is said that this is an alteration of the system of drainage, and comes under sect. 69; but where a house is not sufficiently drained and there is a sewer within 100 feet, and on a lower level than such house, then the vestry under sect. 73 may require the owner of such house to make a drain. Sect. 78 proceeds on the assumption that some one responsible for the drains, as distinct from the sewers, does not attend to them. Sect. 69 applies to a case of sufficient drainage interfered with by the vestry, and sect. 73 to insufficient drainage.

*Macnamara* for the resp.—The primary object of the vestry was to substitute a sewer in front of the house for one at the back, and the drains were only altered so as to substitute one sewer for another. They have not required the owner to make his drains sufficient, but to alter his system of private drains for the purpose of the primary object, viz. a change of sewers.

*Keane, Q. C.* in reply.

*WILLES, J.*—I am of opinion that the decision of the magistrate was right, and ought to be affirmed. The question arises on the construction of the 18 & 19 Vict. c. 120, and the question is, if Viret is bound to pay the expense of making certain drains into a new sewer. It appears that the house, in respect of the ownership of which it is attempted to make the resp. liable, was drained for a considerable period into the old sewer and would have continued to do so. The vestry considered the drainage of the house into that sewer unsatisfactory and passed a

resolution under sect. 73 of the statute, that the house was not drained to the satisfaction of the vestry. It further appears that under the direction of the vestry, in whom the drains of the district are vested with very large powers of superintendence, the drains by which this house was formerly drained were destroyed and new drains made into the new sewer, and it is in respect of the expense of the new drains that the question arises. The vestry found under sect. 73 that the house was not drained by a sufficient drain communicating with some sewer and emptying itself into the same to their satisfaction, and they gave notice to Mr. Viret to make a sufficient drain, and the case does come literally within the terms of that section. It further appears, however, that the resolution of the vestry that the house was not sufficiently drained into some sewer was accompanied by a resolution that the old drains and the old sewers should be discontinued, and that which was the object of the vestry was not merely that the drainage of the particular house should be altered, but that the drainage of that house and others should be taken from the old sewer, and so far as that sewer is concerned put an end to. The question arises on sect. 69, which is the section applicable to that state of things, and before I state that section and the opinion to which I have arrived it is right to draw attention to the provisions of the Act, by which we see that while one body has the superintendence of both the drains and the sewers, there is a marked distinction between the former and the latter. The drains are the property of the owners of houses, and the expenses where there were none before, or where they are insufficient, ought to fall on the private individuals who have an interest in the houses. But with respect to sewers, properly so called, which do not relate to private houses, but drain the district generally, the expense of altering them should fall on the rates which are in the nature of a tax on the district; and looking at the statute in that way, no one can doubt but that sect. 73 relates to cases in which the drainage of a particular house is insufficient, and if we look back to sect. 72 the expense of keeping the system of drainage clear is cast upon the vestry, and when that is established we see at once the propriety of vesting in one body the superintendence and power over individual drains and the sewers. The section for doing that is sect. 69; by sect. 69 the vestry of each parish are to repair and maintain the sewers vested in them, and are to cause to be made and maintained such sewers and works as may be necessary for effectually draining their parish or district; then comes a power which I may pass over with the remark that it is a power such as is proper for preventing flooding and effectually draining the district; then the section goes on to enact that it shall be lawful for the vestry to carry such sewers through or across any turnpike-road, or any lands whatsoever, making compensation for any damage done thereby, and then there is a proviso that no new sewer shall be made without the approval of the Board of Works, which superintends the district boards, and there is to be no discontinuance or alteration of any sewer so as to create a nuisance, and if by reason thereof any person shall be deprived of the use of any covered sewer, it shall be the duty of the vestry or district board to provide some other sewer or drain as effectual for his use as the sewer of which he is so deprived. The object of the inquiries which I made in the course of the argument with reference to whether the old drain was closed up was to ascertain if the case fell within that last proviso, as if so, the vestry must make a new drain to the new sewer; but it was agreed that it was not so, and that what was meant by the vestry was not that it

C. P.]

PETTIWARD v. THE METROPOLITAN BOARD OF WORKS.

[C. P.]

should be closed up, but that it should be discontinued so far as these houses used it for carrying off their drainage. Then we come to the next proviso, "That where the vestry or district board alter any sewer or provide a new sewer in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private drains and provide new drains in lieu thereof." Therefore in the case of the alteration of a sewer such alteration imposes on the vestry the obligation to provide any private individual whose drainage is interfered with an altered or substituted drain as effectual as that previously used. Then we come to the question on which the magistrate decided, was the alteration an improvement of the drains by reason of the existing drains not being sufficient, or was it what the vestry were bound to do as a substituted drain? This is a mixed question of fact and law, and there is no finding upon it, but it does not appear that the drain by which the house formerly drained into the old sewer was an insufficient drain. The finding is, that it was old and unsatisfactory, and one must assume that the new sewer was a benefit; but the reason of that was that the system of drainage was improved—that the new sewer, properly so called, was better than the old one. But to make the owner of the house liable it must be shown that his drain was a bad drain. So much with respect to what is not found. What is found is, that the vestry did do away with the old drains into the old sewer, and did close up those drains so that the house could not drain into the old sewer, and the question is, if that is an alteration within sect. 69? There is in fact an alteration in the drains which would render necessary that which by the proviso the vestry must provide, and I hold that this is an alteration of the old sewers, and there is an obligation on the vestry to substitute a new drain. I consider that what the magistrate decided amounts to a decision in point of fact which I should approve, and which, so far as it is a decision of law, I conceive to be unobjectionable; it was the substitution of a drain for a drain which was altered by the alteration of the old sewer. It was a work rendered necessary by changing the drainage of a number of houses from the old sewer to the new sewer substituted by the vestry. Is it the discharge of an obligation to establish a sufficient drain, or is it an improved system of drainage? Clearly the latter. Looking at the statute I can entertain no doubt on the merits that the work ought to be paid for by the vestry, and not by Mr. Viret. There is one circumstance that the vestry have insisted on through Mr. Keane, that the drains were insufficient drains; assuming that to be so, it must first be considered if it is competent for the magistrate to go into the conclusion of the vestry; the magistrate thought that he could not, and I am far from thinking that he was wrong. If this was an alteration of the sewers, the obligation is on the vestry and not on the owners of the houses.

BYLES, J.—I am of the same opinion, and I think that the magistrate was right and the vestry wrong. The vestry had made a new sewer when there was an old sewer, and to make a connection with the new sewer it was necessary to make drains, and the question is, if the expense of the alteration ought to fall on the vestry or on private individuals. It seems to me that the case falls in every respect within sect. 69. They have made a main drain, and then they have to make drains from every house, and they say, "We cannot put the expense of that upon the public, as we have acted under sect. 73;"

but before they could do that they must show that there was not a sufficient drain communicating with "some" sewer. That is not done; the finding is that it does not communicate with "a" particular sewer, but the Act says, "communicating with some sewer." Independent of that, though the vestry have a general jurisdiction, we are bound to see that they had a particular jurisdiction in this case; therefore in every view, with the finding of the magistrate and without, the district should pay.

MONTAGUE SMITH, J.—I am of the same opinion. I think the district should pay, and not the resp. It is said that the resolution of the vestry is conclusive on the facts, but I think that it is not, and on two grounds: it is not conclusive that this is a work under sect. 73, as the finding is not that there was not a sufficient drain to the old sewer, but it condemns the old sewer, and therefore as a necessary consequence the drains connected with it. It cannot be conclusive where the question arises if the facts bring the case within sect. 69 or sect. 73; and it could never be conclusive when the question is if the vestry is to pay or an individual, as then the vestry would by their own finding conclude the question; therefore on those grounds I think that the magistrate was right. Mr. Keane contended that this is a house drain communicating with some sewer, and that though it is a sufficient house drain, yet, if the sewer is insufficient, and there is a sufficient sewer near enough, the vestry may direct a new drain to the new sewer. I think that is not the construction of the Act, but that the construction is, that where there is no house drain or an insufficient drain, the vestry may direct a new house drain to be constructed at the expense of the owner. For these reasons I think our judgment must be for the resp.

*Judgment for the resp.*

Attorney for the apps., *Randall.*

Monday, June 26, 1865.

PETTIWARD v. THE METROPOLITAN BOARD OF WORKS.

*Sewers—Compensation for land affected—Transfer of liabilities of Commissioners of Sewers—11 & 12 Vict. c. 112, s. 69—18 & 19 Vict. c. 120, s. 145.*

*By the 11 & 12 Vict. c. 112, s. 88, the Commissioners of Sewers were empowered to construct sewers under any lands whatsoever, making compensation for any damage done thereby. By sect. 69 it was enacted that full compensation should be made out of such rates as the commissioners should direct. By the 18 & 19 Vict. c. 120, s. 145, it was enacted that from and after the commencement of that Act all the duties, powers and authorities vested in the commissioners should cease. By sect. 146, that no action, suit, prosecution, or other proceeding commenced by or against the commissioners should abate, but should continue by or against the Metropolitan Board of Works. By sect. 148 all property, &c., of the commissioners was vested in the Board of Works, and all moneys then due and owing by or recoverable from the said commissioners were made payable by or recoverable from the Board of Works.*

*In 1841, Lady H. being tenant for life of the land in question, leased the same for twenty-one years. In 1854 the Commissioners of Sewers constructed a sewer under the land, having given notice to the tenant, but Lady H. never had notice or knowledge of the construction of the sewer. At the expiration of the lease the plt., the then tenant for life, entered into possession of the land, and in the same year commenced building upon it, when he for the first time became aware of the existence of the sewer.*

C. P.]

PETTIWARD v. THE METROPOLITAN BOARD OF WORKS.

[C. P.]

*The question raised by this case was, whether the plt. was entitled to compensation from the Metropolitan Board of Works:*

*Held, that he was so entitled.*

This was a special case stated by an arbitrator.

## CASE.

Roger Pettiward, deceased, was in the year 1832, and thence until his death, seised in fee of certain land used as orchard and market garden, situate in the parish of St Mary Abbott, Kensington, in the county of Middlesex.

By his will, dated the 13th May 1833, he devised (*inter alia*) the land in question to trustees, to settle the same in manner by the said will directed.

The said Roger Pettiward died shortly after making his said will. In 1835 the trustees of the will of Roger Pettiward executed a settlement in pursuance of the said will, and Lady Hotham, under and by virtue of the said settlement, became and was tenant for life of the land in question, with power of leasing the same for not more than twenty-one years.

On the 6th Aug. 1841, Lady Hotham, in pursuance of the said power, granted a lease of the land in question to John Poupart for twenty-one years from June 1841.

On the 14th Dec. 1854, the Metropolitan Commissioners of Sewers served upon Mr. Poupart, then in occupation of the land, the following notice.

The notice was to the effect, that the commissioners had ordered certain works, necessary for the drainage of the district, and that for that purpose it was necessary to construct a sewer along and under the land in question, and that certain persons therein named had been authorised by the commissioners to enter upon the said lands for the purpose and object aforesaid.

In pursuance of this notice the said Commissioners of Sewers, acting in execution of the powers vested in them by the 11 & 12 Vict. c. 112, by their servants and agents, entered upon the land in question and constructed under it a sewer, which was completed the 9th Sept. 1856, and having done so restored the surface of the land to its former condition.

Lady Hotham never had notice from any one, or knowledge of the intention to construct this sewer, or that it had been constructed.

Lady Hotham died on the 30th Nov. 1853, and upon her death, the claimant, Robert John Pettiward, became, under the settlement hereinbefore mentioned, tenant for life of the land in question, and at the expiration of the lease to Poupart in 1862, he entered into possession of the said land.

Mr. Pettiward thereupon determined to apply the said land to building purposes, and he accordingly caused to be prepared a plan for the erection of several houses on the property.

After this plan was completed, namely, in Oct. 1862, it became for the first time known to Mr. Pettiward that the sewer had been constructed under the surface of the land. The existence of this sewer rendered it necessary to alter the contemplated scheme for building, and, in fact, diminished the value of the land to the extent of 1500*l*.

Mr. Pettiward now claims from the Metropolitan Board of Works the sum of 1500*l*., as compensation for the damage occasioned to the said land by the construction of the sewer.

By the 11 & 12 Vict. c. 112, s. 38, power was given to the Metropolitan Commissioners of Sewers to construct sewers under any lands whatsoever, making compensation for any damage done thereby, as thereafter provided.

By the 69th section of the same Act it is enacted that full compensation shall be made out of such rates to be levied under the said Act as the commissioners should by their decree direct to all per-

sons sustaining any damage by reason of the exercise of any of the powers of the said Act, and in case of dispute as to amount the same shall be settled by arbitration in the manner provided by the said Act.

By the Metropolis Local Management Act (18 & 19 Vict. c. 120), sect. 145, it is enacted that from and after the commencement of the said Act all duties, powers and authorities vested in the Metropolitan Commissioners of Sewers shall cease to be so vested.

By sect. 146 it is enacted as follows:

No action, suit, prosecution, or other proceeding whatsoever commenced or carried on by or against the said commissioners shall abate or be discontinued or prejudicially affected by the determination of the powers of such commissioners, but shall continue and take effect in favour of or against the Metropolitan Board of Works in the same manner in all respects as the same would have continued and taken effect in relation to the said commissioners, if this Act had not been passed, and the powers of the said commissioners had continued in full force, and all decrees and orders made and all fines, amercements and penalties imposed and incurred respectively previously to the commencement of this Act shall and may be enforced, levied, recovered and proceeded for, and all administration proceedings commenced and proceeded for, and all administration proceedings commenced and proceeded with and completed, the Metropolitan Board of Works being, in reference to the matters aforesaid, in all respects substituted in the place of the said commissioners.

By sect. 148, it is enacted as follows:

All property, matters and things whatsoever vested in the Metropolitan Commissioners of Sewers, except such sewers as are hereby vested in any vestry or district board, and except such sewers as are not within the limits of the parishes and places mentioned in the schedule to this Act, shall be vested in the Metropolitan Board of Works; and all persons who then owe any money to the said Commissioners of Sewers or to any person on behalf of such commissioners, shall pay the same to the Metropolitan Board of Works or as they may direct, and all moneys then due and owing by or recoverable from the said commissioners shall be paid by or recoverable from the Metropolitan Board of Works, and all contracts, agreements, bonds, covenants and securities theretofore made or entered into with or in favour of or by the said commissioners; and all contracts, agreements, bonds, covenants, and securities made or entered into with or in favour of or by any former or other commissioners which under the said Act of the 11th and 12th years of Her Majesty were to take effect in favour of or against and with reference to the said Metropolitan Commissioners of Sewers and are now in force, shall take effect and may be proceeded on and enforced, as near as circumstances admit, in favour of, by, against and with reference to the Metropolitan Board of Works as the same would have taken effect and might have been proceeded on and enforced in favour of, by, against and with reference to the said Commissioners of Sewers if this Act had not been passed and the powers of such commissioners had continued in full force, and any retiring pension or allowance granted under sect. 37 of the said Act of the 11th and 12th years of Her Majesty shall continue payable on the like terms by the said Metropolitan Board of Works.

By sect. 225 it is enacted, that the amount of any compensation to be made under the said Act by the said Metropolitan Board shall, unless therein otherwise provided, be settled in case of dispute by, and shall be recovered before, two justices, unless the amount of compensation claimed exceed 50*l*., in which case the amount thereof shall be settled by arbitration, according to the provisions of the Lands Clauses Consolidation Act 1845, which are applicable where questions of disputed compensation are authorised or required to be settled by arbitration.

By the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102, s. 106), it is enacted that no writ or process shall be sued out against or served upon, and no proceeding shall be instituted against the Metropolitan Board of Works for anything done or intended to be done under the powers of such board, under the Acts therein mentioned, or the said Act, until the expiration of one calendar month next after notice in writing shall have been served on such board, and every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards.

Mr. Pettiward in Feb. 1863 gave notice to the Metropolitan Board of Works that he desired to

C. P.]

PETTIWARD v. THE METROPOLITAN BOARD OF WORKS.

[C. P.]

have his claim settled by arbitration, and as the parties did not concur in the appointment of a single arbitrator he appointed Mr. Charles Lee as the arbitrator to whom the said dispute should be referred and requested the said board also to appoint an arbitrator to whom the said dispute should be referred.

The said board by an instrument under their seal appointed under protest Mr. J. Oakley to act as arbitrator in the matter of the said claim.

The said arbitrators before they entered upon the matters referred to them duly nominated and appointed me as umpire to decide on such matters on which they should differ or which should be referred to me under the provisions of the Lands Clauses Consolidation Act 1845.

It was agreed between the parties that I should state my award in the form of a special case, and I have accordingly done so.

It was also agreed between the parties that if the court should be of opinion that the said Robert John Pettward is entitled to have any sum of money awarded to him as compensation for the damage occasioned to the land in question by the construction of the said sewer, the amount of such compensation should be 1500*l.* together with the costs of and incident to this arbitration.

If the court shall be of opinion that I have the power under the circumstances above stated to award that the said Robert John Pettward is entitled to have such compensation awarded to him in this arbitration, I award the sum of 1500*l.* as such compensation, to be paid by the board to the said Robert John Pettward, together with the costs of and incident to this arbitration.

If on the other hand the court shall be of opinion that the said Robert John Pettward is not so entitled, I award accordingly.

*Watkin Williams*, for the claimant, contended that the words of the Act were sufficiently comprehensive to transfer all the liabilities of the Commissioners of Sewers to the Metropolitan Board of Works. The only objection to the present case was, that it involved a retrospective rate, but that was provided for by the Act. In *Harrison v. Stickney*, 2 H. of L. Cas. 108, it was held, that there was no rule of law which prohibits retrospective rates, and that the only question was, if the Act under which the rate was made either expressly or impliedly prohibited such a rate. The Act in that case (2 Will. 4, c. 50) used words very similar to those in this Act. He also cited the case of

*The Level of Hull*, 2 Str. 1127.

*Mellish, Q.C.* (*Raymond* with him) for the Board of Works, contended that the Act only applied to causes of action where proceedings were commenced at the time of the passing of the Act, or to liquidated demands. It would be unjust that an entirely different body of ratepayers should have to pay this claim. There was no clause in the Act which transferred any general rights of action, and the words appeared to apply only to moneys and contracts which could be calculated and put down at the time of the passing of the Act, and any persons having claims for unliquidated damages ought to have commenced their actions before the Act came into operation.

*W. Williams* in reply was not called upon.

*WILLES, J.*—I am of opinion that the judgment of the court ought to be for the plt. The only difficulty suggested may arise out of the fact of the powers of the Commissioners of Sewers, under the 11 & 12 Vict. c. 112, having been transferred, to the Metropolitan Board under the 18 & 19

Vict. c. 120, but that transfer was not in consequence of any change in the general policy of the Legislature with respect to the subject-matters. From the earliest time it has been an object of interest to the Government of this country, and it has from time to time attracted the attention of the Legislature, that the country should be preserved by an effectual draining and protection from floods and inundations, and commissions have from very early times been issued for the purpose of effecting those beneficial objects, in the interest of the public and at the expense of those of the public who have derived benefit from the works of the sewers. That was the object of the Legislature in the passing of the 11 & 12 Vict. and 18 & 19 Vict. As it was an object which the Legislature did not think fit to accomplish at the expense of private individuals, any special damage which was done to a private individual in the course of making the system of sewers effectual, it was enacted by the 38th section of 11 & 12 Vict. c. 112, should be made good to him by the Commissioners of Sewers exercising the powers of the Act. They were to make improvements, and in the course of doing so to carry their sewers through, across, or under any turnpike roads or any street or place laid out as or intended for a street, or through or under any cellar or vault, which may be under the pavement or carriage way of any street, and (if upon the report of the surveyor it should appear to be necessary) into through or under any land, whatsoever; therefore at the sacrifice so far of private individuals, and of their land. The language is with this qualification, "making compensation for any damage done thereby as hereinafter provided." Now I think it is perfectly well established, that the meaning of the condition "making compensation for any damage done thereby" is, that the making of the compensation should be a condition precedent. The act may be done, and upon the doing of the act, the making of the compensation becomes an obligation, call it a liability or a debt, or what in this case may be considered a more usual term "obligation." Now the compensation is dealt with, and was made more distinctly the subject of obligation, or the part of the Commissioners of Sewers by the 69th section: "full compensation shall be made out of such rates to be levied under this Act as the commissioners shall by their decree direct to all persons sustaining any damage by reason of the exercise of the powers of this Act; and in case of dispute as to amount the same shall be settled by arbitration in the manner provided by this Act." If there be no dispute the damage is to be ascertained, and if the damage can be ascertained, whether by a surveyor or the opinions of skilled persons, the obligation would be to pay the sum in moneys numbered. The obligation is a debt incurred by the commissioners by reason of their exercising the powers of the Act whereby they become liable to make the compensation, but they are not to be personally liable. The compensation is to be paid "out of such rates to be levied under the Act as the commissioners shall by their decree direct." That is to say, the 68th section charges the amount of compensation upon the sewers which it gives the commissioners authority to make. And by the 76th and 77th sections conjointly it should seem, that if the Commissioners of Sewers, under the 11 & 12 Vict. c. 112, were now in existence and capable of exercising their powers, they might make a rate in discharge of the obligation which they incur. The fact that a considerable time has gone by is merely an argument of convenience. It is inconvenient for the debtor who is called upon at a time when he might suppose that claim forgotten. It is also inconvenient to the creditor, because it is more

C. P.]

PETTIWARD v. THE METROPOLITAN BOARD OF WORKS.

[C. P.]

difficult for him to establish the existence and the extent of the claim which he makes. Then, as to the absence of any statute of limitations, we can attach no importance to it. The only value of it is that which Mr. Mellish, in his argument, attributed to it, that it was probable that of debts the existence of which might be known, there should be a copy left with the Commissioners of Sewers, or the new board substituted in the year 1855 for the Commissioners of Sewers, who are liable to those, but not to unliquidated liabilities. But that argument, with deference, is not *ad rem*, because the liability might have arisen the very day before the Metropolitan Board stepped into the shoes of the Commissioners of Sewers. The objection would only be dealing with the unliquidated character of the demand, not with the staleness of it. We are dealing with a matter which ought to receive the same consideration in 1865 as it would the day after the Act of 1855 came into force. Now we have to put a construction upon the Act of 1855, and say whether or not the liability has lapsed with the Commissioners of Sewers whom that Act displaced, or whether it has been kept alive against the board which was put in their place. I have already stated that it was a mere transfer for convenience of administering the powers of the Commissioners of Sewers, and not by reason of anything in the principle. There was no reason, therefore, why the metropolitan board, or rather the public whom they represent, should be absolved from any liability to which they were exposed while the direction was in the hands of the Commissioners of Sewers. There is nothing, therefore, in the nature of the case, is there anything in the character of the Act, to induce us to come to such a conclusion; or rather is there anything in the language of the Act, read by the light of these probabilities, to show that it was intended that the obligation should not continue? Now, the first section which appears to be material is sect. 145, by which the Metropolitan Commissioners of Sewers are put an end to. Then, by sect. 146, the new board is to stand in the place of the commissioners. Under sect. 147, they may recover all rates made by the commissioners. By sect. 148, all property vested in the Commissioners of Sewers, except minor sewers vested in the vestries and district boards, is transferred to the new Board of Works, and all persons who owe any money to the Commissioners of Sewers, or to any person on behalf of such commissioners, shall pay the same to the Metropolitan Board of Works, or as they may direct, and all moneys then due and owing by or recoverable from the said commissioners shall be paid by or recoverable from the Metropolitan Board of Works. Stopping at sect. 148, and reading it with its kindred sections, it would seem to be clear that it was the intention of the Legislature that the new board should, with the exception of the minor sewers transferred to minor bodies, stand in the same position as the Commissioners of Sewers. Then comes the section expressing more at large the intention of the Legislature, and inasmuch as the language of sect. 181 is precisely applicable to this case, I do not intend to make further observation on sect. 148. Now, by sect. 181 all mortgages, securities, annuities and other debts, and liabilities, which at or immediately before such determination or expiration may be charged on or payable out of all or any of the rates authorised to be levied thereunder, shall continue in full force and be a charge on the same districts on which they were charged before. Here we have words to express the conclusion which, I think, the justice and good sense of the case would incline one to arrive at. We have the large word "liabilities," and we have that word coupled with a provision

which, as I have shown, is strictly applicable to the obligation of the Commissioners of Sewers to make compensation for the private property which they had taken away or injuriously affected. Then, two arguments have been advanced for the purpose of showing that such might not be the construction of the statute. One of them I have already adverted to; the other is founded upon the doctrine or rule of construction, which may be shortly expressed, *noscitur a sociis*. It is said you find this accompanied by provisions applicable to debts for fixed sums of money, and with machinery that can only be applied to the gradual discharge of such debts; therefore it is said that the word "liabilities" ought to be read liabilities *ejusdem generis*. I felt rather disposed to accede to that argument, but to deny that the liability imposed upon the Commissioners of Sewers by this obligation was of a different character from any other debt which was due by reason of a contract being entered into by them. Suppose a contract for the construction of a large sewer, in which there necessarily must be large expense, for the payment of which the contract provided, but the exact price of which was not determined, you would say the claim for such extras was not a claim in moneys numbered; the contractor might claim 40,000*l.* for that in respect of which he might not get 20,000*l.*, and so the board might well be in doubt as to what sum they should lay by for a sinking fund, as is mentioned in the latter part of the section. It is impossible to confine the section to the case of a debt which had to be precisely ascertained; it would exclude all debts of that character, and debts which were likely to accrue against commissioners of sewers. Therefore I must reject the clause for the sinking fund. I cannot help thinking that which struck my brother Byles' mind is a strong argument the other way; that the section deals distinctly with debts of a liquidated character and all liabilities, because it provides in respect of mortgages, annuities, or debts, leaving out liabilities, that they should have priority as before; that they should be marshalled against one another as before, and the section resumes the word "liabilities" when it comes to give power to the Metropolitan Board to raise from time to time the sums becoming payable under or required for the payment of the said mortgages, annuities, securities, debts and liabilities which it gives power to raise and pay in like manner as the expenses of the board in the execution of the Act. There seems to be, therefore, no reason why this obligation of the commissioners should be extinguished, and there is a reason why it should be kept alive. There is the language of the Act which says so, or at all events is large enough to meet it; and, therefore, I think the right of Mr. Pettiward is not lost, and that he is in a position to claim compensation against the Metropolitan Board of Works for whatever might be the amount of his claim.

BYLES, J.—I am of the same opinion, and I say nothing with respect to the rights of those who represent Mr. Pettiward's estates against the old Commissioners of Sewers. The only question before us is whether the liability of the Metropolitan Commissioners is transferred to the Metropolitan Board. Now, one cannot but approach the consideration of the question with a strong sense of the justice of the claim. The district which would eventually have to pay for the sewer has taken a portion of Mr. Pettiward's estate, or a portion of the value of it. The estate has lost it, and the district has got it. One would look anxiously to see whether there be not in the Act of Parliament some transfer of this liability to the succeeding body. Sect. 148, it is plain, strips the Commissioners of Sewers, the predecessors of the present debts, of all property in

C. P.]

PEARSON v. TAZEWELL.

[C. P.]

possession or action, all claims of any sort or kind which they may have had, and transfers them to their successors. Now, are not the liabilities transferred? I entirely agree with every word which my brother has said about the construction of sect. 148, which I suppose it is not necessary to enlarge upon. Whatever the effect of those words may be, the general words of sect. 181, which uses the word "liabilities" twice, apply to this case. With respect to the objection of Mr. Mellish, that the power of paying off the principal does not apply to liabilities, with great deference to him it seems to me it does apply to liabilities, for it is a power which is to be exercised from time to time. In the ordinary course of proceedings those liabilities would be turned into debts as they now are. There will be then time for the board to apply the machinery to pay off the principal debt; therefore, I agree that the claimant in this case is entitled to the judgment of the court.

*Judgment for the plt.*

Attorneys for the plt., *White and Co.*

June 25 and 26, 1865.

PEARSON (app.) v. TAZEWELL (resp.)

*Turnpikes Act—Exemption from more than one payment of toll on the same day—Exception—Stage coach—"Public carriage"—Carrier's cart—3 Geo. 4, c. 126, s. 55—16 & 17 Vict. c. 90, schedule D.*

A local turnpike Act imposed certain tolls on horses drawing (1) any coach, barouche, &c., or other such light carriage (except stage coaches); (2) any stage coach licensed to carry not more than nine passengers; (3) any stage coach licensed to carry more than nine and less than sixteen passengers; (4) any stage coach licensed to carry more than sixteen passengers; (5) any caravan, tilted waggon, tilted cart, or other carriage employed in carrying passengers for a fare; and (6) every stage coach or other public carriage having more passengers than the same is licensed to carry, or having a greater weight of luggage than authorised by law, or having passengers riding on the top of such luggage, double the toll otherwise chargeable. All persons were exempted from payment of toll more than once on the same day, except in respect of "stage coaches and other such public carriages." The resp. was a common carrier passing to and fro from A. to B. three days a-week, with a light covered tilted van on four wheels, drawn by one horse, using it principally and *bona fide* for the carriage of goods, but, as occasion offered, for the conveyance of passengers also at fixed rates. The resp. did not travel more than four miles an hour, and his cart was not licensed, but paid a duty of 2l. 6s. 8d. under 16 & 17 Vict. c. 90, schedule D.:

*Held, that, although the resp.'s cart was a "public carriage," it was not principally employed for the conveyance of passengers, and, therefore, not such a public carriage as a stage coach, and therefore it did not come within the clause rendering "stage coaches and other such public carriages" liable to pay successive tolls on passing and repassing through the turnpike-gate.*

This was a case stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden in and for the borough of Bridgwater, in the county of Somerset, on Monday, the 24th April 1865, before us, the undersigned, &c., two of Her Majesty's justices of the peace in and for the said borough, an information preferred by Jesse Tazewell (hereinafter called the resp.) against Wm. Pearson (hereinafter called the app.), under sect. 55 of the statute 3 Geo. 4, c. 126, charging;

for that he the said app., then being collector of the tolls at the Bridgwater Eastern Turnpike-gate, in the said borough of Bridgwater, did, on the 18th April then inst., demand and take from the said resp. a greater toll, viz. 4½d., than he was authorised to do under the powers of any Act of Parliament, was heard and determined by us the said justices respectively being present, the said app. being also represented by his attorney. And upon such hearing the said app. was duly convicted before us of the said offence, and we adjudged him to pay the sum of 4½d., being the toll excessively taken, the sum of 2s. 6d. to be paid and applied according to law, and also to pay to the said resp. his costs in that behalf. And whereas the said app. being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law, hath, pursuant to sect. 2 of the statute 20 & 21 Vict. c. 43, applied to us in writing within three days after the said determination to state and sign a case setting forth the facts and the grounds of such our determination as aforesaid, for the opinion thereon of Her Majesty's Court of Common Pleas at Westminster. Now, therefore, we the said justices, in compliance with the said application of the said app. and the provision of the statute, do hereby state and sign such case aforesaid as follows:

At the hearing of the aforesaid information it was proved on the part of the informant, the resp. in this appeal, that he was a common carrier living at Ashcott, about nine miles from Bridgwater, and travelling to Bridgwater and back three days in each week with a light covered one-horse spring tilted van on four wheels, having two movable seats which could be put up and down as occasion required, with a small entrance in front, and which was principally and *bona fide* used for and in the carrying of goods, wares, or merchandise, whereby he sought his livelihood, but occasionally only used in conveying passengers for hire. And on cross-examination he stated that the said tilted van was capable of conveying as many as six passengers, but the average taken was not more than two. He charged a fare of 9d. to each passenger from Ashcott to Bridgwater, and *vice versa*, and smaller fares varying with the distance for passengers over shorter portions of his route. That he did not travel more than four miles an hour. That on the 18th April then instant he passed through Bridgwater Eastern gate, kept by app., on his way to Bridgwater with the said tilted van and one horse, and produced a ticket denoting payment of the toll of 4½d. at another gate which clears the app.'s gate. On his return the same day with the same tilted van and the same horse, and having no passenger, the app. demanded of him a back toll of 4½d. on the ground that the said tilted van was a stage coach, or other such public carriage within the meaning of the proviso in the local Act hereinafter mentioned, and the resp. paid it under protest. The resp.'s van is not licensed as a stage coach, but he pays a duty of 2l. 6s. 8d. under schedule D of 16 & 17 Vict. c. 90, which enacts that tolls shall be paid

For every carriage used by any common carrier principally and *bona fide* for and in the carrying of goods, wares, and merchandise, whereby he shall seek a livelihood, where such carriage shall occasionally only be used in conveying passengers for hire, and in such a manner that the stage coach duty or any composition for the same shall not be payable under any licence by the Commissioners of Inland Revenue, where such last-mentioned carriage shall have four wheels, 2l. 6s. 8d.

The tolls imposed by the Local Turnpike Act, 3 Geo. 4, c. lxx., s. 34, are as follows:

1. For every horse or other beast drawing any coach, barouche, sociable, berlin, landau, chaise, calash, chair, phaeton, caravan, taxed cart, hearse, litter, or other such light carriage (except stage coaches), a sum not exceeding the sum of fourpence halfpenny.

2. For every horse or other beast drawing any stage coach licensed to carry in the whole inside and outside not more

C. P.]

PEARSON v. TAZEWELL.

[C. P.]

than nine passengers, a sum not exceeding the sum of fourpence halfpenny.

3. For every horse or other beast drawing any stage coach, licensed to carry on the whole inside and outside more than nine and not exceeding sixteen passengers, a sum not exceeding the sum of sixpence.

4. For every horse or other beast drawing any stage coach licensed to carry in the whole inside and outside more than sixteen passengers, a sum not exceeding the sum of eightpence.

5. For every horse or other beast drawing any caravan, tilted waggon, tilted cart, or other carriage employed in carrying passengers for a fare, a sum not exceeding the sum of fourpence halfpenny.

6. For every stage coach or other public carriage having more passengers than the same is licensed to carry, or having a greater weight of luggage upon the top of the same than is authorised by law, or having passengers riding upon the top of such luggage, double the toll otherwise chargeable upon the horses drawing such coach or other carriage.

By the 39th section it is provided,

That no person shall be subject to the payment of toll more than once in any one day for passing and repassing with the same horse or horses through the same turnpike, except as hereinafter mentioned, such person or persons producing a note or ticket denoting the payment of such toll, and which note or ticket the collectors of the toll are hereby required to deliver gratis on payment of the tolls as hereinafter mentioned.

By the 40th section it is enacted as follows :

Provided nevertheless, and be it further enacted, that the tolls shall be payable for or in respect of all stage-coaches and other such public carriages, licensed or not licensed, for every time of passing and repassing through the same turnpike on the same day, and that the said tolls shall be payable for or in respect of all postchaises and other carriages travelling for hire, for passing and repassing through the same turnpike on the same day upon every time of a new hiring of such postchaise or carriage last mentioned, on a ticket being produced denoting a new hiring.

It was contended on the part of the deft., the app. in the present appeal, that the back toll was legally chargeable on the ground that the 40th section of the local Act must be held to refer to the tolls imposed by the 2nd, 3rd, 4th, and 5th paragraphs of the 34th section, and not to the 2nd, 3rd, and 4th only, inasmuch as those three paragraphs contemplated only the case of carriages licensed to carry passengers, and that to confine the liability to back toll to such carriages only would render the words "licensed or not licensed" meaningless. The app. further contended that the resp.'s carriage came clearly within the 5th paragraph of the 34th section as a carriage employed in carrying passengers for a fare, and relied on the case of *Eatwell v. Richmond*, 12 L. T. Rep. N. S. 52, as an authority that the tolls were chargeable upon that which is the habit of the carriage, and that as this was a carriage running regularly at stated times, not only for goods, but also for the conveyance of passengers, it was immaterial whether, on any particular occasion, there chanced to be a passenger in the carriage at the time of its passing through the gate, provided, in fact, it was performing one of its regular journeys.

It was also contended that the part of the 40th section referring to postchaises, which were only to be liable to toll upon a fresh hiring, supported the same view. And that the 40th section did not (as had been suggested) apply exclusively to the tolls imposed by the 6th paragraph, which was in the nature of a penal clause. We, however, being of opinion that the resp.'s tilted van was not a "stage coach or other such public carriage licensed or unlicensed" within the meaning of the said 40th section of the said local Act, that it was *bond fide* a carrier's cart used principally for and in the carrying of goods, whereby the said resp. sought his livelihood, and only occasionally used in conveying passengers for hire, and travelling less than four miles an hour, and being assessed as such under 16 & 17 Vict. c. 90, and having no passenger on the occasion in question, was not liable to pay back toll, but was entitled to return free on the same day with the same horse under the 39th section of the local Act; and that the assessment of the resp.'s tilted van under 16 & 17 Vict. c. 90,

and the restriction of travel to four miles an hour, by the Stage Coach Act, prevent it from being classed as a "stage coach or other such public carriage, either licensed or unlicensed." That the term "licensed" applies to coaches properly licensed under the Excise Act, and the term "unlicensed" to coaches defrauding the revenue by not obtaining such licence; whilst in this case the resp. has only a modified licence to carry passengers occasionally with his goods, and the Excise authorities being satisfied, the toll keeper ought to be satisfied also. And that the double toll imposed by the 40th section being on the vehicle, must have reference to the 6th paragraph of the 34th section. That the evidence given before us brought the case within the operation of the statute 3 Geo. 4, c. 126, s. 55, and we gave our determination against the app. in the matter before stated. The question of law arising on the above statement therefore is, was the resp. liable, or not, to pay a second or back toll in respect of his tilted van with the same horse returning the same day without any passenger, under the terms of the said 40th section of the said local Act?

Whereupon the opinion of the said Court of C. P. is asked on the said question of law, whether or not we, the said justices, were correct in our said determination as aforesaid, and as to what further should be done or ordered by the said court in the premises. Given under our hands, &c.

*Campbell Foster* appeared for the apps., and explained and distinguished the two cases recently decided in this court respecting the payment of back toll by vans occasionally carrying passengers, viz.,

*Eatwell v. Richmond*, 12 L. T. Rep. N. S. 52;  
*Comley v. Carpenter*, lb. 458.

No counsel appeared for the resp.

The Court reserved their judgment till the next day.

*Cur. adv. vult.*

June 26.—WILLES, J. stated shortly the facts of the case.—The court reserved its judgment in order to take time to consider the two cases decided in this court. In the first of them it was decided that a clause imposing double toll on any "stage coach, stage waggon, van, caravan, cart, or other stage carriage for the conveyance of passengers for payment, hire, or reward," applied to licensed stage coaches proper, but not to vans or carts like the resp.'s. In the other case it was decided that a clause imposing double toll on any "stage coach, diligence, van, caravan, or stage waggon, or other stage carriage conveying passengers or goods for pay or reward," did include such a van or cart as the resp.'s. In the latter case the judgment of the court turned on the words "conveying passengers or goods;" and the question was said to be whether the principal object of the employment of the cart was the conveyance of passengers or goods. In the present case the clause imposing double toll applies to "all stage coaches and other such public carriages, licensed or not licensed." It was insisted for the app. that the words "not licensed" included carriages not requiring a licence. On the other hand the argument is that the word "such" restricted the clause to carriages of the same sort as stage coaches—that is to say, carriages the principal object of the employment of which is the carrying of passengers. The magistrates yielded to the latter argument. It must be taken that they held that the resp.'s cart did not require a licence; that it was a cart intended to carry goods, and occasionally passengers; and that on those grounds they held that it was not "such" a carriage as a stage coach. On consideration, we think that that was not an in-



[Ex.]

PEARSON V. THE LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

[Ex.]

correct construction of the statute, and therefore their judgment must be affirmed.

BYLES, J.—I am of the same opinion. The 39th section of the local Act exempts all persons from a second payment of toll "except as hereinafter mentioned." Therefore all are exempt except those clearly specified. The only exception is that of "all stage coaches, and other such public carriages, licensed or not licensed." This is not a stage coach, but it is a public carriage. Then is it "such" a public carriage within the words of the Act? It is a carriage used by a common carrier, principally for the carriage of goods and merchandise, and occasionally for carrying passengers. A stage coach is principally used for carrying passengers. Therefore, looking at this exemption, it seems to me that this is not "such" a public carriage as a stage coach. It seems to me that this is a reasonable construction, for if a number of people go each way on the same day, it seems right that they should pay toll, and the toll is charged in the fare.

*Judgment for the resp.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEMON, Esqrs., Barristers-at-Law.

June 6, 7, and 9, 1865.

PEARSON V. THE LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

*Repeal of sect. 53 of the Public Health Act 1848 (11 & 12 Vict. c. 63) by sect. 34 of the Local Government Act 1858 (21 & 22 Vict. c. 98)—Effect of on sect. 101 of the Hull Improvement Act (17 & 18 Vict. c. ci.)—Offence under sect. 99 of the latter Act—Meaning of "back yard or other vacant ground or area" in that section.*

*The 101st section of the Hull Improvement Act 1854 (17 & 18 Vict. c. ci.) requiring certain particulars to be furnished to the local board of health in addition to the particulars required to be stated for the approval of the board by sect. 53 of the Public Health Act 1848 (11 & 12 Vict. c. 63), is not repealed or at all affected, so far as such additional particulars are concerned, by sect. 34 of the Local Government Act 1858, which repeals sect. 53 of the Public Health Act 1848.*

*Seemle, that sect. 99 of the Hull Improvement Act 1848, which enacts that "every house to be constructed shall have a back yard or other vacant ground or area open from the ground upwards of not less than eight feet, extending from the main building for the whole length of such building," points to a yard at the back, and not to an open space at the side of the house; and that the leaving an open space of the requisite width at the side of the building was not a compliance with the terms of sect. 99.*

Special case stated by the stipendiary magistrate of Kingston-upon-Hull, under 20 & 21 Vict. c. 23.

The app. Pearson on the 3rd Feb. 1865 was charged by resps. upon information or summons before the said magistrate with having on the 22nd Nov. 1864 committed an offence under sect. 101 of the Hull Improvement Act 1854 (17 & 18 Vict. c. ci., local and personal), by attempting to carry his plan into execution, and commencing the buildings referred to in such plan, before the plan had been approved by the local board, and upon the hearing of such information the app. was duly convicted of the said offence and adjudged to forfeit and pay 40s. and also 14s. for costs to be levied by distress, if not paid forthwith, with imprisonment for twenty-one days in default of sufficient distress,

unless such sum should be sooner paid. And the app. being dissatisfied, the following case was stated and signed by the said stipendiary police magistrate on the 18th April 1865, for the opinion of the Court of Ex.

The app. was charged with having committed two offences. The offence charged in the first summons was the offence last mentioned in contravention of the provisions of sect. 101 of the Hull Improvement Act 1854, which enacts as follows:

*That in addition to the particulars required to be stated for the approval of the local board, by sect. 53 of the Public Health Act 1848, there shall be furnished to such board, by the person intending to build or rebuild any house, or construct any building, a correct plan or plans of the proposed building, drawn to a scale, &c., showing the particulars required by the said Act and this Act, and which plan shall not be carried into execution, nor the building commenced, until the said plan shall have been approved by the local board.*

The second summons (to which it is necessary to refer) was for an offence against sect. 99 of the same Local Improvement Act, and charged the app. with having neglected to provide yards or areas of the dimensions required by that section, at the back of the houses built by him, being the same houses, &c., mentioned in the first summons. The words of sect. 99 of the Local Improvement Act 1854 are as follows:

*Every house to be hereafter rebuilt, and every house to be hereafter built, at the corner of any street or place, shall have a back yard, or back area thereto, if the local board shall in such case deem it right that any such back yard or back area should be made, and in that case such back yard or back area shall be of such dimensions as the local board shall determine, and every house to be hereafter constructed on vacant ground (not being situate at the corner, &c., or not being the site of any other house erected thereon immediately previous to such construction) shall have a back yard, or other vacant ground and area, open from the ground upwards of not less than eight feet extending from the main building, for the whole length of such building, provided that within that space or area the pantry, coal-house, and privy, not exceeding nine feet in height, and not covering more than forty-eight superficial feet of the above area, may be there constructed.*

A plan (annexed to the case) was deposited by the app. at the office of the local board's surveyor on the 20th Oct. 1864, and was laid before the works committee on the 21st, and was not approved by them; and on the 22nd Oct. the surveyor gave notice in writing to the app. that his plan had been presented to the works committee, by whom it was resolved that, as it appeared there would be no open space of eight feet behind such houses, such plan be not approved, but referred to the streets and lighting sub-committee. On the 27th Oct. the proceedings of the works committee were confirmed by the local board, and on the 19th Nov. notice, under the seal of the board, was given by the surveyor to the app. that the decision of the works committee of 21st Oct. that the plan be not approved, was confirmed. Notwithstanding the notices of the 22nd Oct. and 19th Nov. the app., on the 22nd Nov. commenced building, and legal proceedings were, on the 2nd Dec., authorised by the works committee against him for so doing before approval of the plan by the board, which proceedings were subsequently confirmed by the local board on the 29th Dec.

The app. contended before the magistrate that he had received such approval, and it was alleged, on his behalf, that sect. 101 of the Improvement Act 1854 must be read as part of sect. 53 of the Public Health Act 1848 (11 & 12 Vict. c. 63), which latter section had been expressly repealed by sect. 34 of the Local Government Act 1858 (21 & 22 Vict. c. 98), providing, in lieu of procedure under the repealed section, that the local board may make bye-laws, and that the local board had made such bye-laws; that a copy of them was delivered to the app. by authority of the local board to guide him in reference to his said buildings, and that by No. 6 of such bye-laws the local board must, within a certain period, long since elapsed without their doing so, either approve or alter the plan deposited

[Ex.]

FRANSON v. THE LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

[Ex.]

as they think necessary for the purpose of the Public Health Act 1848, and the statute incorporated therewith; and that any plan not altered during that period must be considered as approved, and that the local board did not make any alteration, and the fourteen days in the bye-law No. 6 having elapsed, the app. was justified in believing his plan approved.

The local board, contra, contended, that sect. 34 of the Local Government Act 1858 cannot affect sect. 101 of the Hull Improvement Act, for the latter section states that the requirements of it are in addition to the particulars required to be stated for the approval of the local board by sect. 53 of the Public Health Act 1848, and are independent of and cannot be read as a part of that section, so as to be affected by a repeal of sect. 53. That by sect. 4 of the Hull Improvement Act, the provisions of sect. 53 of the Public Health Act are incorporated with and to be read as part of the Improvement Act, and so its provisions are reserved to the local board, notwithstanding its repeal. That the power to make bye-laws given by sect. 34 of the Local Government Act 1858, being only given in lieu of the powers contained in the repealed 53rd section of the Public Health Act 1848, and not in cases where recourse may still be had to the exercise of powers in a local Act identical with those in sect. 53, it may be doubted whether the bye-laws relied on by the app. were made under valid authority. But if operative, they could not supersede sect. 101 of the Improvement Act, which was independent of sect. 53 of the Public Health Act, and not repealed, and the local board had the option by sect. 29 of the Local Government Amendment Act 1861 of proceeding thereunder.

The bye-laws annexed to the case were made by the local board in 1860, and confirmed by the Secretary of State, and on certain occasions buildings may have been authorised by the board to be made in accordance therewith, but it did not appear that any such authority had been given within a considerable period now last past. A person calling on behalf of the app. at the surveyor's office, prior to the buildings being commenced, received from the clerk there a paper copy of such bye-laws, but was expressly told that they were not the "regulations of the board" which must guide the app. in his buildings, but such copy was not furnished by or by the authority of the local board.

The printed regulations of the board as to buildings, which are entirely distinct from the bye-laws had been delivered to the app.'s agent, and such printed regulations are in accordance with the provisions of the Hull Improvement Act, sect. 101, and not in accordance with No. 6 of the bye-laws. The local board proceeded in this case solely, in pursuance of the said sect. 101, and not, and never had any intention of acting, under the bye-laws. App. was aware when he began building that his plan was objected to by the local board, because it did not show there would be a back yard or other vacant ground or area behind such building, such area being alleged by the local board to be necessary under sect. 99 of the said Improvement Act. There was no evidence before the magistrate indicating that app. believed when he commenced building that the course to be pursued by him as to the depositing and approval of his plan was regulated by the bye-laws. The magistrate found as to the offence under sect. 99, that the buildings had no back yard or back vacant ground or back area of any kind, but a vacant space at the side of each house 16 feet by 8, the depth of the houses being 16 feet, and that such open space was covered by buildings to the extent of 40 feet, such buildings not exceeding 9 feet in height. He found, therefore, that the app. had left the full open space named in the Act

at the side of each house, but none at the back. In the latter part of sect. 99 the words are "back yard or other vacant ground and area," &c., which may well admit of the construction that it may be at the side, and not at the back. The magistrate found the app. guilty of having committed an offence under sect. 101 of the Hull Improvement Act as first hereinbefore mentioned, but as to the offence under sect. 99, he was not satisfied that the app. had not complied with the literal requirements of the Act, and therefore he found him not guilty on that charge.

The questions for the court are: First, whether, upon the above facts, the magistrate came to a right decision upon the construction of the said 99th section? Secondly, whether upon the above facts (whether right or not in his decision as to the 99th section), he is right in deciding that in point of law the app.'s plan was not approved by the board, and that the app. may be legally convicted under the said 101st section for commencing the buildings before his plan had received the board's approval.

In addition to the sections of the Hull Improvement Act set out in the case the following sections of the Public Health Act 1848, the Hull Improvement Act 1854, and the Local Government Act 1858 were cited and relied on in the arguments, and referred to in the judgment.

The Public Health Act 1848 (11 & 12 Vict. c. 63) s. 53:

Fourteen days at least before beginning to dig or lay out the foundation of or for any new house, or to rebuild any new house pulled down, &c., the person intending so to build or rebuild shall give to the local board of health written notice thereof, together with the level or intended level of the cellars or lowest floor, and the situation and construction of the privies and cesspools to be built, &c. or used in connection with such house, and it shall not be lawful to begin to build, &c. such house or to build, &c. any such privy, &c. until the particulars so required to be stated have been approved by the said local board. And in default of such notice, or if any such house, &c. be built, &c., as aforesaid, without such approval, or in any respect contrary to the provisions of this Act, the offender shall be liable to a penalty not exceeding 50*l.*, and the said local board may, if they shall think fit, cause such house, &c. to be altered, pulled down, or otherwise dealt with as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in the summary manner hereinafter provided. Provided always, that if the said local board fail to signify their approval or disapproval of the said particulars for the space of fourteen days after receiving such notice, it shall be lawful to proceed according to such notice, if the same be otherwise in accordance with the provisions of this Act.

The Hull Improvement Act 1854 (17 & 18 Vict. c. ci.) sect. 4, enacts,

That the Public Health Act 1848, and the several Acts supplemental thereto, save so far as any of the clauses and provisions thereof respectively are expressly varied, or are repugnant to, or inconsistent with, any of the powers, provisions, or purposes of this Act, and except sect. 1 and sects. 4 to 34, both inclusive, 50, 105, 121, 128, 141, 142, and 152 of the Public Health Act 1848, and except the last proviso with respect to exemptions from rating of sect. 88 of that Act, are incorporated with this Act.

Sect. 103:

That, if any sewer, drain, privy, cesspool, ashpit, building, or other work, be made or suffered to continue contrary to any of the provisions of this Act, or if any person, without the consent of the local board, make, rebuild, clear out, &c., any sewer, &c., which has been ordered by them not to be so made, or (as the case may be) to be demolished, stopped up, or amended, every person so offending shall for every such offence forfeit a sum not exceeding 5*l.*; and for every day after the first during which the offence continues, a sum not exceeding 10*s.*, &c. &c.

The Local Government Act 1858 (21 & 22 Vict. c. 98) sect. 34:

The 53rd and 72nd sections of the Public Health Act 1848 shall be repealed, and in lieu thereof be it enacted as follows: Every local board may make bye-laws with respect to the following matters (that is to say)—1. With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof. 2. With respect to the structure of walls of new buildings, for securing stability, and the prevention of fire. 3. With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings. 4. With

[Ex.]

PEARSON v. THE LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

[Ex.]

respect to the drainage of buildings, to water-closets, privies, ashpits, and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation. And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to giving notices, deposit of plans, &c., by persons intending to lay out streets or construct buildings, as to inspection by the local board, and as to power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws.

The following were the bye-laws on which the app. relied:

2. During the said period of one month the local board shall either approve the said plan and section or alter the same as they think necessary for the purpose of the Public Health Act 1848, and the statutes incorporated therewith, and any plan or section of which notice has been so given, which is not altered during that month, shall be considered as approved by the local board.

4. Fourteen days at least before beginning to dig, &c., foundations of any new buildings, &c., notice thereof with a plan, &c., showing the structure of the walls and space about the building for securing a free ventilation of air, &c., to be given to the local board under penalties for default.

6. During that period of fourteen days the local board shall either approve the plan, &c., or alter the same as they think necessary, &c., and any plan, &c., which is not altered during that period shall be considered as approved by the local board.

*Mellish, Q.C. (with Philbrick) for the resp.*

*P. Thompson, contra, for the app., citing*

*Dwarris on Statutes*, 2nd edit. p. 621;  
*Sandeman v. Breach*, 9 B. & C. 96; 5 L. J. 298, Q.B.;  
*Whitmore v. Bedford*, 5 M. & G. 9; a.c. nom.  
*Whitmore v. Wenlock*, 18 L. J., N.S., 55, C.P.;  
*Powell v. Thomas*, 11 L. T. Rep. N. S. 786; 84 L. J. 71, C.P.;

*Rea v. Manchester Waterworks*, 1 B. & C. 680; 8 D. & R. 20; in error, nom. *Rea v. Mossley*, 2 B. & C. 226; 8 D. & R. 385;

*Broom v. The Local Board of Health of Holyhead*, 7 L. T. Rep. N. S. 332; 1 H. & C. 601; 82 L. J. 25, Ex., was also referred to.

The scope and substance of the arguments are contained in the judgments, and therefore it is not necessary to set them out here.

*Cur. adv. vult.*

June 9.—*MARTIN, B.*—With respect to this case, which was argued before my brother Channell and myself on Tuesday and Wednesday last, I believe we are both of opinion that the justice was right, and that the conviction should be affirmed. Now, the charge against the deft. was, that he had commenced a building before a plan which he had submitted to the local board had been approved of by them, which is a matter enacted by the 101st section of the Kingston-upon-Hull Improvement Act 1854. For the purpose of understanding that Act of Parliament, recourse must be had to the Act for promoting public health, passed in the year 1848, the Hull Improvement Act having been passed in the year 1854. This Act of 1848 seems to be the first of these Acts, and amongst other sections contained in it there is the 58rd section, which enacts that "Fourteen days at the least before beginning to dig or lay out the foundations of or for any new house," a certain notice shall be given to the local board of health of the level or intended level of the cellars or lowest floor, and the situation and construction of the privies, &c., to be built or used in connection with such house, and a variety of other matters, and the local board may, if they think fit, cause the house to be altered or pulled down, &c. &c. That Act having been passed in the year 1848, the 101st section of the Hull Improvement Act 1854 enacts that, in addition to the particulars required to be stated for the approval of the local board by the 58rd section of the Public Health Act 1848, there shall be furnished to such board, by the person intending to build or rebuild any house or construct any building, a correct plan or plans of the proposed

building, drawn to a certain scale, "and which plan shall not be carried into execution, nor the building commenced, until the same plan shall have been approved of by the local board." Now, that section being contained in the Hull Improvement Act which passed in 1854, by the 84th section of another and public Act, namely, the Local Government Act 1858 (21 & 22 Vict. c. 98) it was enacted that the 58rd section of the Public Health Act 1848 should be repealed, and in lieu thereof it was enacted as follows: "That every local board may make bye-laws with respect to the following matters, that is to say, the level and width of streets, the structure of walls of new buildings, the sufficiency of the space about them so as to secure proper ventilation, and the drainage of buildings;" and then it enacted, "that they (the local board) may further provide for the observance of the same by enacting therein such provision as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or construct buildings and as to inspection by the local board, provided that no such bye-law shall affect any building, which shall be erected before the date of the Act." The local board of Hull acted upon that power, and made bye-laws which were approved of by Sir George Lewis, the Secretary of State, on the 14th Aug. 1860. They made bye-laws with respect to the giving of notice and the deposit of plans by the person intending to make such streets or to construct buildings. The fifth of such bye-laws directed that fourteen days at least before the beginning to dig or lay the foundation of any new building, &c., the person intending so to build shall give to the local board of health written notice thereof, together with a plan and section of the intended building showing the structure of the walls and space about the building for securing the free circulation of air, and the proposed arrangements for ventilation together with the intended drainage of the building, and the water-closets, privies, ashpits, and cesspools in connection with the building; and whoever offends against this bye-law shall forfeit to the local board a sum not exceeding 5l.; and the sixth bye-law declared that "during that period of fourteen days the local board shall either approve the plan and section, or shall alter the same as they think necessary for the purposes of the Public Health Act 1848 and the statutes incorporated therewith; and any plan or section which is not altered during that period shall be considered as approved by the local board." Now what took place in this case was, that upon the 21st Oct. Mr. Pearson, who proposed to build certain houses within the jurisdiction of the Hull Improvement Act 1854, laid a plan before the local board, which plan showed four houses proposed to be erected, and spaces which were sufficient within the 99th section of the same Act, provided it was not obligatory upon him to have those open spaces at the back. They were of a size sufficient, but they were at the side. Now, that being done upon the 21st Oct., upon the 22nd Oct. a letter was written to him by the surveyor of the Hull local board, dated from the surveyor's office of the local board of Hull, to this effect: "Sir,—I beg to inform you that your plan for the erection of four houses in Villa-place was presented to the works committee yesterday, and it appearing there would be no open space behind such houses, it was resolved that such plan be not approved of, and be referred to the sub-committee." It is also found in the case that the proceedings of the works committee were confirmed by the local board on the 27th Oct. 1864, which was within the fourteen days. What the result of the watching and lighting sub-committee, in opposition to the committee who caused the letter to be written on the 22nd Oct.,

[Ex.]

PEARSON v. THE LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

[Ex.]

was we do not know; but, after the expiration of fourteen days, what was done by the first committee (that is, the works committee) was approved of, and that was again approved of by the local board itself. Mr. Pearson thought fit, notwithstanding the communication to him, to proceed to build; and the question is, has he committed an offence within the 101st section of the Hull Improvement Act 1854? We are of opinion that he has. Now, it seems to me, with respect to this matter, that the points made by Mr. Thompson were, first, that the 101st section of the Hull Improvement Act was gone entirely. We think clearly that that is not so, for that section expressly says that, "in addition to the particulars required to be stated for the approval of the local board by the 53rd section by the Public Health Act 1848, the local board shall be furnished with such and such particulars." It seems to me that the repeal of this 53rd section by the 84th section of the Local Government Act 1858 does not at all effect the absolute enactment of the 101st section of the Hull Improvement Act 1854. That 84th section says that the 53rd section shall be repealed, but that bye-laws may be made in lieu thereof; and such bye-laws were made. At first it was supposed that those bye-laws had not been complied with by the local board. I own it seems to me that they have been complied with, almost to the letter. The plans were shown and submitted to the committee and to the local board of health. It has been contended that it was necessary that the local board of health should within fourteen days state that they approved of the plan, or that they ought to have altered it. Now how, by possibility could they alter it? It was impossible to do that. It seems to me it was quite sufficient for them to say, "We disapprove of your plan, and we insist that your open space should be at the back of the house, and not at the side of it; and inasmuch as you have no means of giving an open space at the back, when we tell you that, we tell you not merely that the thing is to be altered, but that it cannot be altered, no alteration can be made in it; and in our judgment, if this house is permitted to be erected in the way you propose, it would be a contravention of the Act of Parliament, by reason of its not having this open space at the back of the house." It seems to me that they have complied with this bye-law in the only way in which, by possibility, they could have complied with it. If they could have altered the plan so as to have shown an open space at the back, it may be they ought to have done that, although it would have left the intermediate space between the two sets of houses, the two proposed buildings, unoccupied at the time. I think the bye-law was substantially complied with, and that within fourteen days of the deposit of the plan they have altered it by stating, "We disapprove of this open space to be at the side, and we will insist upon its being at the back." Mr. Thompson argued, and he seems to have argued to a considerable extent to the satisfaction of the justice, that the 99th section of the Hull Improvement Act does not enact that the yard or open space shall be at the back. My own impression as to the true construction of this section (although one would desire in a matter of this kind that everything really should be enacted in such language that those who run may read, and that there should be no discussion about it) is, that it is unfortunate that there were any words introduced such as the words, "or other vacant ground and area," which raise this discussion. I think, construing this Act of Parliament (as I have more than once said I think it ought to be construed) with a view of ascertaining what is the real meaning of the Legislature, taken with the circumstances ascertained, that the open space should be at the back of the house because it was to extend "from the

main building for the whole length of the building;" and that, coupled with the 97th section, shows that what the Legislature really desired was, that there should be an open space of twenty feet in front, and an open space to that extent at the back, so that there should be a thorough ventilation for the use of the inhabitants of houses of this character and description. In my judgment, therefore, I think that there was an offence against the 101st section, and that it was a building made contrary to the provisions of this Act, for it was made contrary to a provision which enacted that before anything was done it should be approved of by the local board. I think, when the local board has the jurisdiction, which is clearly given to them in this case, to exercise a judgment with respect to the matter, that the deft. had no right in the face of that disapproval to take the matter into his own hands, and in direct defiance of the disapproval of the local board to proceed with his building. If, in reality, the local board were wrong, I imagine the app.'s proper mode would have been by a proceeding in the Court of Q. B. to compel the local board to act in pursuance of the Act of Parliament. For these reasons, I think the conviction of the justice was correct, and that we ought to answer sufficient of the questions which he proposes in the affirmative, and in support of his conviction. It is not, I think, necessary for us, as I have before said, to give an absolutely conclusive judgment upon the 99th section, and I own it would require much argument to convince me that Mr. Mellish's argument is not right, viz., that the "vacant ground and area" must be at the back of the building.

CHANNELL, B.—I also agree with my brother Martin in thinking that the conviction in the first case should be affirmed. The information charges that, the deft., being a person intending to build certain houses described in the information furnished to the local board of health a correct plan of such proposed building, as required by the statute; but that he unlawfully commenced such building before the said plan was approved by the said local board. That is the offence which is charged in the information. The question is, whether the deft., on the facts before us, can be said to have been guilty of that offence so as to render himself liable to a penalty. Now the penalty is imposed by the 103rd section of the Hull Improvement Act, if it is imposed at all. I will consider presently the argument which has been addressed to us upon the question, whether the words of the 103rd section are large enough and distinct enough to hit the offence which the information charges against the deft. I will consider that question presently and secondly. But the offence under the Act is a different question from the one whether the penalty clause (sect. 103) is large enough to include it. The offence charged in the information under the Act, is the offence of commencing the building before the plan which the deft. had submitted to the board of health had been approved of by them. That seems to me to render it necessary to consider the two sections of the Act together, the 101st section and the 99th section. Now it was said with reference to the 101st section that it had dropped altogether. The argument was, if I understood it, that the machinery contemplated by the 101st section could no longer be carried out, and that the section must be considered as one that was now to be excluded from our consideration; and the ground on which we were asked to come to that conclusion was, that the 101st section provided that, in addition to certain particulars required to be stated by the 53rd section of the Public Health Act 1848, there should be also furnished such other particulars as are required by the Kingston-upon-Hull Improvement Act. Then it

[Ex.]

PEARSON v. THE LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

[Ex.]

was said that by an Act which passed in the year 1858, the 53rd section of the Public Health Act had been repealed, and that the necessary and unavoidable consequence of the repeal of that 53rd section was to render entirely nugatory the 101st section of the Hull Improvement Act, so far as that Act required additional particulars to be delivered. I cannot accede to that argument. It appears to me that, of the particulars which were delivered, the plan required to be delivered by the 101st section was one which the board of health had not approved of; then the case is so far an offence under the Act, although a doubt may arise how far the provisions of the Board of Health Act are preserved and continued stringent and operative by virtue of the bye-laws that were made. Now then we must consider the 99th section and, if I were called upon to give a decisive opinion upon that point, I should adopt the argument which Mr. Mellish has suggested, namely, that this pointed to a yard *at the back* of the house, and not to an open space *at the side*. I agree with respect to the words "shall have a *back yard*," that there, "yard" is associated with the word "back;" but when we come to the next words, "*or other vacant ground and area*," it does not say "vacant ground and area *at the back*," and, so far as that goes, it gives rise to the doubt that has been forcibly pressed upon us by Mr. Thompson. But, although those words, so far considered, let in a little doubt and difficulty, they are to my mind considerably, if not entirely, cleared up by the other words to be found in the next line, "extending from the main building *for the whole length of such building*." I therefore agree that, when we look at the other clauses of the Act which seem to throw some light upon the subject, it was intended to provide for a yard or open space *at the back*, and not one *at the side*. This is giving a construction to the Act which would tend to carry out its main object, which contemplates the erection of many houses in the same line fronting what may be called a street, houses adjoining and contiguous to each other, and the object of the Act will be best attained, as I think, by holding it to apply to the area or yard *at the back*. Supposing that to be the construction of the Act, it seems to me that the offence which this information charges is established as against the deft., because the matter was one over which and upon which the board of health had a right to express their opinion. It was not, as it appears to me, a matter entirely foreign to their official duties, and if they had a right to take this matter into their consideration and to disapprove of the plan, then it appears to me that the offence charged in the information is sufficiently established to call upon us to support the conviction. Then comes in the still further question, namely, was the plan in point of fact disapproved of? Now, I think the plan was disapproved of. I do not propose to repeat what my brother Martin has said upon the subject; but it appears to me, upon the facts stated in this case, that there was, in point of fact, a notification by them to the app. that the plan which he had so sent in for consideration to the board of health was one which they would not approve of. The argument was that, applying the provisions of the bye-laws, the plan was not disapproved of within fourteen days, but it was taken and approved of. Now I think there is sufficient evidence to show that a competent body, of competent authority, did within fourteen days disapprove of the plan that was submitted to it. Although it was sent to another committee to consider, the concurrence of the second body in the disapproval of the first could not, in my opinion, render the disapproval communicated by the first body other than a disapproval within the section. There is only one other question to be considered, namely, whether, sup-

posing an offence upon these facts is made out contrary to the provisions of the Act, there is any section in the Act which enables a magistrate summarily to convict in the penalty in which the magistrate has here convicted. I am not at all blind to the force of the argument which has been addressed to us by Mr. Thompson as to the meaning which, ordinarily would be attached to the word "building" in the 103rd section. I concur in the view thrown out early in the course of the argument of the second case by the Lord Chief Baron (although his Lordship did not hear the argument on the first case, he did hear the argument on the second, but both cases involve points common to both), when his Lordship intimated, at first, that looking at the 103rd section alone, the word "building" could not properly receive that construction which the resps. contended for in order to support this conviction. If I were limited to the view to be gathered from the 103rd section only, I should certainly feel the force of the first impression upon the subject, and of the argument which Mr. Thompson has pressed upon us. Admitting the maxim of *accipitur a sociis* in construing words of this description, such as the word "building," I feel myself quite at liberty to go into the earlier sections of the Act of Parliament, and not to limit the word "building" simply to that interpretation which ought to be put upon it if I looked only at the words which precede it in the 103rd section. I think the sects. 96, 97, and 98 fully entitle us, without infringing the ordinary rule of construction, to put a larger construction upon the word "building" than in the 103rd section Mr. Thompson has admitted. I think there is a good deal in the argument suggested by Mr. Mellish, that in a given order the statute proceeds to deal with the different matters, "sewers, &c." in one, "drains" in another, "privies" in another, "cess-pools" in another, "ashpits" in another, and last "buildings," buildings being a much more comprehensive term, and involving sects. 96, 97, and 98; and therefore we are clearly entitled to hold that the word "building" in sect. 103 carries with it that meaning which would support the information. I come to this conclusion more satisfactorily to myself, believing that it does not infringe upon any well-known settled rules of law, and that we are carrying out what I cannot in my own mind doubt was the intention and the policy of the Legislature in passing this Act. I think, therefore, that the conviction should be affirmed.

MARTIN, B.—If we are to give a formal answer to the questions, the answer to the first is, that we decline to give any answer to it; but that upon the above statement we think, whether the justice was right or wrong in his decision as to the construction of the 99th section, that his decision that the deft.'s plan was not approved by the board is in point of law right, and that the app. was legally convicted under the 101st section for commencing to build without the consent of the board.

POLLOCK, C. B. and BRAMWELL, B. were not present during any part of the argument.

— Judgment for the resps.

June 7 and 23, 1865.

SAME v. SAME.

*The Hull Improvement Act 1854 (17 & 18 Vict. c. ci.) ss. 97 and 103—Construction of—Offence under sect. 97, whether within the penalty clause, sect. 103.*

*To constitute an offence within the penalty clause (sect. 103) of the Hull Improvement Act 1854 (17 & 18 Vict. c. ci.), which enacts that "if any building be made or suffered to continue contrary to any of*

[Ex.]

PEARSON v. THE LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

[Ex.]

*the provisions of this Act, every person so offending shall for every such offence forfeit a sum not exceeding 5*l.*, and for every day after the first during which the offence continues, a sum not exceeding 10*s.*, the building must have been made, as well as continued, contrary to the Act; and therefore the offence, under sect. 97 of the Act, of using as a dwelling-house, without the previous consent of the local board, a house without the requisite street or clear open space in front thereof, is not comprehended within the penalty clause, sect. 103.*

*So held by Pollock, C. B., Bramwell, and Channell, BB. (dissentiente Martin, B.)*

Subsequently to the charges contained in the previous special case, the app. on the 17th March 1865 was charged by the resps. with an offence against sect. 97 of the Hull Improvement Act, by having, on the 9th March, unlawfully caused to be used as a dwelling-house a certain building without the previous consent of such board, there not being, or adjoining or belonging thereto, or occupied therewith, either a street or a clear open space in and to the full extent of the front thereof, not less than twenty feet in width; and upon hearing of the information the app. was duly convicted before the said magistrate and adjudged to forfeit and pay 1*l.* 1*s.* and 6*d.* for costs to be levied by distress, &c., with imprisonment, &c., as in the previous case, in default of sufficient distress, &c., whereupon at the app.'s request the following case was stated and signed by the said magistrate on the 27th April 1865.

Upon the hearing of the above charge the whole of the evidence affecting the two former summonses in the previous case was, at request of the app. and by consent of the resps., agreed to be taken as proved. The magistrate expressed his opinion that the evidence adduced in reference to the charges under sects. 101 and 99 could not affect the legal liabilities of the app. under sect. 97, as the plans furnished by him under sect. 101 related only to buildings then intended to be erected, and in nowise affected the use of such buildings, the legal provisions as to which are contained in sect. 97. But if the court should consider such course desirable or proper, it may be assumed that the magistrate finds all the facts found by him in the previous case as to the offence under sect. 101 as facts also found in the present case.

The facts found by him as to the present case are as follows:

The words of sect. 97 of the Hull Improvement Act are as follows:

*That any building after the commencement of this Act built, or any building after, &c., rebuilt (except on the site of a building used immediately before the pulling down thereof as a dwelling-house, or any part thereof respectively, or any building before the commencement of this Act built and not then used as a dwelling-house, or any part thereof, shall not, without the previous consent of the local board, be used as a dwelling-house, except only during such time as there is adjoining or belonging thereto, or occupied therewith, either a street or a clear open space in and to the full extent of the front thereof, and of not less than twenty feet in width, and no building not at present occupied as a dwelling-house shall be converted into a dwelling-house without previous notice and plan being deposited and approved by the local board precisely as required for the construction of new houses and buildings.*

App. had recently built four dwelling-houses in Villa-place, not on the site of any dwelling-house previously pulled down. Legal proceedings have recently been taken by the local board against app. for commencing the same before approval of his plan. Subsequently to the conviction of app. in such proceedings he completed his houses, and has since caused them to be used as dwelling-houses without the previous consent of the local board. There are houses in Villa-place opposite to app.'s four houses, which were built prior to the passing of the Hull Improvement Act, 17 & 18 Vict. c. ci., and have been

continuously and now are occupied by different tenants.

Villa-place is entered from the Hessele-road, such entrance, for the space of fifty-six feet being 10 feet 6 inches wide, and bounded west by a dead wall, east by west end of a dwelling-house facing the Hessele-road. Villa-place commences at the end of such fifty-six feet from the Hessele-road, and previously to the erection of app.'s four houses consisted on the west of a row of ten houses, east of open palisadings, which were boundaries of gardens belonging to houses in a parallel line to, but sixty feet and upwards from the said row west of Villa-place. From the palisades to the said row, west of Villa-place there was a space of seventeen feet. There are no houses east of that space seventeen feet in a line with the palisades, except those recently built by app. Such seventeen feet space is bounded west by the row of ten houses, east by the palisades and boundaries, and by the app.'s four houses which are in a continuation of the line of such palisades. Part of such seventeen feet is appropriated as gardens or inclosures in front of the row of ten houses west of Villa-place, of the width of four feet, which gardens are bounded east for the whole length of the ten houses by an iron railing set in stone; and part of such seventeen feet is appropriated as a flagged footway, two feet wide, adjoining such railings, for the whole length of the ten houses, and the remainder of such space of ten feet six inches, bounded east in part by the palisades in front of the gardens east of such road, and in other part by the app.'s four houses. At the end of the ten houses farthest from Hessele-road, there is a wall built partially across such space of seventeen feet to the extent of (the said small four gardens and flagging) six feet or thereabouts, leaving a gateway ten feet wide or thereabouts (in continuation of the said road ten feet six wide), through which carts, &c. can pass to the parts beyond, which at present are not built upon on the west side, and carts, &c., passing through such gateway can turn so as to go back to the Hessele-road. But there was no evidence as to the ownership of such parts beyond, nor as to the right of carts, &c. having business at any of the houses in Villa-place to pass through such gateway for the purpose of turning as aforesaid.

The magistrate found on these facts that there was never a street nor a clear open space adjoining or belonging to the app.'s four houses, or occupied therewith, in and to the full extent of the front thereof, and of not less than twenty feet in width; the only space in front thereof, including garden, flagging, and roadway, being only seventeen feet from app.'s houses to the opposite houses.

The questions for the court, upon the facts, are:

1. Whether there is, in point of law, adjoining or belonging to the said four houses or occupied therewith, a street.
2. Whether it is necessary that such street to the full extent of the front of such four houses should be of not less than twenty feet wide.
3. Whether the magistrate was right in deciding that, in point of law, an offence has been committed by app. by causing his houses to be used as dwelling-houses without the previous consent of the local board.

The penalty clause, sect. 103, of the Hull Improvement Act 1854 is as follows:

*If any sewer, drain, privy, cesspool, ashpit, building, or other work be made or suffered to continue contrary to any of the provisions of this Act, or if any person without the consent of the local board make, rebuild, clear out, &c., any sewer, &c., which has been ordered by them not to be so made or, as the case may be, to be demolished, stopped up, or amended, every person so offending shall, for every such offence, forfeit a sum not exceeding 5*l.*, and for every day after the first during which the offence continues a sum not exceeding 10*s.*, &c.*

Ex.]

CATOR v. THE BOARD OF WORKS FOR THE LEWISHAM DISTRICT.

[Ex. Ch.]

*Mellish, Q.C. (with Philbrick)* argued for the resps.

*P. Thompson, contra*, for the app., citing the cases which he had cited in the previous case.

*Cur. adv. vult.*

June 23.—The Court differing in opinion, the following judgments were now delivered *seriatim* by the learned judges :

BRAMWELL, B.—In this case, my Lord Chief Baron, my brother Channell, and myself are of opinion, I believe I may say upon the same grounds, that our judgment should be given for the app.; that is to say, that the conviction cannot be sustained. I may say that every point was disposed of upon the hearing, except that one point upon which we think judgment should be given for the app.; and really the matter may be very shortly stated. It is this: that the offences under sect. 97 of the Kingston-upon-Hull Improvement Act are not comprehended in the penalty clause, sect. 103. The offence under sect. 97, which the app. has committed, is the offence of using as a dwelling-house, without the previous consent of the local board, a house without a street or clear open space to the full extent in front thereof of not less than twenty feet in length. Of that he has been convicted, and we think the penalty clause does not apply to it, and for this reason: the penalty clause says, "Any sewer, drain, privy, cesspool, ashpit, or building" (which we think would apply to a house) to be made or suffered to continue contrary to any provision in this Act, then the person shall be subject to a penalty. Still we think that the expressions there show that there can be no *suffering to continue* contrary to the Act except where there be a *making* contrary to the Act, and if a person could not be liable to the penalty of 5*l.* "for every such offence," neither can he be liable to forfeit "every day after the first during which the offence continues a sum not exceeding 10*s.*" In other words, we think there is no offence within this section, unless it is an offence where the building has been made contrary to the Act, as well as continued; and where the offender, or some offender, would be liable for an original making, as well as the same offender, or some other, for a continuing. We think, I was going to say with some confidence, that the using of a building as a dwelling-house without this prescribed space is certainly not a making—it could not be a making—within the 103rd section, and therefore neither can the continuing to use it be a continuing contrary to the provisions of that Act or of sect. 103. We think, therefore, that the penalty clause does not apply to that offence of which the app. has been convicted, and the only proceedings that can be taken against him are those which can be taken in the case of a man infringing an Act of Parliament where no specific penalty is provided for the offence.

CHANNELL, B.—I concur in the judgment just delivered as the judgment of Pollock, C. B., Bramwell, B., and myself. I wish only to add this, that I have given the case great attention, and it has been one to me of a very anxious kind; but, having decided, as we did upon the argument, that the party had committed an offence against the Act, I was, as I always am, extremely desirous, if I possibly could, to concur in the view which my brother Martin has taken; because, having decided the party to be guilty of the offence under the Act, it would be most desirable to do so under the 103rd section, and to hold him liable to the penalty, and not to leave him, as he is now left, to the process of an indictment because it is not under the 103rd section, the language of which, I confess,

is not in my judgment large enough to include this case. I am therefore obliged to concur in the judgment of Pollock, C. B. and my brother Bramwell.

MARTIN, B.—I own I very much regret this decision, as it seems to me it is the result of a most astute verbal criticism upon the clause of the Act of Parliament, which was clearly intended by the Legislature to cover this case. It is merely held not to do so in consequence of an alleged defect of language in it. The facts are these: the Act of Parliament is a Hull Improvement Act, and it is made an offence by the 97th section to use as a dwelling-house, without the consent of the local board, a house which has not adjoining to it a street or open space of not less than twenty feet. That is what is the offence, and the statement of the learned justice, which was admitted to contain his adjudication, shows clearly that this was a house of that character, and it is directly and admittedly contrary to the plain enactment of the Act of Parliament. The question is, whether or not the building and using this house as a dwelling-house is a building "made or suffered to continue" contrary to the terms of the section. The section imposing the penalty contains the words I have just read. It seems to me that, if it was used as a dwelling-house, it was thereby made a building for dwelling in contrary to the Act, and that if a part had been an office or an outhouse, or anything of that sort, if it had been converted into this dwelling-house, and had not this required space of twenty feet before it, it would be thereby made a building, that is to say, a building for dwelling in, which would be contrary to the Act of Parliament; and that is what the facts are. As I say, the objection taken is the result of a most astute verbal criticism, and as I am satisfied that the Legislature intended to impose a penalty upon all offences contrary to the provisions contained in the sections from 88 to 102 inclusive, in my judgment it would be mercy to the app. and to others similarly circumstanced, so to hold it, rather than subject them to the peril of indictments to be preferred and to be carried on at the expense of the town of Hull. I am quite prepared to hold, and thereby, in my judgment, to do a very great act of mercy, that it was within the 103rd section with reference to persons in Hull who have houses similarly circumstanced. It appears to me, therefore, that I should affirm the conviction.

*Judgment for the app.*

Attorneys for the app. (in both cases), *Hampton and Burgin*, 8, John-street, Bedford-row, agents for *Pettingell and Ayre*, Hull.

Attorneys for the resps. in (in both cases), *Cutliffes and Beaumont*, Chancery-lane.

#### EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON, Esq., Barristers-at-Law.

#### ERROR FROM THE QUEEN'S BENCH.

Monday, Nov. 28, 1865.

(Before ERLE, C. J., POLLOCK, C. B., BRAMWELL and CHANNELL, BB., BYLES and KEATING, JJ., and FIGOTT, B.)

CATOR v. THE BOARD OF WORKS FOR THE LEWISHAM DISTRICT.

*Metropolis Local Management Act—18 & 19 Vict. c. 120, s. 86—Works causing damage out of the district—Remedy.*

*A local board of works, in executing drainage works in their district, polluted a stream, which in its onward*



EX. CH.]

CATOR v. THE BOARD OF WORKS FOR THE LEWISHAM DISTRICT.

[EX. CH.]

course flowed through the plt.'s land out of the district, and by such pollution caused an injury to the plt.:

*Held (reversing the judgment of the Q. B., 10 L. T. Rep. N. S. 285), that the plt.'s remedy was by action, and not under the compensation clauses of the Metropolis Local Management Act; the local board not having any power to foul a stream belonging to other persons (Pollock, C.B. and Pigott, B. dissentientibus.)*

Writ of error upon a judgment of the Court of Q. B. in favour of the defts.

A special case was stated for the opinion of the Court of Q. B. in pursuance of an agreement at the trial, when a verdict was formally directed for the plt.

#### Declaration:

That lands of the plt. were in the occupation of certain persons as his tenants, the reversion thereof belonging to the plt., and that a stream called the Poole River and County Bridge Stream did flow and ought of right to flow without being fouled and polluted near to and through the said lands; that the plt. and his tenants were entitled to the benefit of the water of the said stream, and to have the said stream flow and run without being so fouled and polluted. That defts. wrongfully caused and permitted large quantities of filth, soil, &c. to flow permanently into the said stream, whereby the same became and was permanently fouled and polluted, and impure and unfit for domestic or other necessary purposes, &c.

#### Fourth plea:

That the several acts, matters, and things whereof the plt. complains were lawfully done and caused and permitted to be done by the defts. under and in exercise of the powers contained in and given by the 18 & 19 Vict. c. 120 (the Metropolis Local Management Act).

The other pleadings in the action are immaterial.

The following case was stated for the opinion of the Court of Q. B.

The plt. is owner of the reversion of certain lands through which flow a stream called the Poole River, and of a watercourse which is known by the name of the County Bridge Stream. The defts. are the Board of Works for the Lewisham District, constituted on the 1st Jan. 1856, under the Metropolis Management Act 1855 (18 & 19 Vict. c. 120).

The Poole river is a natural stream of considerable width and depth. The County-bridge stream flows in a deep dyke or ditch, and except in wet weather is narrow and shallow. The plt.'s lands are not within the defts.' district, nor within the area to which the Metropolis Local Management Act applies. The injury of which the plt. complains is, the pollution of the County-bridge stream and the Poole river by the discharge through the sewers constructed by the defts., of large quantities of filth into the said watercourse called the County-bridge stream, which joins the Poole river at a point about 400 yards from the outfall of the sewers. It is admitted that the flow of filth into the plt.'s watercourse and stream is such an injury to the reversion as would entitle him to maintain this action if the remedy by action be not taken away by the Metropolis Management Act 1855. Prior to the year 1852 but few houses had been built in the district over which the jurisdiction of the defts. as a board of works now extends. The sewage from some of these houses escaped either by open drains cut for the purpose or by percolation through the soil into open watercourses. These watercourses had a common outfall through a culvert, which has existed for more than twenty years, into the County-bridge stream, and a small quantity of the sewage which escaped into the watercourse was carried into the County-bridge stream, and thence into the Poole river, but without fouling either to any appreciable extent.

In the year 1852 the erection of the Crystal Palace at Sydenham was commenced, and in that and the following years a great number of new houses were built within the defts.' district. A great portion of the sewage from the Crystal Palace

and from the new houses was carried off in the same manner as the drainage of the houses previously built, i.e., through the open watercourses, and thence through the culvert before mentioned into the County-bridge stream. The flow of sewage into the County-bridge stream was consequently increased, and the effect was to pollute the latter, and also the Poole river, to an appreciable but not to a serious extent. The open watercourses continued to be used for the drainage of a large number of buildings within the defts.' district down to the year 1859. About that time the condition of the watercourses had become a serious nuisance to the inhabitants of the district. Large quantities of filth accumulated in them, the effluvia from which was of the worst description, and in many places the adjacent soil was overflowed and saturated with offensive matter. In order to put an end to the further use of the open watercourses for purposes of drainage, and to provide efficient means for the drainage of the whole district, the defts. in the years 1859 and 1860, caused a number of underground sewers to be constructed, the operation of which as regards the plt.'s stream and watercourse is the subject of complaint in this action.

In many instances the defts.' sewers run in the same direction, and follow nearly the same course as the old watercourses. The outfall of both is the same, i.e., through the before-mentioned culvert into the County-bridge stream. The mouth of the culvert is within the area of the defts.' jurisdiction, but is very close to the boundary. In addition to the sewers constructed by the defts., the defts. further adopted into their plan of drainage, and took under their control, certain underground sewers, which had been constructed for the drainage of houses built by the Anerley Building Society, on an estate within the defts.' district called the Anerley Building Estate. They had been originally constructed in the year 1856, with an outfall into one of the open watercourses before mentioned. In the year 1859, the defts.' provided a new outfall for them into a sewer which the defts. had substituted for the watercourse. The new system of sewers adopted by the defts. has prevented the accumulation and flow of filth in the open watercourses, and has effectually provided for the drainage of the defts.' district, but the quantity of filth carried into the County-bridge stream, and thence into the river Poole, was when this action was brought, and still is, vastly in excess of what had reached it before the sewers were constructed. The effect of the increased discharge from the sewers into the County-bridge stream and the Poole river as aforesaid, is to render them foul, stinking, and wholly unfit for cattle, or ordinary domestic purposes.

The question for the opinion of the Court of Q. B. was, whether, under the circumstances of this case, the plt. could maintain this action against the defts., and that court held that he could not, and thereupon gave judgment for the defts.

To reverse that judgment the plt. brought a writ of error.

*Bovill Q.C. (Lush, Q. C. and Murphy with him) for the plt. in error.*

*Mellish (Raymond with him) for the defts. in error.*

The arguments and the authorities cited will be found in the report of the case in the court below, 10 L. T. Rep. N. S. 285.

*Cur. adv. vult.*

*Pigott, B.*—This was an appeal from the judgment of the Court of Q. B. upon a special case. The material facts stated by the case are, that the plt. was the owner of lands through which flowed

EX. CH.]

CATOR v. THE BOARD OF WORKS FOR THE LEWISHAM DISTRICT.

[EX. CH.]

the Poole river, and a watercourse called the County-bridge stream. The defts. are the Board of Works of the Lewisham district, constituted on the 1st Jan. 1856, under the Metropolis Local Management Act 1855. The plt.'s lands are not within the defts.' district, nor within the area of the Metropolis Local Management Act. The plt. complains of the pollution of the County-bridge stream and the Poole river by the discharge, through sewers constructed by the defts., of filth into the watercourse which joins the Poole river four hundred yards from the outfall of the sewers. Prior to 1852 there were few houses in the district of the defts.' board, and only a small quantity of sewage found its way, by open watercourses through a culvert (which had existed for more than twenty years), into the County-bridge stream, and thence into the Poole river, but without fouling them to any appreciable extent. In 1852, and subsequently, the houses have greatly increased, and the sewage was carried off in the same way, through the same open watercourses and culvert, and, being increased, the effect was to pollute the County-bridge stream and the Poole river to an appreciable, but not a serious, extent. But in 1859 the open watercourses had become a serious nuisance to the inhabitants of the district. Large quantities of filth accumulated in them, the effluvia from which were of the worst description, and in many places the adjacent soil was overflowed and saturated with offensive matter. To put an end to the further use of the open watercourse, and to provide efficient drainage, the defts., in 1859 and 1860, executed the works mentioned in the case, availing themselves of the County-bridge stream to carry off the sewage. For the drainage of the houses of the Anerley Society, which since 1856 had been drained into one of the open watercourses, the defts. had also made an outfall into a sewer which was by them substituted for the watercourse. The effect of the new and additional drainage made by them has been to cause a quantity of offensive matter to pass into the County-bridge stream and Poole river to an extent to cause a substantial injury to the plt.'s streams, but has effectually provided for the drainage of the defts.' district. For the injury so caused the plt. brought his action, which resulted in the statement of this special case. The defts. contended that the plt. is not entitled to maintain an action, but must proceed for compensation for the injury under the 86th section of the statute 18 & 19 Vict. c. 120. It cannot be disputed that he is entitled to be compensated in some way, and the question which we have to determine really depends on the proper construction which should be put upon that statute. In my judgment the effect of the 86th section of the statute is to throw upon the district board the duty of draining and covering the open watercourses which are above described, and gives them power to do so by such works to be constructed in their own district as are necessary for the abatement of the nuisances. The mode of doing the work is not pointed out; but the board are left to do what is necessary by "draining, cleansing, covering, or filling up." I think also that the works for draining the new houses of the Anerley estate are not distinguishable from the rest. They are within the district, and were previously drained by means of one of the open watercourses, and which was a nuisance there. So far as the works which have been constructed within their district are concerned, it appears to me that they are authorised by the statute. I now come to consider the question of the outfall into the streams of the plt., the lawfulness of which depends on the language of the proviso. The language appears to me large enough to include every mode in which water rights may be prejudicially affected by sewerage works; and I cannot

distinguish between streams within or without the local district. It is true there is no express permission given to use watercourses for outfalls, nor, in my opinion, was it to be expected that there would be. But, on the other hand, there is no prohibition on the subject, although the Legislature must be taken to have been well aware of the universal custom to drain towns by these outlets. I therefore think that I am justified in construing the provisions of this legislation (so far as the language used will admit of it) with reference to the existing and well-known state of things at the time; and, in my opinion, the terms used in the proviso include cases of polluting water by throwing sewage matter into it. The 150th section rather supports this view by empowering district boards to contract for the removal of any weirs or other obstruction to the flow of water "whereby sewage is impeded." Mr. Lush argued that the proviso would be satisfied by our holding that the interference meant to include obstructions, but not the polluting of water. I cannot, however, see any reason for such a distinction, or that we are justified in putting an arbitrary limit to the plain language employed. Indeed, it seems to me that, bearing in mind that sewerage is the subject-matter of the legislation, when the statute contemplates water rights as being prejudicially affected thereby, it would be more likely to point to pollution as the prejudicial cause than to obstruction or other interference. The proviso does in fact contemplate that the works authorised to be done would cause injury to private rights, and therefore the Legislature, having authorised the parties to proceed in this form, provides for compensation. I further think that, to adopt Mr. Lush's argument would be a virtual repeal of this section, for even without increasing the area of the drainage the board would by merely converting an open watercourse into a barrel-drain so confine the sewage matter and prevent percolation that the nuisance at the outfall would be increased and the liability to an action thus incurred. In fact it is to this as one cause in connection with the increase of new houses in the district, that the plt.'s injury is attributable; for the board have not changed the course of the sewage or point of outfall. The case does not state that the defts. could have sent the outfall in any other direction. By the view I take I believe I am only giving effect to the provisions of the Legislature, who have taken care that no private right shall be affected without ample compensation. The plt. may be deprived of the private enjoyment of his property to some extent, but he is only in the condition, now daily acted upon, of being called on to yield a private right for the public benefit for as full a compensation as a jury may please to give him. The judgment of the Court of Q. B. ought therefore, in my opinion, to be affirmed; but I speak with diffidence on the subject, finding so many of my learned brethren take a contrary view.

BYLES, J.—I am of opinion that the plt. is entitled to the judgment of the court. The question is, whether the defts. below can pour off any amount of sewage from their own land, including the sewage of any district above them, into a private stream situated beyond the limit of their district; and I may add, to any distance below. The consequences of such interference with the water, as has been pointed out in the argument, would be not only the pollution of the stream, but the total annihilation of the value of the adjoining land for building purposes, and it might subject the owner of the soil to the danger of an action or to a prosecution for a nuisance. To test the interference of the defts. by a strong case, the power now claimed by the defts. would justify the district adjacent in

[Ex. Ch.]

CATOR v. THE BOARD OF WORKS FOR THE LEWISHAM DISTRICT.

[Ex. Ch.]

pouring the sewage of confluent districts, or much more important districts, into the New River, from which a large portion of the metropolis derives its supply of water. One would expect that such a power as this, if conferred on a district board or vestry, would be at least given by express words, but no such words are to be found in the statute. Then, if the power exists, it exists by inference if at all. It is now urged that the statute is imperative to compel the vestry or board to do the drainage, and that the drainage in this case cannot otherwise be effected. Therefore it is said that by inference the power is given. The necessity does not appear in this case; nor indeed can it be said that the necessity exists in the strict sense of the word. Absolute physical necessity there cannot be. As was however observed in the course of the argument, the sewage might be removed in carts, or other suitable vehicles, however expensive. Nor does necessity in the lowest sense of the term exist, that is, of doing the thing, or an alternative so expensive as to be commercially impossible. By sect. 89 the district board have the option of turning over the drainage to the general board, who have the power to cut an artificial drain which may effectually dispose of the sewage in the common stream. It is further alleged that the power to give compensation for interference with a stream, and the right to the use of the water, implies a power to pollute the water to any extent, and to any distance. Those provisions may well apply to cases where there has been an interference with the use of the water, rightly or wrongly, with or without licence, because the power to take a mill and employ the water are both alike made the subject of purchase, not indeed of compulsory purchase, but where the contract is the voluntary act of the party. The Act confers no compulsory power on these district boards to purchase land. These reasons might go far to negative an inference that the board could turn this sewage into a stream, even within their own district, but they are stronger to show that they cannot do so beyond their own limits.

CHANNELL, B.—I am of opinion that the judgment of the Court of Q. B. should be reversed, and that the plt. in error is entitled to our judgment. I was not aware that it was intended to dispose of the case to-day, or I should have prepared myself a written judgment, as some of my learned brethren have done; but I do not entertain any such doubt on the case as would justify me in delaying to express the opinion I have formed. We are not called on to determine what power the Metropolitan Board might have with reference to such a case as is now before us, but to consider simply whether the district board have this power, and I am of opinion they have not. The case for the defts. in error has been principally based on the 86th section, and the judgment that we are called on to review is founded on that section; and I think the question mainly depends on the interpretation we should put on that section. I have looked carefully through the other sections of the Act, and I find, if we divest the case of the power given by the 86th section, there is nothing in the statute that would warrant the proceedings which the defts. in error have taken. It does not appear to me that the introductory words of the 86th section give any sanction to the defts., or justify them in the act which they have done. But great stress has been laid on the proviso, and I am of opinion that neither the one proviso nor the other can apply to any case which is not met by the introductory words of the section. The two provisos may well stand upon the construction, which, I think, is the true one, with respect to the proceedings which are justified by the enacting

part of the 86th section; according to which there are two courses open to the board: to do the act, making compensation to the party injured after the act is done; or to take another course (which in a variety of cases would be the better course to take), to endeavour to contract with the party whose water right is interfered with, and so to purchase the option of doing the act in question. It was necessary to introduce such a power as that, for the board would have no right to apply the rates in the purchase of anything, except to the extent that the Act justified. I was much struck by the observation of my brother Bramwell in the course of the argument, that one would expect such a power as that which is claimed, if intended to be conferred, have been conferred by express or direct words. I cannot see any such words here, or any equivalent words, which call on me to suppose that such a power was intended to be implied. For these reasons I am of opinion that the plt. was entitled to maintain his action, and was not driven to demand compensation, and that our judgment should be in his favour.

BRAMWELL, B.—I was not aware that the judgment would have been given to-day, or I would have prepared a written one. As my opinion differs from that of the court below, it would have seemed more respectful if I had done so. I think the judgment of the court below should be reversed, and my opinion proceeds on the grounds taken by my brother Channell. In express words, no power is given to do what the defts. have done to the plt.'s property, and one would not expect to find the power to do such an act given to the local board by implication only, when we find that in express terms they cannot buy land by compulsion. It would be singular if, although they cannot take a man's land, they might by implication foul and spoil it. It is manifest that, whatever reasons may be given for doing what they have done to the plt.'s stream, the same could be given for doing it to any pond that he might have in his field. They claim the right to do it simply on the ground of convenience; and if they have a right to do this, I cannot see why they should not have a right to direct the sewage to one of the plt.'s fields that might lie low, there to find its way out as it might. Still, it may be there is a power given to them by implication to do what they have done. It is said the power is given by sect. 69, by which they are directed to cause to be made and cleansed, and maintain, such sewers and works as are necessary for effectually draining their parish or district. In the first place, it does not appear that they could not do this in some other way. In the next place, if, because they could not, they have a right to divert it into a brook, they have a right to divert it into any other piece of land or place where they may find it convenient to send it. Thirdly, they may go to the Metropolitan Board, if they cannot otherwise do it. Fourthly, if they cannot do it at all, and no one can do it, then the Legislature does not order an impossibility to be done; they must do so as far as they can. Therefore I cannot see that the section which directs that it is to be done, by implication directs that they should have a power either of taking land, or fouling land, or spoiling land, or a pond or a stream, in the way in which it has been done in this case. I am certainly very much confirmed in my own mind by these words in sect. 69: they may carry sewers "through, across, or under." I am not blaming any one who drew this Act; but one cannot help observing on the loose way in which this, like other Acts of Parliament, is drawn. "Through, across, or under any turnpike-road or street laid out, or intended to be a road or place; or through or under,"

[Ex. Ch.]

CATOR v. THE BOARD OF WORKS FOR THE LEWISHAM DISTRICT.

[Ex. Ch.]

leaving out "across," "any cellar or vault, which may be under the pavement or carriage-way of any street, and into, through, or under any lands whatsoever," introducing the word "into," leaving out the word "across." The expression, "into, through, or under," manifestly does not mean to take it into and there to leave it. It must be read therefore, "into and through or under," that is to say, you may take it in, and you must take it out, either by "through or under." That this is the meaning is obvious. Now, the argument of the defts. is, that they have a right to take it into and leave it there, except so far as it may find its way out by the laws of gravitation or otherwise. I confess that confirms my notion that by implication, in this section, the power is not given; therefore, in the section which expressly directs them to do things of that character, in sect. 86, I find nothing to warrant the contention that power is given them by implication to send this sewage into a man's stream. Then by sect. 86, on which great reliance is placed—more reliance by my brother Pigott than by the learned counsel for the defts.—it appears where there is an existing nuisance they may abate it. It says, in so many words, "every vestry and district board shall drain, cleanse, cover, or fill up, or cause to be drained, all ponds, pools, open ditches, sewers, drains, and places, used for the collection of drainage, filth, water, matter, or thing of an offensive nature, or likely to be prejudicial to health," and may cause notice to be given to the persons causing such nuisance, or to the owners or occupiers of premises on which the same shall exist, requiring them to abate it, and if he does not, they may. That section manifestly applies itself to a case where there is an existing nuisance, and gives the local board power to abate it. It was said there was an existing nuisance here, and that these ditches and sewers were nuisances forbidden by the Act. So be it. The defts. had a right to abate it, but they must abate it in some way or other without infringing on the rights of property which the plt. was possessed of, unless power is given to them to do so expressly or impliedly. There is nothing in the introductory part of the section to authorise the defts. to do what they have done. Further, they do not say they have done it for the purpose of abating the nuisance, nor have they given any notice to anyone. Clearly, therefore, that part of the section would not justify them in what they have done. Then comes the proviso, which I agree is more extensive than the introductory part of the section, that is, that the proviso includes things which are not in the introductory part of the section: "Provided also that where any work by any vestry or district board, done, or required to be done, in pursuance of the provisions of this Act," &c., affect any right of water—(now, I admit that does not mean in pursuance of the immediately preceding provisions, but generally the provisions of this Act)—then compensation is to be made as a matter of right to the person whose right of water is affected. It is said that the proviso shows that the local board may do things which would prejudicially affect water right, and consequently by implication shows they have got this power. I do not desire minutely to criticise these words, "done, or required to be done." Does that mean done when not required, or required to be done when it is not done? There is a looseness of language. Probably the original intention of the draftsman was to put a mere proviso on the introductory words of the section; then it occurred to him, or to some one else, why do you not say generally, that for whatever damage is done under the powers of this Act compensation shall be given? I do not know that there is any necessity to interpolate words, but one may fairly read this proviso as though it had said that,

"Where any work is done, or required to be done by any vestry or local board in pursuance of the provisions of the Act"—if any can be done except as aforesaid, compensation shall be given. To hold that this, which is a mere proviso saying they shall give compensation where they do what they may do, imports that they may do something which otherwise they could not do, is contrary to all the ordinary principles of construction. I think, therefore, the proviso neither itself confers the power, nor shows it is conferred by any of the other preceding sections. I am not aware that it has been suggested that on any other ground the local board possess this power. It seems they cannot have it unless it is given to them. Therefore I am of opinion that the judgment must be reversed. I will make this one remark on the judgment of the court below, that they seem to have assumed that this point was what I may call generally speaking against the plt.; that is to say, they had such a power, provided the injury was in their district, and the court seem mainly to have directed their attention to this, whether the fact of its being out of the district made any difference. Mr. Lush has told us that this point on which he now relies, if made at all, was very faintly made in the court below; therefore, in expressing my opinion that the judgment should be reversed, I do not think that I am differing from the opinion given by the court below, if their mind had been directed to this question.

KEATING, J.—I am also of opinion that the judgment of the court below ought to be reversed. It is to be observed that there is nothing in the case which is stated to us which raises at all the ground of necessity for the execution of the works, and Mr. Mellish, though not exactly relying on that as an argument, did certainly press it as a reason why it was extremely probable that the Legislature should have given the power contended for. I entirely agree with the observations made by the other members of the court, who are for reversing the judgment in reference to the construction of the 86th section. It seems to me clear, if I may be allowed to say so, that the proviso in that section does not extend the power beyond the earlier part of the enactment, therefore, so far as the 86th section is concerned, it does not in any way confer this power. I may say, that I think it would be a strong thing to put on the Act a construction, in the absence of express words, which should enable the board to deal with the property of an individual, as the plt.'s property appears to have been dealt with, because, if they have a right to discharge the sewage into the stream to which reference is made in the case, they might have poured it over his land under the same power. No doubt it is said, that whatever injury they may do they are bound to make compensation for; but it seems to me that it is not a case in which compensation could properly redress the injury which has been done to the plt. in this case. That, of course, does not affect the construction of the statute. I was much struck with the observation of Mr. Lush in the course of the argument, that the defts.' power is to abate a nuisance, and it is under their power for the abatement of a nuisance that they seek to exert the power which they have exerted on the present occasion; and it does seem rather anomalous that they, having the power to abate a nuisance, should exercise it in such a manner as to create a nuisance in the plt.'s land, and one which the plt. might possibly be called on by some one else to abate. It is said that compensation might be given which would enable them to abate the nuisance, but it seems to me never to have been contemplated by the Legislature to attribute com-

[EX. CH.]

CATOR v. THE BOARD OF WORKS FOR THE LEWISHAM DISTRICT.

[EX. CH.]

pensation to an injury of this kind. Under these circumstances it seems to me, for the reasons which have been given by the other members of the court, that the judgment of the court below ought to be reversed.

**POLLOCK, C. B.**—I am of opinion that the judgment of the court below ought to be affirmed. It is certainly true that in giving that judgment the Court of Q. B. expressed that they delivered their judgment not without some hesitation. They had taken considerable pains in order to arrive at the conclusion which at last they delivered, for it appears that the case was argued in Hilary Term 1862, and the judgment was not given until the 9th Feb. 1864. I certainly am not prepared to reverse that judgment, and I own it appears to me, with most humble deference to the rest of the court, that the view which the court below has taken on the subject is the correct view. With respect to what fell from my brother Byles as to the New River, it appears to me to be entirely beside the question. The New River is absolutely and strictly private property. The New River Company is not a public board, and the New River, so far as I know, has not a single drain running into it from the fountain-head in the town of Ware down to the reservoir in Islington, whence the water is diffused all over London. Now, that is the very reverse of what was the foundation of the judgment of the court below. It substantially is this, that the streams in question, namely, the Pooler river and the County-bridge stream, had been used as drains; that the drainage of this very district actually flowed into them, but it was under circumstances which at the time rendered the drainage into those streams not appreciably a nuisance. But that the fact was so is expressly found by the special case, and is expressly the foundation of the judgment of the court below. And I think it cannot be much doubted that if, instead of obeying the Act of Parliament, as I think the commissioners have done, they had allowed the houses to increase, and the quantity of nuisance and filth to accumulate until it actually ran down, time would have done that which the commissioners, I think, have done in obedience to the Act. Where there is the drainage of the surplus water of a brook into a stream which flows into another stream, and so at last into the ocean, if the neighbourhood becomes more populous, of necessity, by the multiplication of inhabitants, the various sources of nuisance which arise out of the necessities of social life will make the drains a nuisance which originally were harmless, as the drainage of a farmhouse into a rural stream which finds its way into the river Thames. Now what I consider the commissioners to have done is only this: there were streams which conveyed the water, and which conveyed offensive matter at times, but not in a quantity sufficient to make it appreciably a nuisance. What the defts. have done has been so to construct the drains as to enable them to carry off not merely that which heretofore was carried off, but that which ought to be carried off in order that the defts. may obey the Act, and render the district healthy, which otherwise would become unwholesome. The effect of this has been not to do any new act, but merely to increase that which was done before, and to make that appreciably a nuisance which before was not so. That is the foundation of the judgment of the Court of Q. B. I think they were perfectly right, and that their judgment ought to be affirmed.

**ERLE, C. J.**—In this case the declaration was for fouling two streams of the plt. The defts. pleaded that the acts complained of were done in the exercise of the powers given to the defts. by the

Metropolis Local Management Act. The facts were, that before 1852 the houses in the district were few, and the sewage from those passed into open watercourses which joined to those streams, but did not foul the water to an appreciable extent. If sewage there was, it probably soaked away. After 1852 the Crystal Palace increased the quantity of sewage, and it passed in the same watercourses and fouled the water of the streams to an appreciable but not to a serious extent. Between 1852 and 1859 the houses increased, and the watercourses became a serious nuisance from the accumulation of filth therein. The defts., both to put an end to these nuisances, and also to provide efficient drainage for the whole district, and for the Anerley Building Society's land, caused a number of underground sewers to be made, and arranged so that the outfall for the sewage of the whole district should be at the same place where the old watercourse came. This new system of sewers has prevented the accumulation of filth in the open watercourses, but the quantity of filth carried into the stream is greatly in excess of what had reached it before the newer sewers were constructed, and has rendered those streams foul, and wholly unfit for cattle or domestic use. The outfall of the watercourse is not the boundary of the defts.' district; the fouling of the stream takes place out of the district. The defts. in covering the watercourse acted in pursuance of the powers given by the 86th section, and if any damage arises from such covering it would be a subject of compensation under that section. But the question arises in respect of the deposit in the plt.'s stream of a large quantity of sewage brought there by the new system of sewers for the district made by the defts., as to which it is admitted that an action lies unless the defts. were empowered by the Act to make the deposit. Then does the Act give that power? Sect. 86 empowering the defts. to cover open watercourses which are a nuisance, gives no power to use the land or water of other persons for the purpose of receiving sewage except by agreement. It is clear from the facts stated, that no prescriptive right of fouling the water by twenty years' usage had been gained by anybody. The defts., therefore, had no right of outfall for the sewage there collected into the plt.'s stream, unless the Act created it; and I can find no such right given either by this or any other section of the Act. Sect. 86, after requiring drains to be covered so that the nuisance shall be removed, goes on to provide that when any work by any district board done, or required to be done in pursuance of the provisions of this Act, prejudicially affects any right to the use of water, full compensation shall be made in the manner hereinafter provided, or the board may purchase such right in the manner provided for the purchase of other rights. If the defts. had done no more than covering the open watercourse, and so removing the existing nuisance, they would have acted in pursuance of the powers given by sect. 86, and the remedy for the plt. would have been compensation merely; but as they have made a new system of sewers, and thereby collected a much larger quantity of sewage than reached the stream before, and caused that quantity to fall into the plt.'s stream, they have exceeded their powers, and are liable to an action. The other sections of the Act are framed in accordance with that construction. Sect. 69 gives the general power over the sewers in the district, whereby the district board are required to repair and maintain the sewers vested in them, and to cause such alterations of sewers to be made as will be necessary for effectually draining their district, and it is made lawful for the district board to carry any sewers under any houses, or any land whatever, making compensation for any damage

[EX. CH.]

LEATHAM v. THE VISITORS, &amp;c. OF THE POOR OF BOLTON-LE-SANDS, &amp;c.

[EX. CH.]

done thereby in manner hereinafter provided. Sects. 150, 151, and 152 provide for the compensation to be made if any land, or any right or easement in or over any land, is to be taken. Sect. 150 enables the Metropolitan Board, and every district board, to take any land or any rights or easement in or over any land which may be necessary for the formation or protection of any works which they are authorised to execute under this Act. Sect. 151 enacts that the provisions of the Lands Clauses Act 1845 shall, subject to the provisions in this Act, be incorporated therewith for the purpose of enabling the Metropolitan Board and every district board to take land or any rights or easements in land. Then sect. 152 provides that the provisions of the Lands Clauses Consolidation Act, with respect to the purchase and taking of land otherwise than by agreement, shall not be incorporated with this Act save for the purpose of enabling the Metropolitan Board to take land, or any right or easement in or over any lands. From those provisions it is clear that the district board cannot take land or any right or easement in land by compulsion. They can take only by agreement. Thus they could not acquire the easement of depositing sewage in the plt.'s stream unless by agreement with him as proprietor of the stream. We are confirmed in this construction of the Act by considering the other sections to which Mr. Lush referred as sections containing provisions for the vesting trunk sewers in the Metropolitan Board with the proper outfalls, and enabling district boards to connect branch sewers with the trunk sewers; and also provisions enabling any district board to give up to the Metropolitan Board the branch sewers in their district, if they think right, and the Metropolitan Board has power both in and beyond their district to take lands both by compulsion and by agreement, so as to dispose of the collection of sewage. If the defts. could maintain the right they have claimed, the plt. would probably be liable at his own expense to cover the stream so as to prevent a nuisance; in other words, to be at the expense of making a sewer to carry off the sewage from the plt.'s district. Also, if the defts. can maintain their right, they would permanently deteriorate the value and enjoyment of the plt.'s property for residential and agricultural purposes, and would, in effect, produce a sale by compulsion which the statute has expressly excluded. The power to purchase streams, which is given by sect. 86, is subject to the provisions with respect to the purchase by the district board above mentioned; that is, they can purchase by agreement only, and not by compulsion, when damage has been caused by a work done in the exercise of the powers given by this Act. For these reasons I am of opinion that the defts. in doing the act complained of were not acting in pursuance of the powers given by the statute, and therefore the plt. has a right of action, and is not restricted to a right to compensation. In this judgment I consider the point relied on in the court below, namely, that the damage done to the plt. out of the district of the defts. was immaterial. The ground of my judgment is on the point on which Mr. Lush relied, as above explained, and which does not appear to have been pressed on the attention of the court below. With respect to that point the place of damage makes no difference.

PIGOTT, B.—I wish to add, that the Chief Justice has called my attention to the 152nd section, which says that land may be taken for the drainage of the metropolis. I have not adverted to the interpretation clause, which says what constitutes the metropolis; that it is to include so many sections or districts, of which Lewisham is one. That would

entitle them to take these lands: therefore, so far as my judgment went, I should be in error in saying that they had not the power to take it. That would remove one of the difficulties, but only a little further off; still they would have to take it into the sea, or somewhere else, to get rid of it. I wish to correct that part of my judgment in which I assumed that they had not the power to take the land compulsorily.

*Judgment reversed.*

May 13 and 14, 1865.

ERROR FROM THE QUEEN'S BENCH.

(Before ERLE, C. J., POLLOCK, C. B., KEATING, BYLES, and SMITH, JJ., BRAMWELL and CHANNELL, BB.)

LEATHAM v. THE VISITORS, &c., OF THE POOR OF THE UNITED PARISHES, &c., OF BOLTON-LE-SANDS, &c.

*Lunatic pauper—Order of maintenance—Gilbert Union—22 Geo. 3, c. 83—16 & 17 Vict. c. 97, s. 97.*

*Where a pauper lunatic's settlement is in a parish, part of a Gilbert Union, an order of maintenance under 16 & 17 Vict. c. 97, s. 97, should be made on the guardians of the parish and not on the guardians of the union.*

Reg. v. The Inhabitants of Bramley, 31 L. J., N. S., 11, M. C., to the contrary overruled.

This was a writ of error from the Court of Q. B., on a judgment for the plt. on demurrer, given for the plt. without argument, on the authority of Reg. v. Bramley, 31 L. J., N. S., 11, M. C.

Declaration:

Leatham, the treasurer of the lunatic asylum at Stanley, in the West Riding, being an asylum erected under 48 Geo. 3, c. 86, for the reception of lunatics within the riding, sues the visitor and guardians of the poor of the united parishes, &c., of Bolton-le-Sands, Tatham, &c., in the county of Lancaster, incorporated under and according to the provisions of the 22 Geo. 3, c. 83. For that the overseers of the poor of the township of Bramley, in the borough of Leeds, on the 22nd June 1860, complained in pursuance of the Lunatic Asylums Act 1853 to two justices of the borough, that E. W., a pauper lunatic, had been sent to and received in the said asylum at the instance of the overseers of Bramley on the 3rd Sept. 1859 under an order made by a justice having jurisdiction, and that the said E. W. had been confined and was still chargeable, and that the said E. W. had been maintained in the said asylum at the costs and charges of the said township; and thereupon the said two justices having inquired into the premises and the last legal settlement of the said E. W., by an order under their hands and seals on the 22nd June 1860 adjudged the last legal settlement of the said E. W. to be in the said township of Tatham, and recited that she had, in accordance with the provisions of the last-mentioned Act, been duly received into the said asylum under the before-mentioned order; and the said justices by their said order adjudged that the expenses incurred by and on behalf of the said township of Bramley in and about the examination of the said E. W. and her conveyance to the hospital amounted to 11 15s., and that the moneys paid by the township of Bramley to the treasurer of the asylum for lodging, maintenance, &c., amounted to 161 4s. 4d., and ordered the defts., by the name and style of the Guardians of the Poor of the Caton Union, being the name by which the said united townships there were and are commonly known, within which union the said township of Tatham was comprised, and being a union formed according to law, out of any moneys which might be in or come into their hands by virtue of their office as such guardians, to pay to the overseers of the poor of Bramley aforesaid the said sum of 11 15s., being, &c.; and also the further sum of 161 4s. 4d., being, &c.; and out of any moneys, &c., to pay weekly and every week to the treasurer of the asylum aforesaid, so long as E. W. should live and continue therein, &c. &c. for her future lodging, maintenance, &c.

The declaration then went on to aver that the overseers of Bramley caused a copy of the order to be delivered to the guardians, &c. of Tatham, and to the defts. pursuant to the last-mentioned Act, and that thereupon an appeal against the said order was had and tried on behalf of the said guardians, &c., of Tatham, and that at the hearing a case for the

EX. CH.] LEATHAM v. THE VISITORS, &amp;C. OF THE POOR OF BOLTON-LE-SANDS, &amp;C.

[EX. CH.]

Court of Q. B. was granted, which was heard by that court, and the said order was, on the 9th Nov. 1861, adjudged to be good and valid. The declaration then alleged that the defts. never appealed, that E. W. had continued in the asylum in confinement, that all things were done, &c. to entitle the plt. as such treasurer to have the defts. pay to him under the order 188 weekly sums of 8s. each, amounting to 55l. 4s., as and for, &c.; that the defts. had neglected to pay, &c., whereby, &c. an action had accrued to the plt. as such treasurer to demand and have of the defts. the amount, &c., to wit, the said sum of 55l. 4s. Yet the defts., &c.

#### Fourth plea:

That the defts. were not commonly called or known by or under the name of the Guardians of the Poor of the Caton Union, nor was the Caton Union the name by which the said united townships were commonly called or known.

#### Fifth plea:

That the parishes, &c., of and for which the defts. were visitors, were before and at the time when the defts. became incorporated as hereinafter mentioned, and thence hitherto have been and are, separate and distinct parishes, &c., each maintaining its own poor separate and distinct from the others, except according to the provisions of the Act of Parliament hereinafter mentioned, since the time when the defts. became so incorporated; and all things required by the said Act and necessary in that behalf having happened, &c., the said parishes were before, &c., and at the times of the making of the several orders in the declaration mentioned, and still are, united under the provisions of the 22 Geo. 3, c. 83, s. 4, for the relief and employment of the poor, and not otherwise, and the defts. became and still are incorporated by and under the said Act of Parliament for the purposes therein mentioned, and not otherwise.

#### Sixth plea:

That the defts. never were, nor are they guardians, &c., entitled to act in the ordering of relief to the poor from the poor-rates.

Issues were joined on all the pleas, and the fifth and sixth pleas were also demurred to.

At the trial, all the issues were found for the plt. except that on the fifth plea, on which the verdict passed for the defts.

The points for the defts. were:—That the defts. being incorporated under the 22 Geo. 3, c. 83, were not the parties on whom the order should have been made. That Tatham was a parish maintaining its own poor within the meaning of the 16 & 17 Vict. c. 97, s. 132, and that the defts. were not guardians within the meaning of that section. That the order of justices on which the declaration purports to be founded was not made on the defts. by their proper corporate name, and that the declaration was bad in substance, showing no liability on the part of the defts.

The points for argument on behalf of the plt. were:—That the order is properly made on the defts., and is a good order under the 16 & 17 Vict. c. 97, s. 97. That unions established under the 22 Geo. 3, c. 83, are by the interpretation clause of 16 & 17 Vict. c. 97, s. 132, unions within the meaning of that Act. That any want of form in the order is cured by the 16 & 17 Vict. c. 97, s. 121.

*West (Huddleston, Q. C. with him), for the defts. (the plts. in error).*

*Temple, Q. C. (Maule and Hannay with him), contra.*

The following authorities were referred to in the course of the argument:

22 Geo. 3, c. 83, ss. 2, 24; and schedules, 4, 15, & 16;

33 Geo. 3, c. 85, s. 8;

41 Geo. 3, c. 9, s. 2;

4 & 5 Will. 4, c. 76, s. 28;

9 & 10 Vict. c. 66;

12 & 13 Vict. c. 103, s. 5;

16 & 17 Vict. c. 97, ss. 64, 96, 97, 99, 102, and 132;

24 & 25 Vict. c. 55, s. 6;

*Reg. v. The Justices of the West Riding*, 26 L. J. 41,

M. C.; 4 L. T. Rep. N. S. 809;

*Reg. v. Bramley*, 81 L. J. 11, M. C.;

*Reg. v. Priest Hutton*, 20 L. J., N. S., 226, M. C.

*May 17.*—*ERLE, C. J.*—This is an action brought by the treasurer of the county against the visitors and guardians of what is called a Gilbert Union, for the nonpayment of the expenses of maintaining a pauper lunatic in a county asylum. It is brought by the treasurer of the county, and brought in effect to enforce payment, under an order of justices, for the expenses of a pauper lunatic, those justices acting under the 16 & 17 Vict. c. 97, s. 97. The order on which the action is brought requires the defts., visitors and guardians of a Gilbert union, by the name of the Guardians of the Poor of the Caton Union, that being the name by which they are commonly known, out of any moneys which might be in their hands by virtue of their office as such guardians, to pay the expenses of maintaining the pauper lunatic. The declaration alleges that this order was served, both on the visitors and guardians (the defts.), and also on the guardians for the parish of Tatham, and that they have not paid. The plea which raises the point for adjudication is the fifth plea, and it states that the defts. are a corporation under what is called Gilbert's Act, for the Gilbert unions, and that this order upon a corporation and the guardians under a Gilbert union is void, unless it is authorised by the 16 & 17 Vict. c. 97, s. 97. That statute in the preceding section had made a certain provision with respect to lunatic paupers, and then in sect. 97, when a lunatic pauper is sent from a parish where he is not settled, it makes a provision for justices to ascertain the place of settlement and then make an order upon the parish or place liable for the expenses of that pauper to pay them; and as we read it, the 97th section empowers justices to make an order upon four classes of persons who are to pay. The words of the statute are "to pay," and it refers to the settlement, and orders the guardians of the union to which the settlement parish belongs, or the guardians of such parish in case such parish be in a union, or the guardians of such parish if it be under a board of guardians—there are three kinds of guardians referred to, then comes the fourth class—and if not, then the overseers of the parish. In the present case the order has been made upon the defts. as if they were the guardians of a union incorporated under the Poor Law Amendment Act, 4 & 5 Will. 4, and it is an order calling upon the corporation of guardians to pay the expenses which are the subject of the order. Now we are of opinion that the order ought to have been made on the guardians of the parish, it being a parish in a union under Gilbert's Act. The second clause, applying to two clauses, is that the order shall be on the guardians of such parish, in case such parish be in a union. I think it is clear that the clause meant, in case such parish be in a Gilbert union, as it provides specifically for guardians under a poor-law union and for the guardians of the parish in case such parish be in a union. I know of no officers that would be correctly described to be guardians of the parish liable to have the claim made on them specifically, except in the case of the guardians of a parish in a Gilbert union, or the guardians of a parish where the parish is under a board of guardians by the 4 & 5 Will. 4, being too big a parish to require to be united to any other parish. There being, therefore, according as I read the words of the statute, provision made for an order upon the guardians of the parish, when that parish is in a Gilbert union, I think we are bound to give effect to those words, and to hold an order made on the guardians of the union as if it was a corporation within the 4 & 5



EX. CH.]

LEATHAM v. THE VISITORS, &amp;C. OF THE POOR OF BOLTON-LE-SANDS, &amp;C.

[EX. CH.]

Will. 4, to be a void order. If there was nothing of substance in the objection, I would certainly use every power that I could to prevent an objection merely in point of form, with no importance attached to it whatever, from prevailing. But on giving the best attention that I can to these statutes, particularly to Gilbert's Act, the 22 Geo. 3, c. 88, that appears to me to have created guardians of the parishes united, having duties to perform specifically in their respective parishes, and to have authorised such guardians of the united parishes to meet at monthly meetings; but then to have affixed specifically on the guardians limited and specific duties while they are acting together at the monthly meetings, and giving them a limited authority as to the specific sources of money, neither of which sources of money would be applicable to the charges of a lunatic pauper as expenses, and the future expenses of the costs of litigation. I have looked through the stat. 22 Geo. 3, c. 88. It is an advance towards a union created in a much wider degree and to much greater effect under the Poor Law Amendment Act, but it provides that the parish by itself may have the advantages of this statute in respect of guardians, visitors, and workhouse regulations, which we have nothing to do with. Then, from sect. 2 onwards, there is a provision for the creation of a guardian for each parish; three persons qualified to be guardians are to be nominated and recommended to the justices by each parish, who are to appoint one of the three as the guardian, and then there is a power for the creation of visitors and for churchwardens. The great purpose of this statute was to ameliorate the condition of the poor, in providing employment for them and stock for them to manufacture, and a union-house in which they might live and be maintained. Then sect. 24 points out how the poor are to be maintained, and the funds out of which the expenses are to be paid. It enacts in the earlier part of the section provisions for the general expenses which are to be contributed by the contributing parishes in proportion to the average amount they have paid for the poor-rate in the three years preceding their adopting this statute: the rate of contribution is to be applied, if I may say so, to the more permanent expenses, namely, to the case of repairs of the house, and providing the stock that is to be manufactured in the house, the salaries of the officers, and the like. Then, in respect of the current expenses of the house, maintaining paupers therein, they are to contribute in proportion to the number of paupers sent from each of the parishes. The guardians have no power at all to order the parishes of the union to contribute, except in accordance with one of those two proportions, and then payment is to be made by each parish in respect to the demand, and the demand is to specify the ground on which it is made, so that the parish may know in which of the two proportions it is to contribute. The schedules 15 and 16 give most specific directions for ascertaining those two parts. Schedule 15 is as to the mode of adjusting the first amount mentioned in respect of the utensils, materials, furniture, rent, &c., and it is to be on the average of three years; and then they take the average of the expenses always in that ratio. Schedule 16 is as to the mode of adjusting the second amount, respecting the victuals, beer, firing, and other necessities, and then they are to be paid in proportion to the number of persons admitted into the workhouse at that time. Now, if the order were made according to the Lunatic Asylums Act, if it ever was to be made, it would have to be made upon the parish, and to be provided for by the parish, whatever it be. Such an order has no application to the guardians meeting at

their monthly meeting at the poor-house or the union-house, and making provision for these two sources of expenditure; and it is an order that has no general application to the general body of guardians, who, under the 22 Geo. 3, cannot properly pay the order out of any funds in the nature of a union fund which they have control over. And I take this to be matter of substance and not a matter of form, because, if the judgment were given against the debts, we are bound to see how the debts could get funds at a meeting of guardians of different parishes under the Gilbert Act, to pay the costs of this litigation and the costs of the future maintenance of the pauper belonging to the parish of Tatham. What fund is there for the guardians of all these different parishes to pay these expenses out of? They cannot call for them as permanent expenses of the house; they cannot call for them as permanent expenses of the pauper in the house according to the ratio of pay for those paupers in the parishes themselves; and there is no fund from which the guardians of the different parishes are to take the money, and we ought not to make them by a judgment, and couple the consequences with the judgment, for there is no property they can take except the union-house and the beds of the paupers, and the like of that. It is, I think, impossible to suppose that they would be liable to an execution. Other funds there were none at the time the 22 Geo. 3 passed, and other funds I see none created by any of the subsequent statutes. Is that objection answered on the part of the plt.? Suppose an execution goes, how are these expenses provided for? The cases referred to by Mr. Temple appear to me to very much confirm the view which we have formed upon the argument of Mr. West. We were asked to give judgment against the corporation of the guardians to pay for the expenses of a lunatic pauper belonging to one of the parishes in a union. The difficulty all along has been, there is no fund out of which they can be paid. Now, the 33 Geo. 3, c. 85, following this statute, determined that there should be, if I may say so, something in the nature of a union fund; and having by sect. 3 directed that casual poor, having no settlement, taken ill in different parishes, should be entitled to relief by the nearest guardians, it then specifically created for the first time a union fund because it ordered the casual poor to be relieved by all the parishes conjointly in the same respective proportions as they shall be directed to contribute to the general purposes of the Act 22 Geo. 3. General purposes are taken to be repairs of the house, and for obtaining a stock to work upon, and other matters of that sort; and I think the Legislature recognise this when they bring upon the union as a body, for the first time, the one charge, and direct them to create a union fund in respect of the one charge between the different parishes in proportion to their liability at the time when they adopted the Gilbert Union Act, to find out how they stood on an average of three years before, to see how the payments to the poor-rate should be charged to casual poor divisible amongst those parishes, and make the contribution they were liable to contribute to the maintenance of the workhouse; and so, to my mind, showing there was no union fund known at the time, no Act creating a union fund; for the funds of the Gilbert Act were appropriated to the house and to the sustenance of the paupers—two specific charges. By the 33 Geo. 3 "casual poor" has become a new charge, a charge upon the union specifically provided, and the Act says the union shall meet that charge. The object of the 12 & 18 Vict. c. 103, s. 5, is, that the costs of irremovable paupers should be paid for out of the union fund. I take that to mean the union fund that had been enacted by the 33 Geo. 3, c. 85, s. 8,

[IRELAND.]

GRAHAM v. FORDE.

[IRELAND]

the union fund that the parishes are to contribute as their liability to the common and permanent expenses of the house; and I am confirmed in that view of the 12 & 13 Vict. c. 103, because it was repealed by the 16 & 17 Vict. c. 97, and sect. 102 of that statute provides that the expenses of the irremovable pauper lunatic shall be paid by the guardians of the parish in such union where the pauper shall have acquired such irremovability, if such parish was subject to a separate board of guardians, or by the overseers, where the sum is not subject to such separate board, and where such parish shall be comprised in any union the same shall be paid by the guardians and charged to the common fund of such union. Sect. 102 is specifically applicable to the case of pauper lunatics, not generally, but irremovable pauper lunatics. The tendency of the legislation has been to recognise a wider area in respect of the general charges, and in particular in respect of the charge of irremovable paupers. Now sect. 102 recognised that principle in respect of irremovable pauper lunatics; and the costs of the irremovable pauper lunatics are to be paid by the guardians wherever any parish is in a union from which the pauper lunatic is removed. Now "union" may comprise a poor-law union, or a Gilbert union; but here it is used without any limitation: "any union" that has irremovable pauper lunatics. Sect. 97 is the one for providing for a pauper lunatic assumed not to be irremovable, and there the words are, "the costs of his maintenance shall be ordered to be paid by the guardians of the union to which the parish belongs, or the guardians of such parish in case such parish be in a Gilbert union." I insert there the words "Gilbert union," because it makes it a sensible provision for the general costs of the pauper lunatic who is irremovable; they fall upon the parish to which he belonged, and the meeting of the guardians at the union-house had nothing to do with it. Having provided for the pauper lunatics to be paid by the guardians of the parish to which he belongs, the costs of the irremovable pauper are to be paid by the guardians of the parish to which he belongs. I think that the Legislature contemplated that there should be for these purposes a union fund created in the manner pointed out and enacted by the 38 Geo. 3; and the change in the language of sects. 97 and 102 indicates a different purpose in the mind of the Legislature, appropriately expressed by the change in the language of these sections. Therefore I come to the conclusion that this order was not authorised by the statute, and that the action founded upon it cannot be sustained, and the judgment must be for the debts. on the demurrer.

The rest of the Court concurring,

*Judgment for the debts.*

### COURT OF COMMON PLEAS.

(IRELAND.)

Reported by J. FIELD JOHNSTON, Esq., Barrister-at-Law.

Saturday, Nov. 14, 1865.

GRAHAM (app.) FORDE (resp.) (a)

*Tippling beer*—Case stated—Construction of 27 & 28 Vict. c. 85, ss. 6, 8.

*The app. was summoned to answer a complaint that, he being a person licensed to sell beer by retail to be consumed off the premises, persons were found harboured in his house and place of business who appeared to be, or to have been, recently drinking or tippling beer therein, contrary to 27 & 28 Vict. c. 85. It being*

*proved that persons were found upon the app.'s premises under the circumstances charged, and that the person who usually attended the shop was present, though the app. himself was not, the Dublin divisional magistrates convicted the app. Upon a case being stated for the opinion of the court:*

*Held, that the conviction was right, the words of the 6th section of 27 & 28 Vict. c. 85, including the case of harbouring persons tippling beer.*

The following case was stated for the opinion of this court: The app. was summoned to appear before said justices on the 22nd Sept. last, to answer the complaint of John Forde, inspector in the Dublin police, charging that he, the app., being a person licensed to sell beer by retail to be consumed off the premises where sold, at 109, Bride-street, within said district, between the hours of seven and eight o'clock in the afternoon of the 12th Sept. 1864, divers persons, to wit, one man and one woman, were then and there harboured in his, the app.'s, said house and place of sale at 109, Bride-street, who appeared to be, or to have been, recently drinking or tippling beer therein, contrary to the statute 27 & 28 Vict. c. 85. The following evidence was given upon oath before us by John Forde, the resp., namely:

I visited the house of George Graham, spirit grocer and wholesale and retail beer dealer, he then being licensed for the sale of whiskey, and also being duly licensed as a wholesale and retail beer dealer, on the 12th Sept. 1864, between the hours of seven and eight o'clock in the evening I saw a man and a woman, who gave their names as James Bruce and Maria Bruce, sitting down in a room in front of the bar, having a drinking measure and a glass containing porter. The measure was on a bench convenient to where they were sitting, and the glass was on the chimney-piece; both contained porter. Both of them drank the porter, and both of them appeared to be under the influence of drink; and the person who usually attended the shop was present. I told him I would make an application for a summons. I will not say positively that both drank the porter in the glass.

Being of opinion that the foregoing evidence disclosed an offence within the meaning of the 27 & 28 Vict. c. 85, s. 6, we duly convicted the app. for said offence, and imposed a fine of 10s. upon him. On the part of the app. it was contended that, upon the facts disclosed in evidence, no offence had been committed against the provisions of said statute; and we were called upon by him to state a case for this court pursuant to the provisions of the statute in that behalf provided.

G. WYSE, } J.P.  
W. ALLEN, }

*Sidney, Q. C. (with him Curran) for the app.*—Under 8 & 9 Vict. c. 64, if any person licensed to sell to be consumed off the premises sold to be consumed on the premises, he was liable to a penalty of 50l. That statute gave the police authorities for the first time power to prosecute; it recites 6 Geo. 4, and its second section. That Act had a graft added to it by 17 & 18 Vict. c. 89, s. 12. Down to that statute the offences of this character were confined to those committed by spirit dealers in harbouring persons tippling. In consequence of the decision in this court (see *Quin v. Murray*, 8 Ir. Jur. N. S.), the parties have got 27 & 28 Vict. c. 85 passed. Down to this the law stood that a spirit dealer harbouring a person tippling on his premises was liable to a penalty, but that did not extend to beer dealers. The effect of the section is first to say that the law which before only applied to the houses of licensed dealers shall now extend to licensed beer dealers; and it goes on to say the penalties shall extend to persons licensed to sell beer. And if it stopped there, a beer dealer would be liable under that Act no more than a spirit dealer. He would be liable under the statute of Geo. 4. These offences are, the selling of spirits, the tippling of spirits, and the harbouring of persons tippling, or who have been tippling. All the

(a) From the *Irish Jurist*, by permission.

[IRELAND.]

GRAHAM v. FORDE.

[IRELAND.]

old offences in relation to spirits have been transferred over to another subject; but the Act does not say this shall also extend to harbouring a person tipping beer. A new class of individuals were affected by the earlier statute. [MONAHAN, C.J.—And therefore to create an offence under this Act there must be either selling beer or harbouring a person who has drunk whiskey?] Yes. The summons states that divers persons were then and there harboured in the house, without saying by whom. Whereas, if the statute did apply, it would only apply to the person harbouring. Harbouring in the criminal code imports an actual interference almost amounting to personal interference (sect. 2). There must be evidence to show a harbouring by the app. in the house. The evidence does not go beyond the summons. The policeman only saw a man who appeared to attend. He told him he would apply for a summons. [CHRISTIAN, J.—Is not that a question of fact for the justices? Your objection is two-fold: first, that it ought to be said the man harboured; and secondly, that there was no evidence of being harboured. Was not the latter a matter of fact for the justices?] If there was any evidence at all it would be, but there is none. [CHRISTIAN, J.—They were found in his house.] Harbouring must be more than a person being found in the house, for any member of his family could not in that case be there from the morning till 11½ p.m. In Archbold's Criminal Pleading, 827-828, instances are given of what would and what would not be harbouring. It must be proved the party has done some act to assist the felon personally. [MONAHAN, C. J.—Harbouring a felon means assisting him to escape from justice: it would be hard to give it this meaning here] (Reg. v. Chapple, 9 C. & P. 355.) This is a criminal offence, because there is imprisonment if the penalty be not paid. Therefore the question of agency arises—if a person allows another to sell to those who have a right to do everything but sit down and tittle, is he responsible for their doing this? (Cooper v. Slade, 6 H. of L. 746.) Lord Wensleydale, in his judgment, p. 793, says: "Then comes the more important question, if this can be carried to Slade or his agent, as it is illegal to offer money to another for voting. I take it he cannot be held responsible unless he has given authority." &c. Here is a man licensed to sell beer to be consumed off the premises, who may have a servant to do this for him. If a man is employed to do a lawful act and he acts unlawfully, much more is required to show an intention on his part. The debt. was not present. It may be contended that the Act may be paralysed if a man of straw be put forward to do this; but if so, let the Beer Act be amended. But in this very statute the Legislature have shown, by sect. 5, that they have classified the offences and distinguished the owners. In a certain class of offences against the revenue laws, where the agent acted, the principal was convicted; but in all these cases the offence was committed by the goods being found on the premises of the trader. That was an act, and the agent might be fairly held the agent for the unlawful act.

*J. E. Walshe, Q.C. and Beytagh contra.*—The argument that it is not stated by whom the persons were harboured is not open. If it is, this is a summons and not an information: (Levinge's Justice of the Peace.) The magistrates state that preliminaries were performed, and that question is not open; if it be the summons may be amended. A parol information would suffice:

*R. v. Miller*, 1 Cr. Cas. R., 116;  
8 & 9 Vict. c. 64.

These things are all *ejusdem generis*, all which may happen in the house of a licensed retailer. The

other side put in beer in every other place in the statute except where it presses. They say it does not apply in the concluding clause. They admit that if a man licensed to sell beer has people tipping spirits he would be liable. No doubt, it would be more correct if it were added in the section, "or harbouring persons tipping beer;" but there is no difficulty in concluding the fact of a person tipping beer at an unreasonable hour. [CHRISTIAN, J.—You say that the Act creates a new offence. The app. says the Act only applies to the old offence of persons tipping spirits. It would appear a strange thing if it was enacted that persons should not harbour persons tipping spirits who were already prevented from selling spirits. MONAHAN, C. J.—As I understand, the harbouring was introduced to get over the difficulty of proving an actual sale. No one can doubt that the person who prepared the Act intended to include this case.] The 8th section makes it penal in the persons found there. The word "tipping" is not capable of legal definition, neither is the word "harbouring;" it is for the justices to say what it is. It is too much to say that we are to prove legal harbouring, and that a person may stay away and leave a waiter, and then that we are to prove an authority in the waiter. The point of agency was not made in the court below. This is not the case of principal and agent, it is the case of master and servant. The law could never be carried out against housekeepers if it were held otherwise. The intention was to incorporate everything, and apply to the sale of beer what was law as to the sale of spirits. [CHRISTIAN, J.—The difficulty is to find any words applying to harbouring persons tipping beer. There was only before the offence of harbouring persons tipping spirits.] The Act refers not merely to the sale but to the person selling. [MONAHAN, C. J.—It is admitted on the other side that if a person was found selling beer it would be within the Act.] The words of this Act are, "As if this were repeated and specially enacted;" *i. e. reddendo singula singulis*. The Act must have a reasonable construction. The 8th section would make the person tipping liable to a penalty, and could it be that, notwithstanding this, the party harbouring is not liable? [CHRISTIAN, J.—It is beyond doubt that they intended to include this case. MONAHAN, C. J.—No doubt our decision gave rise to this new Act, and, no doubt, it has provided for the thing we then decided; but we still we have here to decide if relating to the sale includes harbouring.]

*Curran in reply.*—It is contrary to the principles of law that an offence is to be created and punishment attached by intentment. The Act should expressly set forth the offence. It is not to be spelt out from its terms, or from the intention of the Legislature. Three sorts of offences are here. 1. With respect to the hours to which persons licensed to sell for consumption elsewhere shall keep open; and in that there is the omission of the word "not," which nullifies that portion of the section. 2. With respect to 8 & 9 Vict. c. 64, and all the authorities, &c., what were these? To enter a house and punish the parties, &c. In reference to the offences, therein, *i. e.*, in the sections respectively set forth, *i. e.*, transferring to the houses of beersellers the same offences therein set forth; but this does not set forth any new offence. It is not repeating spirits to call it beer. [KEOGH, J.—What are "such persons?"] The persons licensed to sell to be drunk not on the premises. As to harbouring, the word is not to get an extensive meaning the first time it appears in an Act. It may mean concealing the party from the police, and in that sense it ought to be taken and not against the subject. Unless the servant act within the scope of his authority the

[Q. B.]

REG. v. THE RECORDER OF NORTHAMPTON.

[Q. B.]

master is not liable: (Smith's Master and Servant.) There is nothing here to warrant the conclusion that the waiter had any authority to harbour persons tipping beer. The app. ought to succeed, 1st, on the construction of the 6th section; 2nd, on the construction of the word "harbouring."

MONAHAN, C. J.—We are of opinion that this conviction is quite right; that having regard to the 6th and 8th sections persons found recently tipping are certainly within the Act. Therefore there is no doubt it was in the contemplation of the Legislature to render the tipping, or being found recently tipping, an act for which the party would incur the penalty. The only question then is if the words of the 6th section are sufficient. Are there words creating the offence? The words are, that all the provisions in the former Act shall apply to the sale of beer by persons licensed. We think the intention to be found in that section was to extend to the sellers of beer all the penalties, and that every act done in relation and in connection with the sale is equally an offence. We think that the actual sale is one; that the harbouring of a person supposed to be after the sale is another; that the harbouring persons recently tipping beer is an act provided for by the 6th section. The only other question is as to the meaning of "harbouring." It is not the same as in the case of a felon; it is permitting persons to remain in the house who are tipping, or who have the appearance of having been tipping. It would be impossible to say the master would not be responsible for the act of the servant.

CHRISTIAN, J.—I felt some doubt if there were sufficient words in the 6th section to carry out what the 8th section rendered perfectly plain. I think the words are afforded by the concluding words of the 6th section, in which the sale is spoken of. "And in respect of the sale of beer," i.e., what was previously the law as to the sale of spirits shall be of the sale of beer, including the harbouring.

*Conviction affirmed. No costs were given.*

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, ESQTS.,  
Barristers-at-Law.

June 12 and 13.

REG. v. THE RECORDER OF NORTHAMPTON.

*Re AN APPEAL BETWEEN THE BOARD OF GUARDIANS OF THE KETTERING UNION (apps.) v. THE COMMITTEE AND DIRECTORS OF THE NORTHAMPTON GENERAL LUNATIC ASYLUM (resps.)*

*Pauper lunatic—Order for maintenance—Appeal—*  
16 & 17 Vict. c. 97, ss. 96, 108, 128.

*There is no appeal against an order of justices made under 16 & 17 Vict. c. 97, s. 96, upon the guardians of the union or parish, or overseers of the parish, from which a lunatic has been sent to an asylum for the maintenance, &c., expenses:*

*So held per Cockburn, C.J., Mellor and Shee, J.J. (Blackburn, J. dissentiente).*

This was a rule nisi calling upon the Recorder of Northampton to show cause why a writ of *certiorari* should not issue, to remove into this court an order of the Borough Sessions of Northampton made in an appeal between the above-named parties, quashing an original order of justices for the lodging, maintenance, medicine, clothing, and care of one William Voss, a pauper lunatic, on the ground that the sessions had no jurisdiction.

It appeared from the facts that in Jan. 1861 one William Voss, an idiot from his birth, was brought into the Northampton General Lunatic Hospital from the parish of Middleton, in the Kettering Union, as a private patient, at the instance and charge of his father, where he remained at his charge until Aug. 1862, when the clerk to the Kettering board of guardians, in which union the father was settled, wrote to the secretary of the hospital, telling him that the board of guardians had come to an opinion that the father could no longer maintain his son as a private patient, and that the board would pay the maintenance moneys from the 18th Aug. The lunatic was therefore removed from the private to the pauper class, and his maintenance was therefore included in the general quarterly bills of the whole body of the Kettering paupers confined in the asylum. On the 7th Feb. 1863 the clerk to the board of guardians wrote to say that the board would not pay for the pauper after the 25th March then next, and as the father was unwilling to take charge of him, he continued to remain in the asylum without being paid for by anyone. On the 23rd Sept. 1864 the magistrates for the town of Northampton, upon the application of the committee of management, made an order upon the guardians of the Kettering Union to pay the sum of 40l. 12s. 6d. for the lodging, maintenance, medicine, clothing, and care of the said William Voss, being at the rate of 12s. 6d. per week from the 2nd April 1863, to the 1st July 1864. Against this order there was an appeal to the Borough Quarter Sessions at Northampton. The appeal was entered on the 30th Dec. 1864, and recognisances were entered into by the apps. on the 2nd Jan. following, the sessions being holden on the 6th of the same month. Upon the hearing of the appeal it was objected by the resps., first, that the apps. had no right of appeal, as the statutes gave none; secondly, that as the recognisances had not been entered into until after the entry of the appeal, the right of appeal, if any, had been lost; thirdly, that the recognisances had not been entered into forthwith after notice of the appeal had been given to the resps.; fourthly, that as the recognisances were not entered into before a justice of the peace for the town and borough of Northampton, the right of appeal was lost. The Recorder overruled all the objections, whereupon the counsel for the resps. stated that they should defend the appeal under protest, and ultimately the Recorder quashed the order of justices with costs.

*Merewether showed cause.*—This was an order of justices under the 16 & 17 Vict. c. 97, s. 96 (the Lunatic Asylums Act), against which the guardians of the union upon whom it is made had a right of appeal, and if so the order of the sessions is valid. Sect. 128 gives a right of appeal against any order or determination of any justices under the Act, other than orders adjudicating as to the settlement of any lunatic pauper and providing for his maintenance. The order appealed against was not an order adjudicating as to the settlement of the pauper, and therefore is not excepted from the operation of sect. 128.

*Poland and Sills in support of the rule.*—There is no appeal given by the 16 & 17 Vict. c. 97, against an order of this description. The object of the 96th section was to give the proprietor of the Lunatic Asylum a remedy in the first instance against the union or parish from which the pauper was sent. Sect. 95 makes the lunatic pauper chargeable to the parish from which he is sent to the asylum, until his settlement is adjudicated to be in some other parish. An order under sect. 96 in no way affects the pauper's settlement, and

Q. B.]

REG. V. THE RECORDER OF NORTHAMPTON.

[Q. B.]

the parish from which the pauper is sent, and which has in the first instance to pay the proprietor of the asylum, may reimburse itself from the settlement parish of the lunatic or from the county. The appeal given by sect. 128 is not extended to this case. And an order under sect. 98 cannot be appealed against: (*Wilson v. Liverpool (Overseers)*, 17 Q. B. 803.) The order is a mere interim order.

June 18. — COCKBURN, C. J. — I am of opinion that this rule should be made absolute. The clauses of the Act of Parliament upon which the question turns are certainly open to considerable doubt and difficulty; but, upon the whole, I have come to the conclusion that there was no appeal in this case from the order of the justices to the quarter sessions. The order in question was an order upon the guardians of the union which comprised the parish from which the lunatic had been sent to the asylum for his maintenance. The parish might immediately get rid of its liability in one of two alternative ways, either by showing that the pauper was settled in some other parish, a matter upon which the justices had power to adjudicate, and upon adjudicating which they would be bound to make an order for the maintenance of the pauper lunatic upon the parish in which they adjudicate his settlement to be; or, if the parish appealing against this order was unable to ascertain and to show in what parish the lunatic was settled, then by Act of Parliament they are authorised, and the justices are bound, to make an order upon the county for the maintenance of the lunatic out of the county funds. In either case, therefore, the order is only a provisional or interim order. I can quite understand why the Legislature, in making provision for the case of an appeal against an order of maintenance founded on an adjudication of settlement, may have thought that the temporary and transient inconvenience to which the parish, from which the lunatic is sent, may be subjected, should not have thought it necessary in consideration of so small an inconvenience to give them any right of appeal. Besides this, when one comes to look at the sections of the Act of Parliament which relate to the power of appeal, it seems that the machinery prescribed by the Act in case of appeals by parish officers in the case of adjudication of settlement and the machinery provided for appeal in other cases, is so entirely dissimilar, that the machinery to which it would be necessary, if this appeal lay, to resort, namely, the machinery prescribed by the 128th section, is wholly inapplicable to the case of appeal by parish officers. Parish officers are authorised to appeal where there has been an adjudication of settlement and an order for maintenance founded on such adjudication; but then no particular terms are imposed upon them. We come to the 128th section, from which the terms "overseers" and "parish officers" are omitted, and we are dealing with the term "person," and we find an entirely different machinery provided as to recognisances, and so on, and as to the time during which the appeal must be brought, and altogether the machinery is of a different character. It seems to me, looking to the fact alone, that in the one case where the appeal is given, by the 108th section, the terms used are, "the guardians of any union, or parish, or the overseers of any parish;" and that in the 128th section it speaks of "persons," not "person" only; upon the whole, what the Legislature must have intended to mean is this: "If, upon an adjudication of settlement, the guardians of the union, or the overseers of the parish, are aggrieved by an order of maintenance founded on the adjudication, which they believe to be an unjust one, they have a right of appeal. In all other cases "the person aggrieved" must receive a different signification. There are

many instances that might be mentioned where persons might be aggrieved as distinguished from parish officers, or the guardians of a union, by an order made by the justices under the Act of Parliament; and I cannot help thinking that the term "person" is not intended to be applied to the case of a parish officer. And it is a significant fact in this case, that the county may be in the position of being aggrieved by an order; as for instance, if a county, in order to get rid of a liability cast upon it in the event of a settlement not being found, come forward and suggest, or endeavour to maintain or prove, that a given parish is the parish of the pauper lunatic's settlement, they might be aggrieved by an adjudication of magistrates refusing to affirm that fact, and to act upon it, yet the county has no appeal; and that the county has no appeal has been decided in the case of *Wilson v. The Guardians of Liverpool*. But, independent of that case, it would be impossible to say that the county should be included under the term "person." There is no more reason that I can see why the county should not have an appeal in such a case quite as much as a parish like the present, which, as I have said, only suffers the temporary inconvenience of having a provisional order made upon it. I cannot think the term "person" is to include everybody and every class of persons who may be aggrieved by an order made under the present section. I think we must consider that the term "person," used in the 128th section, does not include the guardians of the union, or the overseers of the particular parish. The reason for introducing the exceptions which are found appears to me tolerably manifest. The term "person aggrieved by any order" might include ratepayer of the parish, or ratepayer of the county, and might certainly include ratepayer of a parish; and it may have been that the exception was introduced into the section of the Act of Parliament for the purpose of excluding any person who, as a ratepayer, should be aggrieved in a case where the Legislature intended that the appeal, if preferred at all, should be preferred by the guardians, or proper officers of the parish; therefore, it says: "If any person feel himself aggrieved by any order of the justices other than an order made under the 96th section; in that case the appeal is to be regulated and limited by the provisions of the 108th section. It excepts, therefore, any case that falls within the 108th section, but it leaves the term "person" as applicable to any of those numerous cases in which persons may be aggrieved by orders made under this Act. I think, therefore, readily admitting the matter is involved in considerable difficulty and obscurity, that upon the whole the language of the Act warrants us in saying that no appeal is given in such a case as the present. I think, therefore, that the rule for quashing the order should be made absolute.

BLACKBURN, J. — As at present advised I take a different view from what my Lord and my learned brothers do; for it seems to me the appeal in this case does lie, and consequently, that the rule ought not to be made absolute. But that depends entirely on the construction of the terms of the Act of Parliament. I do not mean to express my opinion very strongly or decidedly, because the words of the Act are very obscure; though I think the natural sense of them is such as to give the appeal. I do not see that there is anything pointed out to prevent our construing the Act in what, I think, is its natural sense. I admit there is a great deal to be said in favour of the other view of the matter, and, therefore, I do not mean to express a strong opinion of dissent from that which my Lord and my learned brethren entertain, but merely to point out

Q. B.]

REG. v. THE RECORDER OF NORTHAMPTON.

[Q. B.]

that I do not take quite the same view that they do. The 128th section gives an appeal to any person who thinks himself aggrieved by any order other than an order adjudicating as to the settlement of any lunatic pauper and providing for his maintenance. Now, first of all, I must say it seems to me, in construing the Act, we must take the words "any person" as including every sort or kind of person that does not come within the exception. I think, if the order aggrieves the guardians of the union, or the treasurer of the county, or any person is aggrieved, by any order not coming within the exception, that those so aggrieved, whether body corporate or not, would come within the meaning of "any person;" but then I think that, if the order against which they seek to appeal comes within the exception, they then certainly cannot appeal. What appears to me to be the difficulty in the case is, to see what are the orders coming within the exception—those are orders adjudicating as to settlement of any lunatic pauper and providing for his maintenance; if they can be so construed—and it is not any great straining of the words to read them as an order adjudicating as to the settlement of any lunatic pauper and also an order providing for his maintenance, and if that is so, this case falls within that exception and no appeal lies. But it seems to me that the natural construction of the words is, that they mean an order adjudicating both as to the settlement and providing for the maintenance; so that the only case within the exception would be orders that do both those things. If that be the exact meaning of the words, then this order, which only provides for the maintenance and does not touch the settlement, would not be within the exception, and consequently the appeal would lie. We are referred back to the Act, and we find that under the 94th section the justices might make an order upon the next friend of the lunatic to provide for the maintenance of the lunatic. That is certainly an order providing for his maintenance. At the first glance I thought it would be a monstrous thing that a person alleged to be the next friend of the lunatic should not have the power of appeal; but, when I come to look at the section, I find there is no personal enforcing of the order against him; and therefore the only effect is, if he does not obey the order, the next order that has to be made is to sell the property. The subsequent section gives the power to sell the property of the lunatic, but against that order there is an appeal. Therefore, it is nothing to say that the order against the next friend would be in itself binding. Next comes another section, the 96th, where the justices may make an order upon the parish from which the lunatic pauper is sent, ordering them to pay maintenance; that is the order against which in the present case the guardians appeal. Now, the first thing that struck me was, that in the case which is alleged to be the case here, of the justices having adjudicated that the person had been sent from the parish when they never sent him at all, and that he was a pauper when he was not a pauper at all, or that he was a lunatic when he was not a lunatic at all, it seems a very hard thing there should not be an appeal from that; but when we look again at it, it does appear that this is a preliminary or interim order, and from which the parish can get its relief by showing where the person was settled. Therefore, there can be no great absurdity in the scheme of legislation if they were to say that should be final also. And then comes the 97th section, and by that the order of adjudication or settlement is also to be an order for maintenance; so that an order under the 97th section falls completely within the terms of the exception in sect. 128, the order adjudicating the settlement and providing for maintenance. Then

from that we go on through several sections till we come to the 108th, and there it is enacted, if the guardians of any union or parish, or overseers of any parish, feel aggrieved by any such order adjudging the settlement of any lunatic, they may appeal, subject to different terms and in different ways to the general appeal afterwards given in the 128th section. Now, it certainly struck me upon the whole as being the true construction of the Act that, when it is said any person may appeal against any order, except orders adjudging the settlement and providing for the maintenance, that referred back to sect. 108, where there is an appeal given against the particular class of orders which fulfilled every word, and which were orders adjudging the settlement and providing for the maintenance, against which they have provided one appeal, which they have confined to the officers of the union and the overseers of the parish, who are the natural persons to appeal. Against other orders they have provided no appeal, and these come within the general rule of the 128th section, the exception being confined to that for which the appeal is already provided; but against that there is this to be said, and which weighs a good deal in my mind in making me doubt whether it is the true construction of the words when they give the appeal in the 108th section against the order adjudging the settlement. In the 128th section the appeal is against orders other than orders adjudicating the settlement and providing for maintenance, yet the Legislature have, in that view of the case, put in sect. 128 superfluous and idle words. I know it is no uncommon thing in Acts of Parliament to put in superfluous and idle words, without considering what they mean; still, upon the general rule of construction, when they put in additional words, one must suppose they *primâ facie* mean to convey some additional meaning, and it may be that here the additional meaning may be to say that an order as to the maintenance of the pauper lunatic, though not as to his settlement, should not be the subject of appeal. I do not say it is absurd; it is, however, a straining of the words, but it is not a great one. I think myself, taking it altogether, that the natural construction of the Act is to confine the exception from the appeal in sect. 128 to the particular class of cases embraced in sect. 108, for which another appeal is given, and against every other order every other person who is aggrieved may appeal. The other view may be better than that view, but that, I think, is the true construction of the Legislature, and I by no means mean to express a stronger opinion than to say I think the appeal did lie.

MELLOR, J.—I am of opinion that the rule ought to be made absolute. There is no doubt very considerable difficulty in coming to a satisfactory conclusion as to the meaning of the various provisions, but I cannot help thinking that the scheme of the Act leads us to the true solution. It seems that, if the lunatic being in an asylum has property, then his property is to be made liable by the mode my brother Blackburn has suggested, provided for by the 94th section. If the lunatic have no property, he is to be considered to be chargeable to the parish from which, at the instance of some officer, or officiating clergyman, he is sent, that is, the parish in which he has an establishment and settlement, and it is to be ascertained in what parish he has a settlement. In that case, *primâ facie* the parish from which he is sent is to be deemed the place of his settlement for the purpose of chargeability. Then the 96th section provides that, in that case, orders for the expense of bringing him to the asylum, and his lodging and maintenance, and medicine, clothing, and care, may either be retrospective or prospective, or partially retrospec-

Q. B.]

REG. v. THE RECORDER OF NORTHAMPTON.

[Q. B.]

tive and partially prospective. That order is to be made on the guardians or overseers of the parish, if the parish be not in any union; therefore the order is to be on the guardians or on the overseers of the parish. Now, what is the way in which the settlement is to be ascertained by the 97th section? "Two justices, at the instigation of the parish from which the pauper has been removed, may inquire, and, if they can ascertain the place of settlement, they may make an order adjudicating on the settlement, and ordering that the parish on which he is settled may reimburse the parish from which he is sent all those expenses; that if it turns out on the inquiry they cannot ascertain that he has any place of settlement, then the charge is to be thrown on the county, and the parish to which he has been sent is to be relieved, and the county is to become chargeable with these expenses. Now, there are provisions in respect of which the county may be relieved from these expenses if they can ascertain the settlement, because at the end of the 98th section, which throws this charge upon the county, it says: "That the magistrate may delay adjudging such pauper lunatic to be chargeable to any county until such further inquiry has been made. Provided also, that every county to which any pauper lunatic is adjudged to be chargeable as aforesaid, may, at any time thereafter, inquire as to the parish in which such lunatic is settled, and may procure such lunatic to be adjudged to be settled in any parish." Then there is a provision for the reimbursement of the county, for the moneys paid on account of the lunatic so adjudged to belong to the parish by the 99th section. And by the 100th section it is provided: "That it shall be lawful for any justice hereinbefore authorised, to make any such order as aforesaid upon the guardians of any union or parish, or upon the overseers of any parish, to make such order upon such guardians or overseers, although such union or parish be not within the jurisdiction of such justices." Now, whenever the determination of the justices finally settles the question of the settlement of the pauper, so as to make the charge perpetual, there the appeal is given, and it is given in the very words to the guardians of or to the overseers of the parish. Now by referring to the 108th section, the words are: "If the guardians of any union or parish, or the overseers of any parish, feel aggrieved by any such order as aforesaid." Therefore they are the persons on whom the justices make the order for the expenses of the removal of the lunatic to the asylum, and his provisional maintenance. They are the persons who are authorised to appeal under the 108th section against any order adjudging the settlement of any lunatic; and I ought to say, upon that 108th section, that the only machinery with reference to costs, or anything else, is, they are to be at liberty to appeal without any condition as to recognisance, without anything being said as to costs, certainly nothing as to recognisance, nor are they tied up as the 128th section ties up the parties to whom the appeal is there given. Therefore, I come to the conclusion that the special machinery which provides for the guardians and overseers of the poor, is the appeal which the Legislature intended to give to them; for, by the 128th section, the words, instead of being "any guardian of any union, or overseer of any union, or overseers of the parish," are, "any person who thinks himself aggrieved by any order or determination of any justices under this Act, other than orders adjudicating as to the settlement of any lunatic pauper and providing for his maintenance, may within four months, and on giving recognisance, appeal." And then there is the provision which I do not rely on, as confining it to those things that the justices may have power to mitigate penalties and reduce the

sum which, by way of penalty, may be ordered to be paid by any person who may appeal against the order. But it does occur to me, when an appeal is given in the manner provided by the 108th section, and in the words of the 108th section without providing for recognisances, or the liability to those provisions, assuming the overseers and the guardians of the union are capable of paying without any recognisance as to costs, it does seem singular they should be considered as included under the words "any person," or under the provisions provided by that section. Therefore, although I have some difficulty, which I am bound to admit on this construction, still, it appears to me that these orders which are made on the guardians or overseers of the parish, which are only interim in their intention, may be got rid of the moment it appears there is a settlement that can be ascertained. It was unnecessary, as it seems to me, to give an appeal, and I do not see any impropriety in allowing the decision of the justices in that case to be to that extent final so far as regards the amount of expenses that the settlement parish will have to pay so soon as the settlement is ascertained. I think also, I might rest in some degree on the words my brother Blackburn has referred to in the 128th section; but I have a little doubt on that, because there are other orders providing for the maintenance of the pauper than the orders which are part of the adjudication of settlement. Therefore, I do not feel I can rely quite so positively upon it, though I do not think there is a great strain upon the words by reading "and" as "or." If we found provisions for the maintenance of the pauper by the parish, I think that would make the matter clear. However, as I cannot rely on that reading, I rather prefer to put it on the other ground, which is the ground relied upon by the Lord Chief Justice, and with whose observations upon it I entirely agree.

SHEEN, J.—I entirely agree with what has fallen from my Lord Chief Justice and my brother Mellor, and therefore I will not attempt to repeat what has been much better stated by them than I can hope to do; but I will briefly add to what they have said, that it appears to me that the order that is provided under the 96th section is final, in the sense of being without appeal, because it is in its nature provisional. It is to be only provisional and temporary. And secondly, because in the very next section the mode of correcting it, should it be made under a mistake, is expressly provided. The object of the section is, as appears to me, to provide certainly and at once for the maintenance of a person who cannot possibly maintain himself, and to throw the charge of his maintenance immediately upon the parish from which he has been brought to the asylum, or upon the parish, the officer or officiating clergyman of which has caused him to be sent to the asylum; clearly indicating an intention not to decide at once who, or what parish, or what union, shall be liable to support the lunatic, but to provide certainly and at once for his support, leaving to those who may dispute the propriety of their being charged with his support a ready remedy under the 97th section, by calling upon two justices to inquire into the last legal settlement of such lunatic pauper, and to adjudicate upon his settlement, and in the order adjudicating the settlement to order that he shall be provided for by the parish in which they adjudicated him to be settled. From that adjudication, there is a clear appeal given by the 108th section, "that the guardians of any union or parish, or the overseers of any parish being aggrieved by any such order as aforesaid adjudging the settlement of any lunatic, they or he may appeal against the same to the next general quarter sessions." Now, the only



Q. B.] CHATHAM LOCAL BOARD OF HEALTH v. ROCHESTER PAVEMENT, &amp; C. COMMISSIONERS. [Q. B.]

difficulty that arises upon this construction is on the words of the 128th section, which are, "That any person who thinks himself aggrieved by any order or determination of any justice under this Act other than orders adjudicating as to the settlement of any lunatic pauper, and providing for his maintenance, may, within four calendar months after such order or determination made or given, appeal to the general or quarter sessions." In my opinion these orders adjudicating as to the settlement of any lunatic pauper and providing for his maintenance, are only a little more detailed description of the order mentioned in the 108th section ordering and adjudicating the settlement of any lunatic pauper, because, on referring to the 97th section, it appears that the order adjudging the settlement of any lunatic pauper shall also be an order for the maintenance of such lunatic. Therefore it seems to me that these words, "orders other than orders adjudicating as to the settlement of any lunatic pauper, and providing for his maintenance," mean the same description of orders as are mentioned in the 108th section. Then, as to the word "person." It appears to me, for the reasons that have already been given, that the word "person" cannot be taken to mean the "guardians of any union or the overseers of the poor, or the inhabitants of the county," and the meaning of them must be ascertained by reference to other sections of the statute, amongst them the 94th, by which justices are empowered, if it appears to them that the lunatic has any estate applicable to his maintenance, to order the relieving officer or the overseer of the poor to seize so much of his money or property, and sell it, for the purpose of maintaining the lunatic, as may be necessary. And further, that if the lunatic pauper has any property in the hands of any trustees for him, who have the possession and custody or charge of any property of the lunatic, or, if he has any property in the hands of the Governor and Company of the Bank of England, or any other body or person having in their or his hands any stock, interest, dividends, and so forth, they are empowered to make an order upon such person to pay what may be the charges necessary for the maintenance of the lunatic. And even after such order made, and after they have satisfied themselves that he has no means applicable to his maintenance beyond what may be necessary to maintain his family, the justices are empowered, until such charges as aforesaid shall be paid, in pursuance of such application or order as aforesaid, to make an order on the guardians of the union or parish, or the overseers of the parish from which such lunatic shall be sent for confinement, for payment of the charges of his removal, lodging, maintenance, clothing, medicine, and care of such lunatic." It appears to me, that this section clearly shows that there are persons to whom the word "person" in the 128th section can properly be applicable, without including in that word either guardians of unions, or the inhabitants of counties, and that the whole scheme of these clauses is, to provide absolutely and certainly, and yet provisionally and only temporarily, for the support of the lunatic, pointing out and giving afterwards in the section that immediately follows a speedy remedy by application to two justices to adjudicate upon his settlement, if it be thought by the parish to whom the order to support has been made temporarily, that a mistake has been made as to their liability to support him.

*Rule absolute.*

Wednesday, Nov. 8, 1865.

THE LOCAL BOARD OF HEALTH OF CHATHAM EXTRA (apps.) v. THE ROCHESTER PAVEMENT AND ROAD COMMISSIONERS (resps.)

*Turnpike tolls—Security of—Sinking fund—Contribution by parish to make good deficiency of repairs of turnpike-road—4 & 5 Vict. c. 67—12 & 13 Vict. c. 87, s. 3—13 & 14 Vict. c. 79, s. 4.*

By a local Act (9 Geo. 3, relating to the town of Rochester) certain commissioners were appointed who were empowered to light, watch, &c., the streets, and to open and keep in repair a certain road, and they were to make an annual assessment upon the parishioners, and to erect two turnpike-gates at the termini of the said road. They were also empowered to raise money upon the credit of the rates and tolls, and to assign the same to any persons who should advance the sum. The commissioners from time to time borrowed money under these provisions at 5 per cent., and in the year 1853 the amount so borrowed and secured amounted to 9800*l*. The commissioners then believing that they could get the amount at a lower rate of interest, advertised for the purpose, and succeeded in getting the whole amount at 4 per cent., and the old assignments were given up and cancelled, and new assignments were granted in the year 1855. By the 12 & 13 Vict. c. 87, s. 3 (passed in 1849), it is enacted that in every case in which commissioners of any turnpike-road shall thereafter borrow, charge, or secure any sums of money on the credit of the tolls arising on such road, they shall out of the tolls of such road, and in priority of all other payments thereout, except the interest on any such moneys as aforesaid, set apart a sum of 5 per cent. per annum on the amount of the money so borrowed, in reduction of the money borrowed. But by the 13 & 14 Vict. c. 79, s. 4, after reciting the above provision of the 12 & 13 Vict. c. 87, s. 3, it is enacted that where the commissioners of any turnpike-road had before the passing of the 12 & 13 Vict. c. 87, borrowed any sums of money on the credit of such tolls, and any such money should remain unpaid and unsatisfied at the time of the passing of that Act (13 & 14 Vict. c. 79), such commissioners are, out of the tolls, after payment thereout of the interest of any money owing on the security of such tolls, &c., "and the necessary expenses of the repairs of such road," &c., set apart the like sum of 5 per cent. as a sinking fund. The commissioners had annually, in addition to the amount due to the several creditors, set aside the sum of 5 per cent. as a sinking fund, and in the current year the sum of 400*l*. was so set aside for the latter purpose. It was found, however, that the amount remaining in their hands was not sufficient for the proper repair of the road, though it was admitted that if such sum of 400*l*. had not been so set aside the amount would have been sufficient. Their treasurer, therefore, exhibited an information, under the 4 & 5 Vict. c. 67, before justices, alleging that the funds of the turnpike trust were insufficient for the repair of the road, and praying for an order for contribution from the parish towards the repairs. At the hearing the justices made such order for contribution to the extent of 100*l*.

*Held*, that the order was bad, for that the transfer of the debts in the year 1855 was not a borrowing within the meaning of the 12 & 13 Vict. c. 87, s. 3, and so the commissioners had no authority to set aside the 5 per cent. for a sinking fund, in priority of the sum required for repairs of the road:

*Held*, also (per Cockburn, C. J., Mellor and Shee, J. J., Blackburn, J. dubitante), that, as the rates as well as the tolls were a security under the local Act, neither the 12 & 13 Vict. c. 87, nor the 13 & 14 Vict. c. 79 (each of which speaks of the security of the tolls only), applies to the case.

Q. B.] CHATHAM LOCAL BOARD OF HEALTH v. ROCHESTER PAVEMENT, &amp;c. COMMISSIONERS. [Q. B.]

This was a case stated under the 20 & 21 Vict. c. 43, upon the following facts:

At a special session for the highways, holden at the precinct of Rochester Cathedral, in and for the north or Rochester division of the lath of Aylesford, in the county of Kent, on the 10th and 24th Feb. 1865, the commissioners of the turnpike trust, under an Act of the 9 Geo. 3, intituled "An Act for paving, cleansing, &c., the high streets and lanes in the parish of St. Nicholas, within the city of Rochester and parish of Strood, in the county of Kent, and for making a road through Star-lane, across certain fields adjoining thereto, to Chatham-hill, in the said county" (hereinafter called the resps.), by John S. Bullard, their treasurer, exhibited an information pursuant to the statute 4 & 5 Vict. c. 59, which has since been periodically re-enacted, and was last renewed in the 23 & 24 Vict. c. 67, before us, alleging that the funds of the said turnpike trust are insufficient for the repair of the said turnpike-road lying within the district called Chatham extra, and praying us to make an order that such portion of the highway rates of the said parish of Chatham, or other the rates or assessments levied and applicable to the repair of the highways within the said parish and district as we should judge necessary, should be paid by the said local board of health, being the surveyors of the highways of the said parish and district, to the said commissioners or their treasurer, towards the repairs of such part of the said road as is within the said parish or district. Upon the hearing of the said information, and after due examination of the state of the revenues and debts of the said turnpike trust, and inquiry into the state and condition of the repairs of the roads within the same, and the length of the road within such parish and district, an order was made by us, the said justices, that the sum of 100*l.*, part of the rate or assessment levied or to be levied for the repair of the highways in and for the said district of Chatham extra, in the said parish of Chatham, should on the 1st Aug. 1865, by the said local board of health of the said district (hereinafter called the apps.), be paid to the said resps., commissioners of the said trust, or their treasurer, to be wholly laid out in the actual repair of such part of the said turnpike-road as lies within the said parish of Chatham and district of Chatham extra.

The apps., being dissatisfied with our determination, &c., required a case to be stated, as follows:

Upon the hearing of the information it was proved, on the part of the resps., and admitted and found as facts, that the commissioners appointed under the said Act of the 9 Geo. 3, were empowered from time to time to cause the streets and lanes in the parishes of St. Nicholas, Rochester, and Strood to be paved, cleansed, lighted and watched as they should think fit. Also to open, make, and keep in repair a road through and from Star-lane, in the city of Rochester, across the fields and grounds leading to Chatham-hill, to a road then existing on Chatham-hill aforesaid, being the old road from London through Rochester and Chatham to Dover. The same local Act empowered the commissioners to make every year one rate or assessment of and upon all and every person and persons who inhabit, hold, or occupy any houses or tenements whatsoever within the said parishes of St. Nicholas and Strood respectively, so as such rate or assessment, in respect of the tenements within the said parish of St. Nicholas shall not exceed 1*s.* in the pound according to the rate made for the relief of the poor of the same parish, nor more than 9*d.* in the pound on houses and buildings in the same parish of Strood, and to erect one turnpike-gate at the end of the new road next Chatham-hill, and another gate at or near the Angel Inn in Strood, and to take at

such gates the tolls specified by the said Act. The commissioners are also empowered at any meeting to borrow and take up at interest any sum or sums of money upon the credit of the rates, assessments, and tolls, and to assign over the same, or any part thereof, to any person or persons that shall advance or lend their moneys thereon, as a security for the several sums borrowed, and the interest, &c. That the said new road was made and maintained to the present time by the said commissioners, and the turnpike-gates set up and maintained as directed, and tolls continued to be taken, and rates were annually made and collected in the parishes of St. Nicholas and Strood, at the maximum rate of 1*s.* in the former and 9*d.* in the latter parish, and the streets and lanes of the two parishes are kept, paved, &c., pursuant to the local Act. The whole of such income is treated as a common fund, and has been applied to all the payments to which the trust is liable. That the commissioners from time to time borrowed money for the purposes of the Act, amounting to upwards of 10,000*l.*, which has been reduced by occasional payments of principal to its present amount of 8000*l.* That the great bulk of this loan was borrowed in 1769 and 1770 (except 200*l.* borrowed in 1823), at 5-per-cent. interest, and sums were paid off from time to time, so that in 1853 the principal secured by the assignment of tolls, &c., was 9800*l.*, and the commissioners believing that the money could be had at a lower rate, accordingly advertised for a loan of that amount at 4 per cent. interest, to be secured on the tolls and rates of the trust. Among the holders of the original assignments of 1770, creditors to the amount of 2000*l.* offered to continue such at the reduced rate of interest, and new capitalists came forward whose tenders were accepted for 7500*l.* more, making together 9700*l.*; the remaining 100*l.* was paid off absolutely from funds in hand. All the original assignments were in April 1855 delivered up and cancelled, as well those of creditors who lowered the rate of their interest and continued otherwise creditors as before as those of the creditors who received their principal money and relinquished all claim, and new assignments to the amount of 9700*l.* were executed to all the creditors, whether new or continuing. Since 1853 assignments to the amount of 1700*l.* have been paid off without any preference, reducing the total secured debt to the present sum of 8000*l.* at interest of 4 per cent. That upon the passing of the Municipal Reform Act, 5 & 6 Will. 4, c. 76, the assessments made pursuant to the local Act in St. Nicholas and Strood were, under the 81st section of the Municipal Reform Act, reduced in proportion to the amount ascertained to have been the previous annual expense of watching, and were therefore, for a time, assessed at only a portion of the respective rates of 1*s.* in the pound in St. Nicholas, and 9*d.* in the pound for Strood, but shortly afterwards, on reference to the 85th section of the same Act, the rates of assessment were, on account of the debt, again raised to the original maximum, and have so continued. There are in the two parishes of St. Nicholas and Strood portions of highways not under the care of the commissioners, or included in this turnpike trust, and highway rates are made by the ordinary surveyor of highways within each of those parishes for the maintenance of such outlying portions. That the total length of road under the charge of the commissioners, from near the Angel Inn, is 4650 yards, of which length 2050 yards are in the streets of Strood and St. Nicholas, and the remaining 2600 yards consist of the new road, namely, 1000 yards in the parish of St. Margaret, Rochester, and the remaining 1600 yards in the parish of Chatham, and entirely within the district of Chatham extra, and the road in Chatham extra

## Q. B.] CHATHAM LOCAL BOARD OF HEALTH v. ROCHESTER PAVEMENT, &amp; C. COMMISSIONERS. [Q. B.]

is the only part of the 4650 yards within our jurisdiction, St. Margaret and the other two parishes being in that of the city of Rochester. The new road has for several years been falling into inferior condition in consequence of the lowness of the funds of the trust arising from the falling off of the tolls caused by diversion of traffic and the discontinuance of stage coach and post travelling, and it is estimated by the surveyor of the roads to require about 120*l.* in the current year to keep in a proper state of repair that portion which lies within the district of Chatham extra. That the estimated revenue and expenditure for the year 1865, founded principally on the actual receipts and payments of 1864, are as follows. [Here followed a statement of figures showing a deficit of 376*l.* 12*s.*, two of the items of expenditure being 320*l.* interest on the present debt of 8000*l.*, and 400*l.* for sinking fund of 5 per cent. on principal of 8000*l.*] It was contended by the apps., that the respondent commissioners cannot lawfully set aside 5 per cent. per annum on the 8000*l.* principal remaining unpaid on the assignments until after payment out of the revenues of the trust of not only the interest on that principal, and other liabilities and annual expenses of the trust, but also the necessary expenses of the repairs of such road, inasmuch as the debt, if any, being an old debt created before the passing of the 12 & 13 Vict. c. 87 (1st Aug. 1849), the powers of that Act are not available, and the commissioners are left to apply those of the 13 & 14 Vict. c. 79. They would then find sufficient funds from their tolls and rates to pay the interest and all other liabilities, and also to repair the roads, their sole deficit being then in the sinking fund, for which (being postponed to all other payments) there would remain to be set apart only about 25*l.* instead of 400*l.*, and that such a deficiency in means for raising a sinking fund cannot be made good by contributions from highway rates; and further the apps. say, that unless the debt of 8000*l.* is an old debt created long before 1849, the existing assignments are void as being for money raised for other purposes than those of the local Act of 1769, so that in either case the 5 per cent. on capital cannot be set apart for sinking fund until after providing for repair of road out of the income of rates and tolls. The apps. further contend that, supposing the new assignments to be good, and it be held that the money raised comes within the operation of the 12 & 13 Vict. c. 87, yet after deducting the interest (320*l.*) and the 5 per cent. for sinking fund (400*l.*), from the tolls and rates revenues (1492*l.*), there would still remain 772*l.* 7*s.* 2*d.*, which, with the estimated increase of rates, will give about 785*l.*; while the labour and materials for repair of the road and pavements throughout, and the salaries and incidental expenses, would amount to about 895*l.*, thereby reducing the deficit to about 110*l.*, to be made good by such parishes as are liable to the same. [The case proceeded to state other facts, which have become immaterial, and then continued:] The resps. contended that they, the commissioners of this turnpike trust, are authorised, under the Acts 12 & 13 Vict. c. 87, and 13 & 14 Vict. c. 79, to set apart 5 per cent. of the principal of their secured debt, after payment of interest only, and that therefore if the income of the trust should be insufficient to defray the cost of repairs of the road, the deficiency is to be provided for by contributions from the moneys applicable to the repairs of the highways of parishes through which the turnpike-road passes. They allege that the present debt is, both in form and substance, a new debt created since the 1st Aug. 1849, after the old assignments to the amount of 7600*l.* had been actually paid off in cash, and the remaining twenty-two securities (2200*l.*) satisfied by being exchanged for new assign-

ments (made the same as to the new lenders) in April 1853; that the new loan was for the purposes of the Act, and highly beneficial to the trust in reducing the amount annually required for interest. [The case then proceeded to state other matters, now immaterial, and then continued:] Being of opinion that the resps. will, under the circumstances above stated, be unable during the current year 1865 to keep and maintain the road within their said trust in a good state of repair by means of the revenues of their said trust, and that, after paying interest and setting apart 5 per cent., part of the principal 8000*l.*, as a sinking fund under the Act of the 12 & 13 Vict. c. 87, as aforesaid, they are entitled, under the provisions of the said Act of the 4 & 5 Vict. c. 59, to call upon parishes and districts within the trust to contribute and make up the deficiency; and having considered the circumstances of the parishes of Strood and St. Nicholas, Rochester, and the parish of St. Margaret, Rochester, all which are out of the jurisdiction of our special session, we accordingly made such order as aforesaid.

The questions for the opinion of the court are, whether our judgment was in point of law correct, and whether the estimated deficiency of the resps.' revenues, as shown in this case, arise lawfully under the provisions of the 12 & 13 Vict. c. 87, so as to authorise an order for contribution from parochial or district highway funds towards the maintenance and keeping in repair of the road within this turnpike trust? or whether the resps. are bound to provide for the maintenance and repair of such road, and other payments prior to setting apart the sinking fund of 5 per cent. per annum on the principal debt, and prior to defraying the charge of lighting the parishes of Strood and St. Nicholas, Rochester? whether the deficiency should be made good from time to time as well by the parishes of Strood and St. Nicholas as by the other two parishes of Chatham and St. Margaret (which are not liable to the rates made under the Rochester Local Act), and if so, in what proportions and upon what principle? and whether 100*l.*, the amount ordered by us is excessive?

By the 4 & 5 Vict. c. 1, power is given to justices upon information that the funds of a turnpike trust are insufficient for the repairs of the turnpike-roads within any parish, to examine the state of the revenues and debts of such trusts, and to inquire into the state and condition of the repairs of the roads, &c.; and if after such examination it shall appear necessary or expedient for the purposes of any turnpike trust so to do, then to adjudge and order what portion, if any, of the rate or assessment levied by virtue of the 5 & 6 Will. 4, c. 50, shall be paid by the said parish surveyor, and at what time or times to the said commissioners or trustees, or to their treasurer, to be wholly laid out in the actual repairs of such part of such turnpike-road as lies within the parish from which it was received.

By the 12 & 13 Vict. c. 87, s. 3 (passed 1st Aug. 1849), it is enacted,

That in every case in which the trustees or commissioners of any turnpike-road shall hereafter borrow, charge, or secure any sum or sums of money on the credit of the tolls arising on such road, they shall, out of the tolls of such road, and in priority of all other payments thereout, except the interest on any such moneys as aforesaid, and on any other moneys remaining owing on the security of the said tolls set apart a sum of 5 per cent. per annum on the amount of the money so borrowed, &c., in reduction of the moneys borrowed, &c.

By the 13 & 14 Vict. c. 79, s. 4, after reciting the above enactment of the 12 & 13 Vict. c. 87, s. 3, and that it is expedient to extend such enactment to debts contracted before the passing of the said Act, it is enacted,

That where the trustees or commissioners of any turnpike-road had, before the passing of the 12 & 13 Vict. c. 87, borrowed, &c., any sum or sums of money on the credit of the tolls arising on such roads, and any such money shall

[Q. B.] CHATHAM LOCAL BOARD OF HEALTH v. ROCHESTER PAVEMENT, & C. COMMISSIONERS. [Q. B.]

remain unpaid and unsatisfied at the time of the passing of this Act, such trustees or commissioners shall, out of the tolls of such road, after payment thereof of the interest on any moneys owing on the security of the said tolls, and such sums of money as may be required to be set apart under the said recited enactment, and all other annual liabilities (if any) of their trust, "and the necessary expenses of the repairs of such road, and of the salaries of their officers, and all other necessary expenses of their trust, set apart a sum of five pounds per centum per annum on the amount of principal money so borrowed, charged, or secured before the passing of the said Act and remaining unpaid and unsatisfied as aforesaid," to form a fund towards discharging the moneys borrowed &c., after the passing of the Act.

*Mellish, Q. C. (F. J. Smith with him)* now appeared in support of the order of justices, and contended that they were right in their decision, for that the case was governed by the 12 & 13 Vict. c. 87, s. 8, and that the 5 per cent. for the sinking fund was properly deducted before applying the tolls to the repairs.

*Bovill, Q. C. (Prentice with him)* contended that the justices were wrong in giving priority to the amount for the sinking fund, for that they should have given priority to the amount required for the repairs, and that, if they had done so, there would have been sufficient (as the case stated) to have effected the repairs without calling upon his clients for contribution; that the 12 & 13 Vict. c. 87, s. 8, does not apply, inasmuch as the money was not borrowed after it passed, the paying off of the old creditors in 1853 being merely a transfer of debts; and that the case came, therefore, within the operation of the 13 & 14 Vict. c. 79, s. 4, which, with reference to money borrowed before the passing of the 12 & 13 Vict. c. 87, requires that the tolls should be applied to the repairs of the road before any part is applied to a sinking fund.

*Mellish, Q. C.* was heard in reply.

*COCKBURN, C. J.*—I am of opinion that the app. is right, and that this order must be quashed. The first question for us to consider is, whether the 12 & 13 Vict. c. 87, applies to the present case? If it does, then it would be the duty of the commissioners, out of the fund which comes to their hands, to assign five cent. of the amount for the formation of the sinking fund before they proceed to pay the interest of the money borrowed, or to expend the necessary amount for the repairs of the road. I think that Act does not apply. In this case the trustees were appointed under an Act of Parliament, to which our attention has been called, and they were empowered to borrow money upon the credit of the rates and tolls levied under the powers of that Act; and they did borrow a sum of money at interest of 5 per cent. They were ultimately advised that they could obtain the amount which they required, or some portion of the money, at a lower rate of interest, namely, at 4 per cent., and they advertised for persons to advance money on the same security, on the assignment of the tolls and rates under the Act of Parliament of 1849, and they obtained the money for that purpose. Now this is all after the passing of the Act of 12 & 13 Vict. c. 87, and the question is, whether that Act of Parliament applies to the second borrowing. The terms of the Act are: "In every case in which the trustees or commissioners of an turnpike-road shall hereafter borrow, charge, or secure any sum or sums of money on the credit of the tolls arising on such road, such trustees or commissioners shall, out of the tolls of such road, and in priority to all other payments thereout, except the interest on any other moneys remaining owing on the security of the said tolls, set apart a sum of 5 per cent. per annum on the amount of money so borrowed, charged, or secured." Now, it is

true, if you take those words in their literal signification, they would apply to the present case, because this was money borrowed after the passing of that Act; but, inasmuch as it was a sum of money borrowed, not for any fresh purpose, not by way of making fresh roads, or being expended in any improvements that might come within the scope of the Act of Parliament, but as it was merely a sum borrowed to pay off the previously existing debt, it appears to me that it was merely a substitution of a new debt for an old debt; the Legislature never could have contemplated such a case, or intended that that should come within the enactment of that statute. As I pointed out in the course of the argument, it might be that the fund arising from the tolls here, combined with the rates, might be adequate to pay the interest of the money borrowed and to maintain the repairs of the road, and yet, after those two most essential objects had been complied with, to constitute a sinking fund. Now what I imagine is what the Legislature intended was, not to alter the existing state of things with reference to a case like the present, but to provide after the passing of that Act, should money be borrowed to carry out the objects of that trust in case of such borrowing, a sinking fund for the purpose of paying the debt. As it was truly pointed out in the course of the argument, the state of things is different from that which existed prior to the 12 & 13 Vict. c. 87, about which period the great railways of the country came into operation, and I cannot think that it was intended that that enactment should apply to such a case as the present, in which the money has been borrowed previously, and where no new charge or incumbrance was created, but simply a new one substituted for an old one to the manifest and obvious benefit of all parties concerned, it being very desirable that money should be got at a cheaper rate of interest. I do not think therefore, on the first point, that the Act of Parliament applies. Secondly, it cannot be contended here that the commissioners are bound under that Act to set aside a sum of 5 per cent. on the amount due, which comes to 400*l.* a-year, and to do that before they pay the interest of the money due with the expenses of the repairs of the road. If they are not bound to do that, then it is admitted on both sides that there is a sufficient fund for the repairs of the road after the payment of the interest, without calling upon the apps. parish to contribute. I own, besides taking that view of the first question, that I cannot see my way to the conclusion that the Act of Parliament in question can be applicable to the present case. It seems to me that the Act of Parliament, which relates to tolls simply and provides for a sinking fund to be created out of those tolls, without anything more, is not applicable to such a case. I think, therefore, that in deciding on the first point it is not necessary to decide the second; but I entertain a strong opinion on the second point, that Mr. Mellish there would be also wrong, and that that Act of Parliament cannot apply. For these reasons I am of opinion that the order of the justices was wrong, and that the appeal must be allowed.

*BLACKBURN, J.*—I have come to the same conclusion on the first point on which our judgment is based, namely, that under the circumstances the debts were not to come within the meaning of the Act of 1849, so as to make a sinking fund have priority over the repairs of the road. If that be so, then the present case is one in which the order should not have been made. Upon that point, and on that point only, I base my opinion that the order ought to be quashed. The Act of 1849 enacts, that in every case in which the trustees and commissioners shall hereafter borrow or secure any sum of

Q. B.] CHATHAM LOCAL BOARD OF HEALTH v. ROCHESTER PAYMENT, &amp; C. COMMISSIONERS. [Q. B.]

sums of money on the credit of the tolls, they shall set apart a sinking fund out of the tolls before they discharge any other charges upon them. The Act of 1850 extends that enactment to a case in which money has been borrowed before the Act of 1849, and makes a sinking fund to be set aside out of the tolls after the repairs of the roads and other charges have been met. The difference of those two cases can only become of practical importance when the turnpike-road, as far as the turnpike trust is concerned, is in a state of insolvency. So long as the turnpike-roads trustees have a sufficient amount to keep the road in repair, and set aside the sinking fund, it is utterly immaterial whether they set it aside before or after. It only becomes material when there is not enough to set aside for that; therefore, it is in such a case as that that the Legislature have made a difference, and we must look at the state of the law at the time the Act was passed in order to see what was meant. Now, turnpike-roads are all public highways, and as such, if the turnpike-trusts are sufficient to keep them in repair, they are bound to do so, and if they are not, the parish is to contribute. The question really comes to this practically, shall the increase of the sinking fund be delayed, or, shall it go on to the expense of the parishes? That is what it practically comes round to. In that view of the matter it would be right and proper for the Legislature to say, whenever there is any fresh thing to be done for the turnpike-road, and money to be borrowed for fresh purposes for the benefit of the parish, that the parish will have to give a first security for the sinking fund, because that will be a new matter. But where the debts have been already incurred without the parish being liable, it is not right and proper to make the parish give security for the sinking fund for parishes which do not meddle with the bygone debts, but leave them as they were before. Now comes the question of, what is the meaning of a borrowing of any sum or sums of money? I think this can only mean, a new charge; and where money is already borrowed and charged, and it is merely a transfer to fresh creditors for the purpose of diminishing the quantity of interest, I do not think that that is a charging the tolls with any fresh charge—it is merely continuing an old charge; consequently I am of opinion that in such a case as I have mentioned it is merely an old charge continued to a new person, and it does not come within the Act of 1849, though I think it is within the Act of 1850. Now in the present case, the form was gone through of the old creditors being paid off and a new assignment made of the debt; and was that new assignment such as to make it a new borrowing? It is quite plain, as the case is stated, that it is the old charge continued on, although in the hands of new persons, to reduce the rate of interest. A good deal was said in the argument that that was beyond their power. I cannot think there is any doubt that if parties are to continue borrowing sums of money, and they having borrowed, and finding that they can get it at a reduced rate of interest, I do not think that they do go beyond their power in getting it, if there is no hardship and they do it fairly. In substance it is merely a continuation of the old debt; therefore I think it does not come within the Act of 1849, but, subject to the other point, it would come within the Act of 1850. Now, as to the other point, to which my Lord has adverted. This is money borrowed on the security, not only of the tolls, but also of the rates. The commissioners of the turnpike-road are not only commissioners of the roads, but they are commissioners for paying and lighting. Upon that point I do not think it necessary to express any opinion. If it were, I should take time to consider, but my

inclination of opinion at present is contrary to that of my Lord. My inclination of opinion is, that these words are within the Act of Parliament, although the borrowing is not only upon the tolls, but upon other matters. But that is merely an intimation of opinion, and, if it were necessary, I should take more time to consider it. If that ever becomes a material question, it will be raised on *mandamus*, when it could be taken to error to be decided. As it is, the present case will be decided without an appeal.

MELLOR, J.—I agree with my Lord and my brother Blackburn as to the first point. Admitting the literal construction of the words of the statute to be what Mr. Mellish says, yet when one comes to look at the whole context of the two statutes, I think we have an interpretation that is reasonable, and satisfactory. It is this, that money which had been borrowed before the Act of 1849, and secured upon the tolls, though it may be reasonable coming to a change of circumstances, that a sinking fund should be provided, yet still, as that would have an effect upon the interest of the parish at large, it is not, as it appears to me, to have in that case any priority to money borrowed after, because there the money is borrowed on the credit of the thing as it stood, and the money is not, therefore, to be raised, and there is no necessity to hold out special inducements to obtain the money. I think, as this was simply money raised for the purpose of paying off the old charge (and that is the real key to the whole construction of this Act of Parliament), the commissioners are not to increase the charge or the incumbrance of the tolls, except upon the terms of the Act of 1849. If there be no increase of the charge, or enlargement of the obligation, but a simple substitution of money borrowed at 4 per cent. to pay off money borrowed at 5 per cent., I can see no reason in justice why the construction contended for by Mr. Mellish should prevail. Without saying more on that point, I entirely concur in the conclusion which has been come to by my Lord and my brother Blackburn. But with regard to the second point I confess I agree with my Lord, and I cannot help thinking that the case does not apply to this Act of Parliament. The great object of this Act of Parliament is, lighting, watching, cleansing, improving, and incidentally making a new road, and for that purpose rates are to be levied on certain parishes, and tolls taken at particular gates; and according to the whole form of the statutes, they become one common fund, and are applicable to the various purposes of the Act, not merely to the repairs of the roads alone, but lighting and watching, and various other things which are the principal objects, as it appears to me to be, contemplated by the Act of Parliament, the road itself being comparatively a subordinate matter. At all events it is not put forward as the important object of the Act itself. That being so, when we come to look at the terms of the 12 & 13 Vict., we find they are “in every case in which the trustees or commissioners of any turnpike-road shall hereafter borrow, charge, or secure any sum or sums of money on the credit of the tolls,” that is to say, in the case in which the charge and the security is upon the credit of the tolls, then priority is assigned. And then it says, “and on any moneys remaining owing on the security of the said tolls, set apart a sum of five per centum per annum on the amount of money so borrowed, charged, or secured.” Then again, when we come lower down, we find a section which says what is to be the application of the moneys. It says they shall pay such sums, “and the payment of a proportionate part of the moneys borrowed, charged, or secured as aforesaid, and then remaining unpaid to the

Q. B.]

REG. v. THE INHABITANTS OF ST. LEONARD, SHOREDITCH.

[Q. B.]

creditors on the tolls of such road." Now, here these persons are not creditors on the tolls "of such road" alone, but the first security they have according to the words of the statute, which empowers the commissioners to make the road, which says they may borrow and take up at interest any sum or sums of money upon the credit of the rates, assessments, and tolls. Therefore, it appears to me, these persons are not creditors of the tolls only but creditors of the rates, assessments, and tolls; and it appears to me that the working out of the sinking fund would be attended with great hardship, and would alter very much and very materially the position of the parish. As it appears to me, it is not intended really to apply to a case where the main security, or where the security may, or a considerable portion of it, consist of a right to charge and assess lands and tenements of a permanent character and which are not precarious like tolls. I think for these reasons that the Act of Parliament does not apply, and that it is not necessary to go further. I agree with my Lord and my brother Blackburn on the first point upon which I base my judgment; but I have thought it right to express an opinion in accordance with what my Lord has given, thinking that that is the fair construction to be put upon the Act of Parliament.

SHEE, J.—I agree that the 12 & 13 Vict. c. 87, has reference only to a new charge made after the passing of the Act, or to further charges on tolls after the passing of that Act; and I also entirely agree with what has fallen from my Lord and my brother Mellor on the second ground.

*Order quashed.*

Attorneys for the apps., *Wills and Winch, Chatham.*

Attorney for the resps., *W. Webb Hayward, Rochester.*

REG. v. THE INHABITANTS OF ST. LEONARD, SHOREDITCH.

*Poor-law—Irremovability by three years' residence—Houseless wanderer—9 & 10 Vict. c. 66, s. 1.*

*Residence in a parish, to constitute irremovability, need not be a residence in a house, or in any place ordinarily applied to human habitation. Sleeping in the open air will constitute such residence, if for the requisite period.*

*Where, therefore, a destitute woman, who had resided for sixteen years in the parish of A., at the latter part of her residence gave up her lodgings and wandered about the parish by day, sleeping on the steps of houses, and then for three weeks sleeping in a refuge for homeless poor in the adjoining parish of B., but returning each day to the parish of A. until she obtained admission into the workhouse of A.:*

*Held, that she had acquired the status of irremovability in the parish of A.*

This was a case stated by the Quarter Sessions of the county of Middlesex upon an appeal by the parish officers of St. Dionis, Backchurch, in the city of London, against an order of removal from the parish of St. Leonard, Shoreditch, of one Sarah Broad, widow; upon which appeal the said quarter sessions quashed the said order.

The case was as follows:

The grounds of removal accompanying the said warrant alleged a settlement in the appellant parish, and it was proved and admitted on behalf of the appellant parish that the last legal settlement of the pauper was in that parish. The only ground of appeal on which the present case arises was the fol-

lowing: that the pauper resided in the said parish and in the union in which the said parish is included for three years next before the said application for the said order of removal. The application for the said warrant of removal was made on the date thereof, the 25th Feb. 1864. The pauper had resided at various places in the respondent parish of St. Leonard, Shoreditch, for about sixteen years previous, and until the month of Sept. or Oct. 1863; that in such month, in consequence of illness whilst lodging in the last-mentioned parish, she went into St. Bartholomew's Hospital in the city of London, but left at her last-mentioned lodgings such articles of furniture as she then had, intending to return to it. The pauper remained in the said hospital till near Christmas 1863; on the day she left the said hospital she returned to her lodging and then sold her said articles of furniture, in order to pay the rent which had accumulated, and other debts. She then left her said lodgings, and resided in the said parish of St. Leonard, Shoreditch, with the person who bought her furniture, for a week, when, being destitute, she wandered about in the parish of Shoreditch and out of it, and slept on the steps of a house in that parish the night before she obtained shelter in a refuge for the houseless poor, where she slept for twenty-one successive nights, her ticket of admission having been renewed at the end of the first seven, and again at the end of fourteen days, such renewal being necessary according to the rules of the refuge. The refuge is situate out of the parish of Shoreditch, in the adjoining parish of St. Luke. It is supported by voluntary subscriptions, and is opened during the winter for the purpose of receiving houseless persons, who are sheltered therein, and provided with a sleeping-place and a ration of bread.

During the period of her being thus sheltered, she in the day time wandered about chiefly in the parish of Shoreditch until she met a gentleman who knew her, who endeavoured to procure her admission into Shoreditch workhouse, but she was refused admission. She then slept for two nights in the parish of Shoreditch, and on again applying she was admitted into the workhouse of that parish. It was contended, on the part of the apps., that upon these facts the said pauper was irremovable by virtue of having resided in the resps.' parish for more than three years next before the said application for the said warrant of removal. It was contended on behalf of the resps. that the residence was broken. The Court of Quarter Sessions were of opinion that the pauper had no intention of permanently leaving the parish of Shoreditch, but that she was driven to do so in the manner herein stated by being destitute and houseless, and they quashed the order of removal. The respondent parish is an extensive parish under a board of guardians, and under the control of the Poor Law Board, and for the purpose of irremovability by residence and other purposes of the Poor Law Board forms a union of itself.

The question for the opinion of the court is, whether, on the above facts, the pauper was irremovable from the respondent parish by virtue of having resided therein for more than three years next before the application for the said warrant of removal? If such question be answered in the affirmative, then the said order of sessions quashing the said warrant of removal is to stand confirmed. And if such question be answered in the negative, then the said order of sessions is to be quashed, and the said warrant of removal is to stand confirmed.

By the 9 & 10 Vict. c. 66, s. 1, it is enacted that

No person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years (after



Q. B.]

REG. v. THE INHABITANTS OF ST. LEONARD, SHOREDITCH.

[Q. B.]

wards limited to three years) next before the application for the warrant.

*Huddleston*, Q. C. appeared in support of the order of sessions, but the Court called upon

*Taylor* in support of the order of removal.—He contended that, to constitute irremovability when a party leaves his home, there must not only be an intention to return, and an actual return, but that he must have a place of residence to which he has a right to return: (*Reg. v. The Justices of Worcestershire*, 12 L. T. Rep. N. S. 542.) [BLACKBURN, J.—In that case the pauper was physically absent, but here she was wandering about in the parish and merely went out of it for certain nights to obtain temporary shelter. COCKBURN, C. J.—She did not go to the house of refuge as a place of permanent residence. She returned each day to her parish.] She had no place in Shoreditch to which she had a right to go. When she left her lodging she had no residence. [COCKBURN, C. J.—She merely sleeps at the refuge, and goes back to the parish each day. My difficulty is in seeing that she ever left the parish. BLACKBURN, J.—To constitute a residence a person need not reside in a house. Sleeping is an important element in residence, but it is not conclusive.] Residence in such a case as this must mean a place to which the party has a right to return. There is no case where it has been held that a residence may be where the party has no place for sleeping. [MELLOR, J.—Suppose the pauper were to sleep in one of the dry arches of a bridge, would not that be sufficient?] Probably so, if for the requisite time, but, as she would have no right to return to the place, it would be a break if she went away for a single day. There can be no continuous residence where there is no right to return; where there is no place to return to there can be no continuation of the residence; whilst, therefore, the pauper was away sleeping in the refuge out of the parish, she had no constructive residence in Shoreditch.

COCKBURN, C. J.—I think that the order of the sessions was right, and that the pauper was irremovable from the parish of St. Leonards, Shoreditch. I start with the proposition, that the requisite residence within the meaning of the statute makes the pauper irremovable if the three years' residence has not been broken. It is not necessary that the residence should be in a house, as he may live anywhere he may think proper. There are many poor persons who have no place of that kind in which to live, but who do the best they can, sleeping in the open air, under the arches of bridges, and in various other places where they seek a temporary shelter; and if a person under such circumstances, without a habitation in the ordinary sense of the term, were to reside three years in a parish sleeping in the open air, and doing the best he or she could to live, that would be a residence equally with that of a person who resided in a house, or "other place," within the ordinary acceptance of the term. That being so, if a person who lives in the open air is, in one respect, on the same footing as a person living in a house, the next proposition is this, that that residence will not be interrupted by a temporary absence for the purpose of pleasure or convenience, or any of those occasional motives which induce people to leave their place of abode for a time and then return. If that be so in the case of a person who lives in a house, it appears that the same rule applies to the case of a person who, having no house, lives in the open air. Then the case of this poor woman was this, that having been in Shoreditch for some sixteen years, she is turned out of her house and obliged to give up possession of a room which she inhabited in

the parish; she wanders about in the parish by day, and at night she has to go to some place in order to obtain a night's shelter and bread to eat; she goes into a house of refuge which is not within the parish, and it is quite clear that she did not cease to be an inhabitant of St. Leonard's, Shoreditch, by simply obtaining a lodging at a refuge. She comes back to the parish day by day, and as soon as she is compelled to leave off sleeping at the refuge, she tries to get into the workhouse in Shoreditch, and she is in Shoreditch parish until the time when, by the order of sessions, she is thought to be irremovable. I am inclined to think that that is no more an interruption of her residence in Shoreditch than there would be an interruption of the residence in the case of a person who had a house, and for a temporary purpose had gone out of the parish, but intended to come back. It was pressed by Mr. Taylor that, in all the cases that have been before the court on questions of this kind, there has been always some place of residence in the parish in the shape of a lodging, which the person temporarily absent has left behind; and he seems to imply from that, that in order to constitute a constructive residence there must be "a place of residence" in the ordinary sense of the term, to which the person has a right to return. That seems to me to be begging the whole question. If there can be such a residence in the air out of a house where the person remains in the parish, not having a habitation in the usual sense of the term, I see no reason why there may not be a constructive residence, just as a person who has no house may be said constructively to reside in the parish, though bodily out of it for some temporary purpose of necessity. There seems to me to be no distinction between these two cases. In the case of this poor woman she did not "leave the parish with the intention of returning," as in the other cases; but I go further, and I say she never left it at all, for although deprived of her home she is remaining constantly about the parish; and that does not appear to me to constitute a leaving the parish at all, any more than it would be in the case of a person who may leave a place of residence for a temporary purpose, intending to come back. I think that there is no difficulty in this case upon the facts as they are presented to us; but without taking the same ground as the sessions appear to have taken, upon the simple ground that she never did leave the parish in the true sense of the term, the residence continued and the pauper was irremovable.

BLACKBURN, J.—I am entirely of the same opinion. The pauper had, as is admitted, resided sixteen years in Shoreditch. At the end of sixteen years the unfortunate woman falling into destitution was forced out of her house and wandered about the streets, then she slept in a refuge for several weeks, and it is contended that she having no house in Shoreditch, but being a houseless wanderer, that was a ceasing to reside. Now sleeping is an important element to determine whether a person is residing or not. Where there is a dwelling-place existing it is of extreme importance to ascertain that in order to draw the right conclusion. The case then seems perfectly clear. But looking at the facts here, the sleeping in an adjoining parish under the circumstances under which she did sleep there, having no house, but merely taking a refuge for the night, for a night's lodging and a ration of bread, did not, in my opinion, amount to a ceasing to reside, and therefore the pauper was irremovable.

MELLOR, J.—It appears to me that Mr. Taylor's argument would lead to the conclusion that many of the persons for whom the poor-laws were framed would be deprived of the benefit resulting from



Q. B.]

RUSSELL v. TRICKETT.

[C. P.]

them, and that the most destitute according to him could not be relieved. For the reasons assigned by my Lord and my brother Blackburn I think the sessions were right.

SHEE, J. concurred.

*Order of sessions confirmed.*

Friday, Nov. 10, 1865.

RUSSELL (Clerk to the Local Board of Health) v. TRICKETT.

*Local board—Contract by deed—Surety for contractor—Liability of.*

*By an indenture made between a local board (the plts.) of the first part, certain contractors of the second part, and the deft. of the third part, the contractors covenanted to do certain work upon the basis of a certain specification; and the deft. covenanted to pay any losses that might be sustained from the non-performance of the work. The indenture recited that the specification had been signed by five members of the local board as was required by the local Act. In point of fact the specification had never been signed, although it had been acted upon. In an action against the sureties:*

*Held, that the mere fact of the specification not having been signed did not release the sureties from their liability.*

This was a demurrer to pleas.

The declaration stated that, by an indenture between the Local Board of Health of Merthyr Tydfil of the first part, Thomas Evans and Joseph Evans of the second part, and deft. and G. Kielman of the third part, T. and J. Evans covenanted with the local board to do certain works according to the conditions and schedule of prices set forth in a certain specification. The deft. and G. Kielman covenanted that if Messrs. Evans should not fulfil their contract and keep the conditions of the said specification, they would pay to the board such sums as they should spend, not exceeding 2500*l.* The local board covenanted with Messrs. Evans to pay them 10,778*l.* and to keep the conditions to be performed on their part. It then averred that the Messrs. Evans did not fulfil their contract, whereby the local board were obliged to expend sums of money exceeding 2500*l.* It then assigned a breach of deft.'s covenant that neither he nor G. Kielman had paid the said sum of 2500*l.*

The deft. pleaded three pleas on equitable grounds.

The first said that it was stated in the indenture that the specification was signed by five members of the local board, and that on the faith thereof the deft. executed the indenture, whereas it was not so signed.

The second said that deft. executed the indenture on the faith of the representation made to him by the board that the specification had been signed.

The third said that the deft. executed the indenture on the faith of the representation that the specification should be signed.

These pleas were demurred to, and there was also a replication which was also demurred to, but as this raised the same question, no further notice of it is required.

The points set down for argument on the part of the plt. were, that the pleas were bad, because no ground for equitable relief was disclosed in either of them; because the statements relied upon in the first plea, and the representations relied upon in the second and third pleas were not shown to be either fraudulent or material, nor that the deft., as surety, had been in any way prejudiced, all

the terms of the specification on the part of the local board having been complied with.

The points set down for argument on behalf of the deft. were, that the defts.' liability as surety for the Messrs. Evans was discharged by reason of their not having had the benefit and protection under the contracts for which the deft. had stipulated, and on the faith whereof he became surety; also by reason of the non-execution by the plts. of the specification, and also by reason of the misrepresentation made that the specification had been signed.

*Beresford* (with him *Manisty*, Q. C.), for the plts., in support of the demurrer.—The question is, whether the fact that the specification had not been signed does away with the deft.'s liability. [COCKBURN, C. J.—Suppose it had been signed, how would the surety have been benefited? The object of signing the specification, I take to be to bind the board to the specification, to show that it was the basis of the contract.] As to the ground of misrepresentation, *Smith's Prin. of Eq.* 165, shows that for equity to interfere, the representation must be material, fraudulent, and that the party must be damaged.

*Mellish*, Q. C. (with him *Macnamara*).—One question is, whether signing the specification was not a condition precedent. By the local Act, the indenture must be in writing. Now the indenture recites that specification had been signed. That specification governs the contract. As long as not signed it might be altered. [COCKBURN, C. J.—No, no.] A recital in a deed may often be a condition. [COCKBURN, C. J.—The specification was fully agreed to. Work was actually done under it. How was deft. damaged?] All the damage that I can speak to was, that if obliged to prove specification he would be put to expenses to make plts. sign it.

By the COURT. (a)

*Judgment for the plts.*

Attorneys for deft., *Harrison and Lewis.*

### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUKLEY SMITH, Esqrs.,  
Barristers-at-Law.

April 28 and May 10, 1865.

OVERSEERS OF THE POOR OF SUNDERLAND-NEAR-THE-SEA (apps.) v. THE GUARDIANS OF THE SUNDERLAND POOR LAW UNION (resps.)

*Poor-rate—Rateable value—Valuation list under Union Assessment Committee Act—Tied public-houses—Small Tenements Act.*

*The union assessment committee amended the valuation list of a parish which had adopted the Small Tenements Rating Act (18 & 14 Vict. c. 99), by inserting in the column for rateable value the full rateable value of the small tenements:*

*Held, that the full rateable value of the small tenements should be inserted, and that the assessment committee therefore were right: also,*

*Held (Byles, J. dissentiente), that where the occupiers of public-houses were bound to take their beer from a brewery, in consideration of which they paid a smaller rent, the "rateable value" of the public-houses was not to be lowered, nor that of the brewery raised, on account of the benefit of such contract.*

Allison v. Monkwearmouth commented on.

This was a special case, stated by order of Byles, J., under 12 & 13 Vict. c. 45, s. 11.

(a) Cockburn, C. J., Mellor, Shee, and Lush, JJ.

C. P.] OVERSEERS, &amp;C. OF SUNDERLAND-NEAR-THE-SEA v. THE GUARDIANS, &amp;C.

[C. P.]

The parish of Sunderland-near-the-Sea is one of the parishes included in the Sunderland Poor Law Union, the board of guardians of which union have, in accordance with the Union Assessment Committee Act 1862, appointed an assessment committee for the purposes of the Act.

The overseers of the said parish, in pursuance of the said Act, made a list of all the rateable hereditaments in the parish in so much of the form shown in the schedule of the Act 6 & 7 Will. 4, c. 96, as set out in the schedule of the Act now reciting, which list was duly deposited for inspection, published, and afterwards transmitted to the committee as required by the Act. This valuation list, as so transmitted, and as afterwards confirmed and approved by the committee, is to be referred to as forming part of this case.

The committee, after receiving the valuation list, made alterations in the value of certain hereditaments, and then caused the list to be deposited for inspection, as required by the Act, and appointed a day for hearing any objections thereto. The overseers of the poor of the parish of Sunderland gave notice of objection, and appeared before the committee and stated their objections to the alterations; but the committee adhered to their original views, and approved and confirmed the list.

The overseers having reason to think that the parish was aggrieved by the decision of the committee, and having duly obtained the consent of the vestry, gave the notice of appeal.

Previous to the quarter sessions the resps. gave notice to respite, which was done, and immediately an arrangement was entered into that the questions of law should be settled by a special case for the opinion of this court.

The grounds of appeal were, "That the rateable hereditaments comprised in the valuation list were valued at sums beyond the rateable value thereof." This ground of appeal had reference to the valuation of certain breweries in the parish, and the facts are as follows:

In the parish there are five breweries, three of which are occupied by the owners, and the remaining two by leasees.

The occupiers of those five breweries are respec-

tively possessed of, as owners or as leasees, or entitled to a great number of public-houses known as "tied houses," some of which are situate in the parish of Sunderland-near-the-Sea, and some in other different parishes. All these public-houses are let to tenants at smaller rents than they would be let at if they were free public-houses, the tenants being bound to purchase from the brewers all malt and other liquors which they sell in their public-houses, the brewers thus securing to themselves a certain large trade, and being enabled to charge higher prices for their liquors than they would charge the occupier of a free public-house.

In valuing these breweries and public-houses for the purpose of making the valuation list, the overseers applied the same principles to the breweries and public-houses as to the other rateable hereditaments in the parish, pursuant to the Parochial Assessment Act (5 & 6 Will. 4, c. 96), and in the case of the breweries without any regard or reference to the advantages derived by the occupiers from the before-mentioned contracts with the occupiers of the several "tied public-houses," and in the case of the said "tied public-houses," without any regard or reference to the "smaller" rents paid by the occupiers to the brewers, and as if such occupiers were at liberty to purchase the liquors in the open market.

The assessment committee having ascertained that the overseers, in arriving at the "gross estimated rental," and the rateable value of the breweries, had not taken into consideration the advantages which the occupiers of such breweries derived from the before-mentioned contracts with their tenants the publicans, and having obtained the number of such "tied public-houses" attached to each brewery, increased the "gross estimated rental" and "rateable value" of such breweries respectively by such an increased sum as the committee in their opinion considered the breweries might reasonably be expected to let for with the advantages attending the contract with the "tied public-houses."

The following extract from the valuation list will show the nature of the alteration made by the union assessment committee in the case of one brewery:

No. of Assessment.	Name of Occupier.	Name of Owner.	Description of Property.	Name or Situation of Property.	Estimated Extent.			Gross estimated Rental.			Rateable Value.		
					A.	B.	P.	£	s.	d.	£	s.	d.
	Robt Fenwick & Co.	Robt Fenwick & Co.	Brewery, Malting Vaults, Warehouses, and Offices.	Low St.				426	0	0	355	0	0
								327	0	0	254	0	0

The figures 327 and 254 were crossed out to show the amounts at which the brewery was returned by the overseers. The figures entered above show the increased amounts charged by the Union Assessment Committee.

The committee, however, made no reduction in the valuation list in respect of the value of the several tied public-houses.

The overseers, in objecting to the increase made in the value of breweries, insisted that if the valuation of the breweries was to be increased by reason of the advantages derived by the tied public-houses, the occupiers of the tied public-houses should be valued only in respect of the smaller rents actually paid by them and at the reduced value of the premises resulting from their obligations to purchase their malt liquors of their landlords, and not at the full annual value of the premises without reference to such obligation.

The committee, however, being of opinion that they were bound by the case of *Allison v. Monkwear-*

*mouth*, 23 L. J. 117, M. C., and the cases therein referred to, refused to alter their decision.

As to the second and third grounds of appeal, the following are the facts:

In the parish of Sunderland-near-the-Sea the Small Tenements Rating Act (18 & 14 Vict. c. 99) was duly adopted in the year 1850, and is still in force.

By this Act, sect. 4, it is enacted that whilst such order as firstly hereinbefore mentioned is in force,

The owner of every tenement in every parish, the yearly rateable value whereof shall not exceed 6*l.*, shall be assessed to the rates for the relief of the poor and to the rates for the repairs of the highways, in respect of such tenements, at three-fourths of the amount at which such tenements would be liable to be rated in case the Act had not passed.

It is further enacted by the same section, that while such order as firstly hereinbefore mentioned is in force, if any owner of any one or more of such tenements shall be desirous of paying a rate in respect of all such tenements in any parish, whether such tenements be occupied or unoccupied, and

shall give notice in writing of such his desire to the overseer of the poor and to the surveyors of the highways as therein mentioned, then and in such case such owner shall be assessed to the rates for the relief of the poor, and to the rates for the repair of the highways in respect of such tenements respectively, whether the same be occupied or unoccupied, at a sum not being less than one-half of the amount at which such tenements respectively would be liable to be rated if occupied in case this Act had not passed.

In the parish there are upwards of four thousand tenements the yearly value of each of which does not exceed 6*l.*, and in making out the valuation list, the overseers entered the rent of these tenements respectively in the column of the valuation list headed "Gross estimated Rental," at the rent at which the said tenements might reasonably be expected to let from year to year free from all usual tenant's rates and taxes, and to the tithe commutation rentcharge, as required by the 5 & 6 Will 4, c. 96, s. 1, and the Union Assessment Committee Act 1862, s. 15. From this gross estimated rental the overseers made the usual deductions for the average annual cost of repairs and insurance, thus arriving at the sum at which the said tenements would have been liable to be rated if the Small Tenements Rating Act had not been adopted; then, in order to arrive at the reduced amount at which the owners should be assessed instead of the occupiers, the overseers, in those cases where the owners had not compounded, deducted from such last-mentioned amount (that is the amount at which the property would have been liable to be rated if the Small Tenements Rating Act had not passed) one-fourth part thereof and entered the remainder in the column of the valuation list headed "Rateable Value." In those cases where the owners had compounded, the overseers deducted one-half instead of one-fourth from the amount at which the property would have been liable to be rated if the Small Tenements Rating Act had not been adopted, and entered the remainder in the column headed "Rateable Value."

The following case shows the mode adopted by the overseers:

In the case of a tenement in which the owner did not compound, from the "gross estimated rental" of 6*l.* one-sixth was deducted as the annual average cost of repairs and insurance, leaving the sum of 5*l.* as the "rateable value" under the Parochial Assessment Act; from this sum of 5*l.* was then deducted one-fourth, that is 1*l.* 5*s.*, leaving the sum of 3*l.* 15*s.* as the reduced amount or "rateable value" on which the owner was rateable under the Small Tenements Rating Act, and on which sum the rate was to be computed.

In cases where the owner had compounded, from the gross estimated rental of 6*l.* one-sixth was deducted as the average annual cost for repairs and insurance, leaving the sum of 5*l.* as the rateable value under the Parochial Assessment Act; from this sum of 5*l.* was deducted half, that is 2*l.* 10*s.*, leaving the sum of 2*l.* 10*s.* as the reduced amount or "rateable value" on which the owner was rateable under the Small Tenements Rating Act, and on which the rate was to be computed.

Upon these principles the rates for the relief of the poor of the parish have been made ever since the adoption of the Small Tenements Rating Act in 1850, and by which means the overseers have assessed the owners of the small tenements at the same uniform pound-rate in common with the rest of the ratepayers.

The overseers contended that, by the increased valuation made by the committee in respect of the last-mentioned rateable hereditaments, the aggregate "rateable value" of the hereditaments within the parish was improperly increased to the extent

of 3875*l.*, and that such increase was contrary to the provisions of sect. 2 of the 5 & 6 Will. 4, c. 96, and to the provisions of sects. 35 and 36 of the Union Assessment Committee Act 1862.

The committee being of opinion that the 14th section of the Union Assessment Committee Act 1862 required the overseers, in making out the valuation list, to return the full "annual rateable value" of all the rateable hereditaments within the parish, and that the reduction to be made in favour of the owners rated, instead of occupiers, should be made from the rate in the pound, and not from the rateable value, confirmed and approved the valuation list accordingly.

The questions of law arising out of the above statement for the opinion of the court are:

First, whether, under the special circumstances stated in this case, the breweries in question should be rated on any additional sum beyond their annual rateable value as breweries for the advantages derived from the custom of those tied public-houses, the occupiers of which are compelled to purchase their liquors at such breweries; and, if so, whether the public-houses connected with the breweries, but situate in other parishes, should be taken into account in calculating the gross estimated rental and rateable value, as well as those within the parish where the brewery is situate?

Secondly, if the said breweries are, in the opinion of the court, liable to be assessed in respect of the advantages derived from the said tied public-houses, whether the said tied public-houses are liable to be assessed at a reduced "gross estimated rental" and "rateable value" in consideration of being so tied to such breweries?

Thirdly, whether the reduction to be made under the statute 13 & 14 Vict. c. 99, s. 4, and the 14 & 15 Vict. c. 39, s. 3, to the owners of small tenements who are rated instead of the occupiers, should be made from the rateable value of the hereditaments assessed or from the rate in the pound to be levied and collected?

First, as to the rateability of the breweries and "tied-up" public-houses:

*Lush, Q. C. (Prideaux and Heath with him)* contended, for the apps., that the committee were wrong in rating the breweries higher on account of the contracts made with the occupiers, as by sect. 1 of 6 & 7 Will. 4, c. 96, the property alone should be looked at, and not the contracts which the occupier might have with the owner. That in this case the brewery was in no way annexed to the public-house except that they both happened to belong to one person. Secondly, as to the Small Tenements Rating Act, they contended that, under 13 & 14 Vict. c. 99, s. 4, the reduction should be made from the rateable value, and that is not interfered with by the Union Assessment Committee Act. They referred to

*Allison v. Monkwearmouth*, 4 Eil. & Bl. 18;  
*R. v. Bradford*, 4 M. & S. 317; and  
*Easton v. Alce*, 7 H. & N. 452.

*Liddell, Q. C. (Tomlinson with him)*, for the resps., firstly contended that the cases of *Allison v. Monkwearmouth* and *R. v. Bradford* were directly in point; and that the rate was to be made on what might be reasonably expected from a tenant who took the property from year to year *rebus sic stantibus*, the test being, not what might be, but what was, really done with the property; that this principle applied to public-houses, Lord Campbell, in *Allison's* case, stating, that "the obligation to grind at a particular mill would no doubt to a certain extent diminish the yearly value of a farm subject to the servitude; but it is allowed on all hands that this deterioration would be no argument against making the mill assessable in respect of the

multure involuntarily rendered therein." Secondly, as to the Small Tenements Act, that the object of the Union Assessment Committee Act was to get an uniform and correct valuation of the parishes, but that nothing was said about the Small Tenements Act; and as that Act had not been repealed, the parish, in calculating the amount of the rate on each person, ought to take into account that the Act was simply adopted for the convenience of the parish, to save trouble and insure certainty in the collection of rates, and that therefore there was no hardship in the fact that the lump sum of contribution was larger, as it would not be fair on the other parishes that in one parish the rate should be less because it adopted a statute for its own convenience.

ERLE, C. J.—Upon this latter question, my judgment is for the resp., according to the argument of Mr. Liddell. On the first reading of the statute, my judgment was inclined to be the other way, thinking there was a hardship in the conclusion he contended for. I do not, however, think the argument of hardship really can be sustained; but more than that, we are bound to give effect to the enactment of the Legislature as we understand it; and the Legislature has required valuation lists to be made out for every parish, and those valuation lists are to be made out for the purpose of having a uniform and correct valuation of the rateable property in the different parishes. The question is, whether the list set out in the schedule of this Act, containing seven columns (the seventh column being headed "Rateable Value") is, in the column of rateable value, to show the annual rateable value truly, or, in a parish which has adopted the Small Tenements Act, the small tenements are to be set down at the sum which the owner of those tenements has to pay under the statute. In other words, the question is, whether the column of rateable value in the valuation list is to show the true rateable value, or, where it relates to a small tenement in a parish that has adopted the Small Tenements Act, it is to show the proportion of the rateable value which the owner has to pay. I am of opinion that it is to show the rateable value. That gives effect to the words according to the plain meaning of the words "rateable value." If the contention of the overseers was true with respect to small tenements, it would mean three-fourths or one-half, according to the arrangement made with the owner; and as to the rest of the property, true rateable value. I think that means "rateable value" *simpliciter*. I observe all the way through the Act, in the sections as pointed out by Mr. Liddell, until we come to sect. 35, the enactment carefully points out that there shall be one uniform valuation of the rateable hereditaments in the different parishes, and that the result of the survey and valuation shall appear in the valuation list. I was greatly struck with the argument, that it is to be such a uniform correct valuation as a surveyor surveying the corporeal hereditaments that are to be the subject of the rate would perceive from the locality, and the circumstances under which the rateable subject is placed; and that if the rateable value was to be ascertained with respect to these small tenements upon the principle contended for by the overseers, the rateable value would not be what the surveyor would perceive by a survey of the property as it stands, but it would be what the surveyor would perceive from a survey of the property together with an inquiry as to whether the owner had made an arrangement, and if so, whether he made an arrangement to pay the sum at which it should be rated (in which case it would be three-fourths), or an arrangement to pay whether the property is occupied or not (in which case it would be one-

half); and so the column showing the rateable value would be subject to two accidental ephemeral circumstances, and be subject to the further accidental circumstance that the parish which had adopted the Small Tenements Acts at one period might, by giving notice, reject the adoption; and then the column "rateable value," showing the sum to be paid by the owner during the time the parish had adopted it, would not show the rateable value. According to the construction which I have adopted, the words of the statute are to be construed according to their literal meaning, and the whole tenor of the statute directing these valuation lists to be made is clearly to command, without any limitation or exception of any sort that I can see, that the rateable value shall be ascertained according to the Parochial Assessment Act, on the well-known principle of that Act, entirely independent of the Small Tenements Act. The contention on the part of the overseers is, that under sect. 35 of the Union Assessment Act, the owners of small tenements have a right to compound as heretofore; and under sect. 36 the payments are to be made as heretofore. Mr. Lush says these sections would be inoperative if the owners could not compound and pay the smaller sums. But I say I give to these sections their full operation, and hold that the owner has the full right to compound as heretofore, and that where he does compound he is to pay the smaller sum; and although the contributions of the parish would depend on the amount that is put down in the first column of rateable value, yet the sum collected in the parish would not be the same in proportion to the rateable value where the Small Tenements Act had been adopted. The case put by Mr. Liddell has convinced me that there is no real hardship. Supposing two parishes side by side, with exactly the same quantity of rateable property, without small tenements, and exactly the same ratio of small tenements, and one adopts the Small Tenements Act and the other does not adopt the Small Tenements Act, in that case it is agreed on all hands that the parish which has not adopted the Small Tenements Act should have the small tenements put down at their true value in the rateable value. Then, according to my experience as counsel for one parish, where there were a vast number of poor, the sum collected in those two parishes, in my opinion, would be exactly the same. If I am at liberty to import the experience I had in respect of the parish that I was acquainted with, it satisfied me that the collector had an impossibility of getting the true real amount from the small tenements. The operation of this section and the operation of the Small Tenements Act altogether has an operation relating to the collectability of the poor-rate. The whole operation is a convenient mode by which the parties can collect the poor-rate. But the property in the parish which is subject to the rate, the gross estimated rental, the rateable value of all the premises in short before you come to the end of the column as the sum to be paid, all these remain the same. But, in respect of the collectability of the rate, if the parish has adopted the Small Tenements Act, and the owner insures to the parish either three-fourths or one-half of the rate, that is collected. And a comparison of the Union and the Parochial Assessment Act confirms me very much in this view, for the schedule of the Union Assessment Act contains all the same first seven columns that are in the schedule of the Parochial Assessment Act, but does not contain the eighth column. Each of them have got "Name of occupier," "Name of owner," "Description of property," "Situation of property," "Estimated extent," "Gross estimated rental," "Rateable value." But "Rate at sixpence in the pound" is in the Parochial Assessment Act, and is

C. P.]

OVERSEERS, &amp;C. OF SUNDERLAND-NEAR-THE-SEA v. THE GUARDIANS, &amp;C.

[C. P.]

not in the Union Assessment Committee Act. I say that the application of the privilege given by the Small Tenements Act should be confined entirely to the sum put down in the eighth column, which eighth column is called "The rate at so much in the pound." And as to an owner who has compounded, it would be exactly one-half of that which was put down for every one else as resulting from premises of the same value. Thus: to use the schedule of the Parochial Assessment Act as an example, put down "rate at 1*l*. 7*s*. 6*d*," add against name, "Owner having compounded," instead of being the total of the rate, it would be three-fourths or one-half of it. Upon an examination of the Union Assessment Act, and referring to the Small Tenements Act, and reading them together with the Parochial Assessment Act, I think the Legislature intended that the rateable value in the valuation list should be the true rateable value ascertained from the essential permanent quality of the rateable subject, capable of being ascertained by a surveyor, who would know the real permanent value of the property, not depending on any accident, such as the arrangement made from time to time between the owners and the overseers in respect of the collection of the sum which would be due and be paid by them.

BYLES, J.—I am of the same opinion. I must confess that until I heard the argument of Mr. Liddell I thought otherwise. I now entirely agree with my Lord. It must not be forgotten in all these cases that the statute imposes the tax, not upon the land, but on the person; for the statute says, "by the taxation of every inhabitant, parson, vicar, and others, and every occupier," &c.; and it was decided in *Theed v. Starkey*, 8 Mod. 314, that poor-rates were personal charges and not charges on the land. Now, that being so, it seems to me that the words in the 18 & 14 Vict. c. 99, s. 4, may very well be read as referring to the person, and not to the property. I admit that some slight violence must be done to the Act, and that instead of the exact words we must read "according to," or "in proportion to." Indeed that must be so; because, if you made a rate on any other principle, it would appear that the rateable property is one-half in value of what it really is. At the end of every rate there is this declaration of the overseers and churchwardens: "We do declare the several particulars specified in the respective columns of the above rate to be true and correct, so far as we have been able to ascertain them." The constructions contended for by Mr. Lush would have this effect, that the churchwardens and overseers at the bottom of the rate must make a false declaration, whereas, if you read the word "rate" here to mean what it really means, namely, a charge on the person in respect of the land, then there is nothing but what is strictly correct. The rateable value, the gross value, and the rate on the person are put down. Therefore, I now incline very much to think that the proper mode of proceeding even before the Union Assessment Act was to put down the correct rateable and the correct gross value, and the amount of the rate upon the person. However that may be, it seems to me, when we come to the Union Assessment Act, it must be so. This statute is imperative with respect to that which is now under appeal, namely, the valuation lists, that they shall be correct valuation lists. They are to be made, and as pointed out by my Lord they may be made by persons who have no knowledge of these arrangements. The statute says they shall be correct valuation lists. This is not an appeal against the rate, but it is an appeal against the valuation lists. It seems to me, if it had not been in this form it would have been incorrect. Perhaps there was no occasion for the 35th

section of the Union Assessment Act; but if there was, it applies to this case, for it says "nothing shall be construed to prevent the owners of tenements from compounding for the rates to be assessed on the same." That is not quite correct. It ought to have been "assessed in respect of the same," in such manner as they were by any statute or statutes enabled to do before the passing of this Act." Upon these grounds, therefore, I conceive that what has been done has been rightly done; and if it were otherwise, we should be adopting a construction which would make the declarations of the overseers and churchwardens incorrect on the face of it. With respect to the hardship, that has been clearly answered by Mr. Liddell; that objection has been entirely disposed of, and I can add nothing to what has been said.

MONTAGUE SMITH, J. concurred.

Judgment on the third question for the resp.

The following judgments were subsequently delivered on the other two points:

May 10.—ERLE, C. J.—The question relating to the rateable value of the small tenements was answered at the time of the argument. The questions relating to the rateable value, first, of the breweries, and, secondly, of the tied public-houses, are now to be disposed of. The case relates to five breweries, and a number of public-houses tied to each brewery; some being in the same parish with the brewery to which they are tied, and some in a different parish. It seems, from the case, that all the breweries are rated on some principle known to the assessment committee. Without referring to the title-deeds and leases for the purpose of this judgment, I will take the case as if it related to one brewery in one parish, and one public-house tied thereto, by a contract for beer, in another parish; and then the facts relevant to the question are, that the occupier of the public-house holds it under a lease from the occupier of the brewery; that in the lease he contracts to take beer from his landlord's brewery; and that the rent to be paid for the public-house is adjusted by reference to this contract. Thus this causes a loss to the tenant in respect of the beer he buys; that is, he pays more for it than he would have to pay if he traded free from such contract. It also causes a gain to the landlord's brewery, from the same cause. The case does not state that the gain to the brewery is greater or less, or equal to the loss of the public-house; but, as nothing is stated to the contrary, I assume it to be equal. Thus, the rent in money to be paid and received respectively is less than it would be if the house were free, by the amount of such respective loss and gain; but the value that passes between the landlord-brewer, selling beer on the one side, and the tenant-publican buying beer on the other side, is the same as it would be if the house were free. The overseers making out the valuation lists for these parishes, and setting down the rateable value of this brewery and of this public-house, among the others, have obeyed literally the commands of the Union Assessment Act and the Parochial Assessment Act; that is, they have estimated the gross rent which each of those tenements would be worth to a free occupier; and in making that estimate they have excluded from their attention, as they were bound to do, any reference to special profits of trade by reason of special contracts in leases or otherwise. The assessment committee, in revising these valuation lists, have made an alteration by increasing the estimate of the gross rent which the brewery could command. They do not state on what principle they have made this increase, or on what evidence they have acted; but

C. P.] OVERSEERS, &amp;C. OF SUNDERLAND-NEAR-THE-SEA v. THE GUARDIANS, &amp;C.

[C. P.]

they have raised the rateable value from 254*l.* to 355*l.* in the example set out in the case, being nearly the rate of increase which was approved of in the case of *Allison v. Monkwearmouth*. It is further stated that, although they have followed that case in raising the rateable value of the brewery on account of the brewery, they have not lowered the rateable value of the public-house by the amount of the loss caused by the tie; probably because the judgment in *Allison's* case does not refer thereto. We are thus called upon to decide between the overseers and the assessment committee; and, in my opinion, the overseers are right. In support of that opinion I would premise some observations before examining the application of the case of *Allison v. Monkwearmouth*, on which the assessment committee rely; I would premise that the Union Assessment Act now under consideration, has a purpose ulterior to the Parochial Assessment Act, which alone was under consideration in *Allison v. Monkwearmouth*. The purpose of the Parochial Assessment Act is to provide for equality in the rating of each of the rateable subjects in one parish. The purpose of the Union Assessment Act is to provide for equality in the rating of each aggregate of rateable value in each of the parishes of the union. This latter purpose is to be effected by applying, with correct uniformity, throughout every parish of the union, the principles for estimating value as required by the Parochial Assessment Act. The valuation lists are made a permanent standard of value whereby to assess all the rateable subjects within the union, both to the Parochial and to the Union Assessment Acts, until an alteration shall have been made; and, although a mode of alteration is provided, yet, considering the expense and difficulty of a survey of the rateable property in a union, an alteration will not be easily made. It is therefore commanded by those statutes, as I understand them, that the estimate of the rental should be confined to corporeal hereditaments, and should be founded on the more permanent elements of value found therein, excluding the effect of temporary contracts and other such contracts. I would further premise that, as the case is stated, there is no ground for assuming that the aggregate value of the two tenements does not continue the same whether they are held separately or jointly, there being no statement of any increase of value by reason of any combination. Then, if the brewery gains by the tie what the public-house loses thereby, and no more, the aggregate amount of the rateable value of the two tenements ought to be the same, whether they are rated together or separately, whether they are held under the same or different landlords. Under these circumstances the notion that the rateable value of the brewery could be increased by the gain from the tie, without lowering the rateable value of the public-house to the same extent by reason of the loss from the tie, was so untenable that the counsel for the resp. did not offer to maintain it. By that admission the question to be answered is narrowed to the point whether the whole rateable value of the public-house shall be set down in the list for the parish where it is situate, or partly therein and partly in the parish where the brewery is situate to which it is tied. That question may be raised in respect of four changes of the relation between the respective occupiers of the brewery, and of the public-house: first, I would take the case when the owner of both is the occupier of both, the brewer carrying on the public-house by a servant. There is no lease and no tie, and each rateable subject would be rated in the parish where situated, upon the ordinary principle, and the contingent possibility of a tie, in case there should be a lease of each, would be immaterial. The value thus ascertained is the true

rateable value for the list. Secondly, I would take the case where the owner of both tenements occupies the brewhouse, worth say 200*l.* per annum, and lets the public-house to a publican, say at 20*l.* per annum, without any contract relating to beer, the house would be free, and the rateable value would be the same as in the last case, unaffected by a tie. Thirdly, I would take the case where the owner of both tenements occupies the brewery and lets the public-house with the tie, that is, with the contract for taking beer, the money-rent being lowered, say to 10*l.*, and the beer overcharged, say to the same amount. In this case also it seems to me that the rateable value of each remains the same, and would be rated in the parish where situate. Fourthly, I take the case where the owner of both tenements makes a lease of each, first letting the public-house, assumed to be worth 20*l.*, for 10*l.*, monied rent, with a contract for taking beer which is worth 10*l.*, given to the brewer, and then letting the brewery with the benefit of that contract, the brewery by itself being worth 200*l.* per annum, the benefit of the tie being worth 10*l.* per annum. Thus the rent for the brewery with the contract is 210*l.* per annum. Under these circumstances, also, it seems to me that each tenement should be rated in the place where it is situate, at the rent which it would command if let by itself without the tie; and that a decision that the rateable value in the fourth case is different from that of the former cases, would in effect hold that the rateable value depends on the actual occupation, not on the estimated rental, which is contrary to the Assessment Acts, as I understand them. Moreover, if the rateable value is altered by the tie, the overseers making the rate ought to know whether it exists. Its existence depends on the title-deeds and leases of the brewer and publican. If the overseers are to rate for the tie, it seems to follow that they ought to inspect and understand those documents of title, and this consequence seems to me absurd. The assessment committee do not refer to any such source of knowledge: perhaps they have increased the rate on every brewery to a large amount, assuming that the tie exists, and they expect the brewer to produce his deeds to relieve himself if that assumption be wrong. But such a principle of rating cannot be sanctioned by any court at Westminster. I now proceed to the case of *Allison v. Monkwearmouth*. The facts of that case seem to me to be materially different from those here stated, and the statute here to be construed is different from the statute then in question, and therefore it is not necessary to decide whether an opinion given by a court by way of advice, from which there is no appeal, is as binding on co-ordinate courts as a judgment would be where the same question is sent up to a second court for its opinion. I should think not. It seems to me that each court is in such case original, and bound to give its own judgment, just as on a motion for a writ of *habeas corpus* each tribunal must give its own decision without being swayed by other tribunals. But, as already observed, it may be that we are not called on here to say that any former case should be overruled. In *Allison v. Monkwearmouth* the title-deeds and leases were produced by the brewer, and the facts relevant to the rating of the brewery for the supposed profit from the tie were taken therefrom. Those facts were that Sir Marmaduke Williamson was owner of a brewery, of which the rateable value by itself was 350*l.*, and thirty-three public-houses, of which the rateable value is not given. The public-houses he had let with the contract to take beer at monied rents amounting in the aggregate to 150*l.* He then leased to Allison for seventeen years the brewery, with the goodwill of these public-houses, as it is called, subject to the payment of the rents

C. P.]

OVERSEERS, &amp;C. OF SUNDERLAND-NEAR-THE-SEA v. THE GUARDIANS, &amp;C.

[C. P.]

theretofore received by Williamson, that is, yielding in respect of the brewery and fixtures 350*l*, and in respect of the public-houses 150*l*. This sum of 150*l* thus described is found to have been in substance the rents of the public-houses collected by Allison for Williamson during the existing leases. When the tenancies changed, Allison let to the new tenants, and continued to receive during the term the same moiety rent from those public-houses amounting to about the sum of 140*l* per annum, which he paid to Williamson under the above-mentioned covenant. The lease of the goodwill of the public-houses is thus shown by the case to have been, in effect, a lease of the public-houses. The court held that Allison was liable to be rated for this sum of 150*l*, being the amount of rent so received. The case also finds that all the tenants were assessed for their public-houses, but the value is not stated. These being the facts, the judgment affirming the rate on the brewer for the amount of rent collected by him and paid over to the superior landlord, has the singular effect of holding that a rent-collector may be rateable for the amount of rents which he collects where the given relation of brewer and publican is found to exist. Although, as a general rule, the province of the court here is confined to deciding on rateability, and does not extend to deciding on amount, yet the court, in thus holding the brewer liable to be rated for the rents collected, refused to give permission to go into the question of the cost of the production of the supposed rateable value of 150*l*, and assumed that the covenant to pay that sum as rent of the brewhouse was inclusive of rateable value, although the deed showed it was rent collected. The case also found that Mr. Allison rented other public-houses, not of a brewery landlord, which he sub-let to publicans with the contract for beer. The notion of rating him for the rent he received from those publicans seems not to have been attempted; but, if he was liable for those he rented of Williamson, it is difficult to say why he was not liable for those rented of others. If the attempt had been made to rate him for every public-house under contract with him to take beer, it would have been the rating of a profit of trade, and yet the profit from beer to Williamson's public-houses was the same profit of trade as that from other public-houses. Furthermore there is sound distinction between that case and the present, on the ground that the assessment lists relate to the whole union, and all the tenements are at once to be assessed. Under the former Act, before the Union Assessment Act, there was a defect in deciding appeals on rates, because only one tenement was the subject of the judgment at a time, and in apportioning the rateable value of two or more portions of the same rateable subject in two or more parishes, the injustice of doubly rating the same rateable subject might be inflicted in the apportioning process, unless all the portions were disposed of at once. Accordingly, in *Allison's case*, although it appeared that the tenants of the public-houses were rated as well as the tenant of the brewery, yet the court had no power of inquiring, and did not inquire, whether the public-houses were rated at their full value, and whether the rating Allison for the rents which they paid to him was not in reality a double rating of the rent of these public-houses; that is, once on the tenant, and again on Allison. Here the overseers have rated all the public-houses, as well as the brewery, according to the principle of the Assessment Acts, and according to those principles the publican would have to pay a rate both on the lower money payment and higher beer charges which he pays to the brewer, his landlord, under the contract. There is no suggestion that any further value is created by this relation of landlord and tenant. If the suggestion was made,

it certainly could not be ascertained without taking an account of the profits of the beer trade, involving an account of all losses by insolvency, and otherwise, and so it would be made apparent that it was an attempt to rate a profit of trade. If the doctrine is established that the supposed profit from a publican-tenant taking beer by contract is rateable upon the brewer, the question would arise why the same profit arising by reason of a publican-debtor contracting to take beer from the brewer-creditor should not be also assessed. The tie is created as well by a loan secured by bill of sale as by a covenant in a lease; that is, unless the publican can pay off the loan he may be broken up, as it is called, at any time, and yet the attempt to make such a profit of trade rateable has not been made. It is also clear that a brewer differs not in respect of this liability from a butcher, a baker, or the like. If the brewer-landlord is to be rated as Allison was, other tradesmen landlords influencing custom by letting retail tenements, with contracts for custom, ought to be raised, but such an item of rateable value has never been recognised. For these reasons the case of *Allison v. Monkwearmouth* seems to me distinguishable from the present. In the judgment delivered by us in that case I endeavoured to distinguish the right of the occupier of a soke-mill, derived from immemorial custom, to the servitude of all within the soke, and the right of the occupier of a canteen placed in a populous locality from a right derived under such a contract as that in *Allison's case*. I refer to the reasons there given, which appear to me to have more force when applied to an assessment list fixing the rateable value of each rateable subject in the union, on the principles above explained, and I will not increase the length of this judgment by repeating what I am reported there to have said. I will only add, as to the soke-mill, that the prescriptive right of the miller of that mill to the mulcture from the inhabitants of the soke is a reality affecting the fee-simple of the whole locality, and the immediate profit fixed by the custom subject to no risk of trade, if the miller may take his toll in kind; whereas the right of the landlord to sue on the contract for taking beer is a personalty affecting only the persons of the contracting parties, and the profit therefrom varies in proportion to the skill of the contracting parties, and is subject to all the risks of trade from insolvency, dishonesty, and the like. If this be correct, the profit to the mill from the prescription is rateable, and the profit to the brewer from the contract for beer is not. Upon this review I come to the conclusion that the judgment should be for the apps.

BYLES, J.—In this case no question arises as to the aggregate rateable value of the whole brewing concern, including in that expression both the brewery, properly so called, and the restricted public-houses. The question is, how that rateable value should be distributed between the brewery itself and those restricted houses. It has been decided by the Court of Q. B., in *Allison v. Monkwearmouth*, 4 El. & B. 13, by which conclusion I think we are bound, that the monopoly which a brewery enjoys over its tributary public-houses enhances the rateable value of the brewery. It is a necessary consequence that it diminishes the rateable value of the public-houses. It doubly affects, or may affect, their annual value to the occupiers, who not only pay more for their beer, but being shut out from the benefit of buying in the open market, may be obliged to purchase an inferior article and to suffer a diminution of the extent of their trade as well as of their rate of profit. These public-houses do in consequence actually let at a lower rent than they would otherwise command. It is objected that a mere personal contract cannot diminish the rate-



C. P.]

OVERSEERS, &amp;C. OF SUNDERLAND-NEAR-THE-SEA v. THE GUARDIANS, &amp;C.

[C. P.]

able value of land or houses. But the stat. 6 & 7 Will. 4, c. 96, establishes as the criterion of rateable value the rent (subject to the deductions there enumerated) which a tenant not for a long term of years, but from year to year, would give. The statute does not make the actual rent reserved the criterion of rateable value, but the true theoretical rent; that is to say, the sum at which, making the statutable deductions and having regard to all the surrounding circumstances, the tenement ought to command. Again, the statute, by adopting a supposed tenancy from year to year, seems to exclude a valuation of distant future advantages or disadvantages of the property demised, and to regard its actual condition at the time of the rate, or in the immediate future. Now, if the natural or ordinary advantages of a tenement are permanently taken away from it, and annexed to another tenement, that should seem to be a diminution of the value of the first tenement, and an augmentation of the value of the second. It seems to me that it makes no difference whether the severance arises from modern contract, or from prescription, which presupposes an ancient contract. In this case the ordinary advantages of the tenement are, by a permanent contract between landlord and tenant, taken away from the tenant's tenement, and annexed to the landlord's tenements. If it be said that the surrender of these ordinary advantages by the tenant to the landlord is in effect rent paid by the tenant to the landlord, I should respectfully answer that it is straining the word "rent," as used in the statute, to give it this extensive signification. Moreover, there are cases, much nearer to a reservation of rent service to the landlord than the case now under consideration, in which cases, nevertheless, the reservation of valuable privileges to the landlord on the one hand, or the enjoyment of them by the tenant on the other, have been held respectively to diminish or augment the rateable value of the tenant's occupation. Thus it has been decided, that if the landlord allows to the tenant the right of shooting, the tenant will be rated at more; but if the landlord reserves it to himself the tenant will be rated at less: (*Reg. v. Thurlstone*, 28 L. J. 106.) Some ornamental squares in the metropolis must, by mere private contracts for a long term of years, be used as squares, and no one would live there subject to those contracts. Their rateable value, though in itself very great for many purposes, is destroyed by contract, and by contract it is transferred to the adjoining property, for it is included and rated in the increased value which the ornamental square confers on the mansions that surround it. A house in Cheapside, let as a shop, for which it is adapted by situation and construction, would command a large rent, but if it be subjected by the ground landlord to a stipulation that it shall be used as a dwelling-house only, and not as a shop, its rateable value in the occupation of a tenant is reduced by the effect of the contract. It is no objection that a portion of the value of the land may thus escape the rate altogether, for the statute of Elizabeth imposes the rate, not on the land, but on the person of the occupying tenant in respect of his ability, as tested by the annual value of the land he occupies; for, originally, an inhabitant and occupier was rated for personal property as well as real property; and it has been repeatedly held that the poor-rate is no charge upon the land: (*Theed v. Starkie*, 8 Mod. 814.) Nor is there much danger of abuse, for in ordinary cases that method of letting which will produce most rent will be preferred by the landlord. It is true that pecuniary charges on the land created by contract, as ground rentcharges, annuities, interest of mortgage, and the like, are not to be deducted from the rateable value of a tenement, but that it

is because the legal criterion of rateable value is, by the provision of the statute, the rent which a tenant from year to year would give for the land in its actual condition, subject to certain deductions, among which are tithes, rates, taxes, insurance, repairs, &c., but among which deductions pecuniary charges created by contract are not to be found. But in truth the statute of 6 & 7 Will. 4, though not in form declaratory, made very little alteration in the principles of rating before accepted by courts of law. For these reasons, differing, with respect and reluctance, from the judgment of the Lord Chief Justice, I think the magistrates were right in their decision.

MONTAGUE SMITH, J.—I agree with my Lord that the judgment on the first and second questions of this special case should be for the apps. These questions in substance are, whether the rateable value of a brewery, to be inserted in a valuation list under the Union Assessment Act 1863, is to be increased beyond the ordinary rateable value of the like property, and the rateable value of certain public-houses is to be reduced, because the owner of both has made a contract with his tenants of the public-houses that they shall buy all their beer of him as brewer, at a price beyond the fair market price of the beer. It is contended by the counsel for the resps. that the rateable value of the brewery should be increased, and, as a consequence (which he admits), that the rateable value of the public-houses should be reduced by reason of these contracts, and this although the properties may happen to be in different parishes. It appears to me that this contention is not well founded, and that the contracts between the brewer and the publicans do not form a basis for either raising or diminishing the gross or net rateable value, as defined by the statutes, for the purpose of the valuation list under the recent Act. In estimating the rateable value, or the "rent at which these properties might reasonably be expected to let from year to year," the value of the tenements as they stand and are fitted up, the use to which they may be applied, their local position, and other like circumstances are to be considered. In the case of a brewery the capacity of the building and premises for carrying on trade, and also the fact that a trade corresponding to its capacity would *prima facie* be carried on in it, would be proper elements to include in the estimate, subject, however, in the case of the latter element, to modification if it were shown, as in the case of the idle cotton-mill, *Staley v. The Overseers of Castleton*, 38 L. J. 178, M. C., that the trade was not in fact carried on. But these contracts, if considered, would introduce personal and collateral matters into the estimate, not directly bearing on the occupation of the property and the uses to which it is applied. The contracts here are really modes by which the owner of the two properties chooses for the time not to alter the nature or uses of the occupation of the properties, but to apportion and regulate his own rents and profits. Assume that the owner and occupier of the brewery derives increased profit as a brewer from the contract, there is on the other hand a corresponding loss to him as owner of the public-houses; and if this profit so purchased is held to add to the rateable value of the brewery, it would follow that that value must be reduced below the ordinary rateable value of the like property, in case the brewer chooses to foster his public-houses at the expense of his trade as brewer, by contracts to sell beer to his tenants at a loss. It seems to me that such grounds of raising and depressing rateable value are not warranted by the statutes. The difficulty of importing such contracts into the estimate of rateable value is still more apparent when we are called on to reduce the

C. P.]

WILLIAMS v. GOLDING.

[C. P.]

rateable value of the public-houses below that of other like houses; I am unable to find a sound principle for such a reduction. The public-houses are occupied, their capacity for trade exists, and a trade is actually carried on in them. These things afford the ordinary elements for estimating rateable value, but neither the particular rent a tenant pays, nor the particular profits or losses of his individual trade depending on provident or improvident contracts in relation thereto, can, I apprehend, be imported. It may be assumed here, that the profits of the publican's trade are cut down by the contract, with the consequence, as found in the case, that the publican pays less rent; but rateable value is not altered by the actual rent being more or less than the rent the premises would reasonably command from a yearly tenant. Rent is no more than presumptive evidence of value, and this being so, I think the rateable value of the public-house remains unaffected, although the actual rent may be below what, without the contract in question, the house would let for. If it were to be held otherwise, and the contract of the publican happened to be so onerous in its terms that no new tenant would give more than a nominal rent for the public-house burdened with a like contract, it would follow from the argument of the resps. that the houses must be rated at a nominal value only. But in truth, in the case of these public-houses, the publicans are really paying a part of their rent in the extra price they are charged for the beer, and clearly the shape in which they pay cannot alter the rateable value of the house. The facts of the case of *Allison v. Monkwearmouth Shore* differ in some respects from the present, and the question of reducing the rateable value of the public-houses was not in that case before the court for decision. Here we have to decide that question, and to decide it upon the provisions of the recent statute. Notwithstanding the respect which I feel for the opinion of the two learned judges who formed the majority of the court, their decision, which could not be appealed from, ought not, I think, to be conclusive in this case. On the first and second questions of this special case, I think the apps. are entitled to judgment.

*Judgment on the first and second questions for the apps.*

Nov. 7 and 9, 1865.

WILLIAMS v. GOLDING.

*Metropolitan Building Act 1855 (18 & 19 Vict. c. 122) s. 108—Building owner—Notice of action—"Other person."*

*By sect. 108 of the Metropolitan Building Act 1855 it is enacted that no "writ or process shall be sued out against any district surveyor or other person for anything done or intended to be done under the provisions of the Act" till one month after notice of action:*

*Held, that the words "or other person" were restricted to a class, and were intended to protect persons of the same class, as a district surveyor or persons who had official duties cast upon them by the Act, and that they did not include a builder, who while building a house adjoining the plt.'s had negligently underpinned the party wall and thereby caused damage to the plt.'s house.*

This was an action to recover damages for injuries to the plt.'s house by reason of the deft.'s negligence in building a house on the adjoining land. There was also a count in trespass. The deft. pleaded not guilty by statute 18 & 19 Vict. c. 122, s. 108.

At the trial before Willes, J., at the sittings in Middlesex after Easter Term, it appeared that the

plt. was the owner of a freehold house, No. 23, Merchant-street, Bow, on the north side of which was a vacant space, on which the deft., who is a builder, was building two houses for a Mr. Hogg, the owner of the land. There were no rooms in the basement of the plt.'s house, and the foundations only went about two feet into the ground. The houses built by the deft. had rooms in the basement, and it was, therefore, necessary to underpin the party-wall of the plt.'s house. The proper way to do this was by digging under the plt.'s foundations in very short lengths at a time, and building up a fourteen-inch wall. The deft., however, though cautioned by the plt. did it in long lengths, and only built a nine-inch wall, the consequence of which was, that the plt.'s house cracked, and was otherwise damaged. No notice of action was given.

On these facts the counsel for the deft. submitted that the deft. was entitled to notice of action under sect. 108 of the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122).

Willes, J. overruled the objection, but reserved leave to the deft. to move.

The 18 & 19 Vict. c. 122, s. 108, enacts that,

No writ or process shall be sued out against any district surveyor or other person for anything done or intended to be done under the provisions of this Act, until the expiration of one month next after notice in writing has been delivered to him or left at his office, or usual place of abode, stating, &c., and every such action shall be brought or commenced within six months next after the accrual of the cause of action, and not afterwards.

The jury having found a verdict for the plt. for 20l.,

*Philbrick*, in Trinity Term, obtained a rule to set aside the verdict, and enter it for the deft. pursuant to the leave reserved.

*Macnamara* now showed cause.—The question is, if a builder under these circumstances comes within the words, "any district surveyor or other person." It is submitted that "other person" means other person *ejusdem generis* as a person acting for or under the district surveyor. The surveyor has duties imposed upon him by the Act which he is bound to perform, and which expose him to certain risks, and therefore it is reasonable that he should have this protection; but a builder acts voluntarily under a contract for his own benefit. The statute requires the action for anything done under the provisions of the Act to be brought within six months: (sect. 108.) So that the effect of holding that it applied to such a case as this would be, that a builder guilty of negligence within the metropolis must be sued within six months, while any other builder may be sued at any time within six years. The interpretation clause (sect. 8) defines the meaning of "builder," "district surveyor," and "person." Sect. 31 points out the duties of the district surveyor. By sect. 32 the Metropolitan Board of Works are empowered to dismiss and appoint district surveyors, and I should say that the Metropolitan Board of Works and the persons so appointed by them would come within the words "other person" in sect. 108. By sect. 36, the Metropolitan Board of Works may direct any person to assist the district surveyor. By sect. 37, they may appoint a surveyor to act when the district surveyor is engaged professionally. By sect. 62, they may appoint a superintending architect and clerks. By sect. 63, he may appoint a deputy. Sect. 69 and the following sections throw on the commissioners of sewers and commissioners of police certain duties with regard to dangerous structures. All these persons would come within the words "other person," and therefore it is not necessary, in order to give a meaning to those words, to extend them to a builder. The

C. P.]

WILLIAMS v. GOLDING.

[C. P.]

old Building Acts, 7 & 8 Vict. c. 24, s. 8, and 14 Geo. 3, c. 78, s. 100, simply used the words "any person;" in this Act "any district surveyor" is inserted. That must have been for some reason, especially as in the case of *Collins v. Poney*, 9 East, 322, the Court thought themselves bound to hold a building owner within those words, though not within the intention of the Legislature. Analogous cases have arisen under the old Bankruptcy Acts, 6 Geo. 4, c. 16, s. 44, re-enacted by the 12 & 13 Vict. c. 106, s. 159, where it has been held that the words "any person" apply only to officers acting under the provisions of the Acts, and not to assignees for acts done in consequence of the property being vested in them. So here, it does not apply to a builder acting under a contract, but only to persons acting officially:

*Carruthers v. Payne*, 5 Bing. 270;

*Edye v. Parker*, 8 B. & C. 697;

*Knight v. Turquand*, 2 M. & W. 101.

Lord Tenterden lays down the rule in *Sandiman v. Braach*, 7 B. & C. 96, that where particular words precede general words, the general words are to be construed as including persons *ejusdem generis*, and that rule has been acted on in many similar cases:

*Reg. v. Silvester*, 33 L. J. 79, M. C.;

*Peatt v. Dicken*, 1 C. M. & R. 422;

*Brumwell v. Pennock*, 7 B. & C. 536;

*Kitchen v. Shaw*, 6 Ad. & E. 729.

When this rule was moved the case of *Wheeler v. Gray*, 4 C. B., N. S., 584, affirmed in the Ex. Ch., 6 C. B., N. S., 606, was relied on, but there is no decision on this point there. The Ex. Ch. affirmed the decision of this court on the ground that the building owner had a complete justification under the Act. The cases which will be cited against me come under three heads: they are either decided on the words "any person," as in

*Hughes v. Buckland*, 15 M. & W. 346;

*Pratt v. Hillman*, 4 B. & C. 269;

*Wells v. Ody*, 2 C. M. & R. 128; and

*Collins v. Poney*, already cited;

or they fall under the head that the persons come within the express words of the statute, as in *Newton v. Ellis*, 5 E. & B. 115; or they come under the head of persons filling an official character, as in

*Davis v. Curling*, 8 Q. B. 286;

*Smith v. Shaw*, 10 B. & C. 277; and

*Wallace v. Smith*, 6 East, 115.

But there is no case going so far as where a particular description of person is named, followed by the words "or other person;" any one has been held to come within those words who is so different from the particular person as a builder is from a district surveyor.

*Philbrick* in support of the rule.—The whole argument turns on the construction of sect. 108, and the only difficulty is occasioned by the words district surveyor being inserted. The deft. gave the notices required by the Act, and he was in fact acting under the powers of the Act, as he was doing that which but for the Act he would have no power to do. The third part of the Act relates to party structures, and gives power to pull down and rebuild, or to make good or repair any party structure, acts which would be trespasses were it not for the Act. Sect. 88 gives power to interfere with party structures on condition of making good any damage. Therefore to hold that a builder is not within this section, and that the action may be brought immediately, entirely does away with the *locus penitentie* given by the Act. The question is, if the deft. *bona fide* believed in a state of law which would protect him. [WILLES, J.—No; he must believe in a state of facts which, if they existed, would protect him.] I

submit that, if he believes that he is acting in pursuance of the Act, and that belief is *bona fide*, he would be protected. The case of *Pratt v. Hillman*, already cited, is in point as to the quality of the act. The words here were large enough to include the deft., and if on the whole statute there appears to be an intention that the words should apply, the rule *noscitur a sociis* does not apply. It has been said that the words would apply to the Commissioners of Sewers and Commissioners of Police, but they were protected before. Here he was doing improperly an act which would have been lawful if he had done it properly. [WILLES, J.—There is nothing in the Act which deals with the manner in which the thing may be done; but if he acts in an unreasonable manner, I do not see how he is acting in pursuance of the Act. He took out the foundations and put in something, which might have been a straw.] But he could not touch the foundations without the powers of the Act. In *Wheeler v. Gray* there was not a decision on this point, but there was a strong expression of opinion by Cockburn, C. J. As to the cases under the Bankruptcy Acts, assignees could not be said to be within the section, as the Act only gives them a title, and does not give them power to enter and seize; but here certain specified powers are given, and it also gives specific remedies. Sect. 8 requires notices to be given to the district surveyor; sect. 41 imposes a penalty on builders neglecting to do so; sect. 42 gives the district surveyor power to inspect the buildings; and sect. 55 to give notice to the builder requiring him to make good defects, and if he do not comply with the notice he may, under sect. 46, be summoned before a magistrate, who may, by sect. 47, impose a penalty. Then sect. 88 imposes the conditions on which he may exercise the right; and sect. 94 imposes a penalty if he fails to make good any damage done, and this is to be recovered before a justice of the peace. Therefore, I submit that he is entitled to notice in order that he may make good the damage before action.

ERLE, C. J.—I think that this rule should be discharged. This was an action against a tradesman employed by a building owner to do some work in respect of a party-wall. The building owner desired to deepen his premises, and to do so it was necessary to undermine the plt.'s wall, and it was the clear duty of the deft. to underpin it, so that no damage should come to the plt.'s house. He built up only a nine-inch wall, by reason of which the plt.'s house was damaged, and for that damage he brought this action, and the deft. says that he is entitled to judgment, because he received no notice of action, and the requirements of sect. 108 of the Metropolitan Building Act were not complied with. That section says [his Lordship read the section, and then proceeded as follows:] Now it is clear that the deft. was not the district surveyor, nor authorised by the district surveyor to do an insufficient work, but he says that the words of the statute are wide enough to include him, as it gives protection to the district surveyor "or other person." I think that some limitation must be put on the words "other person," and I think that the statute did not intend to protect every person who did a wrong while doing something under the Act. In the former statutes protection was given to "any person," now to the "district surveyor or other person;" and I am of opinion that the Legislature intended to restrict "other person" to a class, and meant "other person" *ejusdem generis* as a district surveyor. The builder acts for his own convenience in altering his own premises, and I think that he is not within the same class as a district surveyor. I think that the class intended to be protected was persons who had an official duty

C. P.]

HADLEY v. TAYLOR AND OTHERS.

[C. P.]

or some duty cast upon them by the statute, so that they were performing a statutable duty, or intending to do so. Comparing this statute with the former ones, it seems that the Legislature intended to change the class to which the protecting clause was to be applicable, and the words in the old Bankruptcy Act, though different, lead me to the construction which I put upon this case, as do also the authorities which Mr. Macnamara went through very learnedly and fully. In *Newton v. Ellis*, which at first sight seemed strong the other way, it was pointed out that the statute included any person acting under the orders of the local board of health, and the deft. had been ordered by the board of health to sink a well, which was to be done to the satisfaction of the surveyor, and under his direction, and he had negligently left a hole unguarded in the highway, into which the plt. fell and was injured, and as he did it under a contract, it was contended that he did it for his own benefit. But that case is not in point. In *Wheeler v. Gray* the question was raised, but was not disposed of, and it now comes before us for our decision. I think that I may give judgment for the plt., in accordance with the argument of Mr. Macnamara. I place some reliance on the fact that the rights which the defts. exercised was a right to private parties to interfere with their neighbours' property for their own benefit; sect. 80 gives that right, but it is given on condition of making good all damage, and the building owner (and the builder stands in the same position) had a right to enter upon the property and undermine the wall, but only on condition that he made good the damage. He did not make good the damage, and I don't see why I should not hold that having done what was clearly an actual wrong, he is not within the protection of the statute. I think that the section which imposes a 20l. penalty is cumulative, and that is one ground of my decision; but I rely chiefly on the ground contended for by Mr. Macnamara, which satisfies me that this rule should be discharged.

WILLES, J.—I am of the same opinion, and I concur with the Lord Chief Justice on the first and main ground of our decision. But, assuming that Mr. Philbrick had succeeded in bringing the deft. within the words "other person" as exercising statutable powers, he would still have great difficulty in satisfying the court that it is right to enter the verdict for him on the other part of Mr. Macnamara's objection, as it seems that he not only put in an insufficient wall, but he was warned that it was insufficient, and as a builder he must have known that a nine-inch wall was insufficient. Mr. Philbrick is right in saying that that is a question for the jury, but I think that he exercised a wise discretion in not putting it to them.

BYLES and KEATING, JJ. concurred.

*Rule discharged.*

Attorneys for the plt., Lovell and Co.

Attorney for the deft., Proudfoot.

Friday, Nov. 3, 1865.

HADLEY v. TAYLOR AND OTHERS.

*Public nuisance—Liability of occupier of premises for having an unfenced hole near a highway.*

*The defts. being in want of warehouse room for a short time, hired the ground-floor of the plt.'s warehouse and stored their goods in it. At the back of the warehouse, and within fourteen inches of the highway, was a hoist-hole which had been made by the landlord,*

*but which was unfenced. The plt., in going along the highway after dark, slipped into the hole and was injured:*

*Held, that the hole was near enough to the highway to be a public nuisance, and that the defts.' occupation was such as to make them liable to the plt. for the injuries he had sustained.*

The declaration stated that the defts. were the occupiers and possessed of a certain warehouse and hoist-hole, vault, or cellar immediately adjoining a public highway, and wrongfully suffered the said hoist-hole, vault, or cellar to be open to the said highway, without any light, railing, fence, or protection, and so as to be dangerous to persons lawfully passing along the said highway during the hours of darkness; and the plt., while lawfully passing along the said highway during the hours of darkness, fell into the said hoist-hole, vault, or cellar. whereby, &c.

Plea, not guilty.

The action was tried before Byles, J., at Worcester, when a verdict was found for the plt. for 250l. It appeared from the evidence that the defts., who were merchants in Manchester, had occasion, last February, to have their own warehouse pulled down, and whilst this was being done they agreed with a Mr. Jeffries to allow them for a certain rent to put some of their goods in a part of his warehouse which was in course of erection. The defts.' goods were accordingly placed in the ground-floor of this warehouse, at the back of which was a hoist-hole fourteen inches from a public footpath, not at the time fenced in, but intended to be protected when the warehouse was completed. A short time after the defts. had taken possession, and whilst the warehouse was in the hands of the workmen, the plt., as he was walking along the footpath after dark, slipped into the hole and sustained the injuries for which the present action was brought.

The learned Judge at the trial directed the jury to find for the plt. if they were of opinion that the defts. were in occupation, and that the place was dangerous to persons passing along the highway and they having so found, *Powell, Q. C.* now moved to set aside the verdict, and enter a nonsuit, and contended that the defts. were not liable, first on the ground that they had no control over the premises, except, so far as their own goods were concerned; that they were not bound to fence, and that they had no power to interfere, either with the architect, builder, or those employed by them; secondly, that there was no public nuisance, and that the case was distinguishable from *Barnes v. Ward*, 9 C. B. 392, as there the hole came flush up to the footpath, whereas here it was fourteen inches from it.

ERLE, C. J.—I am of opinion that there should be no rule. The action was brought by the plt. for injuries sustained by him by reason of his falling through a hole which, though not on the highway, was within fourteen inches of it. I think the occupier is liable for that hole, if a passenger passing along the highway is liable by an ordinary accident to be injured by it. The plt. was using the highway when he slipped into this unfenced hole, and I think, according to the case of *Barnes v. Ward*, that the defts. are liable for the nuisance. It is contended on behalf of the defts. that the building was uncompleted, that the landlord put the hole there, and that they (the defts.) had only a temporary occupation during the time that their own warehouse was being built. This, in my opinion, is no defence. As a general rule the party in occupation of the premises is the person to

C. P.]

WIGAN v. STRANGE.

[C. P.]

whom the public must look in the case of a nuisance, although they may have a right to look to some one else.

WILLES, BYLES, and KEATING, JJ. concurred.

Rule refused.

Friday, Nov. 17, 1865.

WIGAN v. STRANGE.

Stage play—6 & 7 Vict. c. 68—Ballet—Music-hall.

*The resp. was charged before a police magistrate under the 6 & 7 Vict. c. 68, with unlawfully having and keeping a house and place of public resort for the public performance of stage plays without authority by letters patent, and without a licence from the Lord Chamberlain.*

*It was proved that the resp. was the occupier of the Alhambra, which is a place of public resort, and is not licensed by the Lord Chamberlain, but is licensed for music and dancing by the county justices, under the 25 Geo. 2, c. 36. What would be a pit in ordinary theatres was there a large space fitted up with tables, at which refreshments are served. There are also balconies and stalls, an orchestra with a full band, a stage and proscenium lighted by foot and side lights, a curtain, wings, and grooves for scenes, with drops and flies, &c. The resp. caused to be represented for the amusement of the public, for which they paid, a ballet, sustained by from sixty to seventy females, who came down through a large opening at the top of a platform painted like rocks, and danced down to the stage; when on the stage they formed into two parties and, each lady being armed with two daggers, charged through each other's ranks, striking right and left in mimic warfare. Several of them then stood over the others in triumph. The première danseuse then performed a pas seul, and the other dancers formed themselves into groups, placing palm leaves so as to represent a flower. All then went through some other evolutions, and the performance concluded. This dagger dance, which was brought out at Drury-lane Theatre, was described as a ballet divertissement, and it was capable of being described so as to enable a copy of the directions to be sent to the Lord Chamberlain. The magistrate dismissed the summons, but stated this case, and the question for the opinion of the court was, whether this performance was legal without the licence of the Lord Chamberlain:*

*Held, by the Court, that the question for the opinion of the court was a question of degree, and more a question of fact than of law, and that they could not say, as a matter of law, that this performance was a stage play.*

*Erle, C. J. was inclined to think, as a matter of fact, that the performance, as described in the case, did not fall within the statute.*

*Willes, Byles, and Keating, JJ. thought otherwise.*

Case stated by a justice under the 20 & 21 Vict. c. 43.

This was a summons under the statute 6 & 7 Vict. c. 68, ss. 2 and 3 (Theatre Act), on a complaint by Horace Wigan against Frederick Strange, that he the said Frederick Strange, on the 20th May 1865, at a certain house and place of public resort called the Royal Alhambra Palace, Leicester-square, in the parish of St. Martin-in-the-Fields, in the county of Middlesex, did unlawfully have and keep the said house and place of public resort for the public performance of stage plays without authority by virtue of letters patent from Her Majesty or any of her predecessors, and without licence from the Lord Chamberlain of Her Majesty's household for the time being.

On the hearing before me, at the Police-court, Great Marlborough-street, on the 22nd June 1865, the following facts were proved:

The Alhambra has an extensive and lofty interior to which, in evenings, the public is admitted on payment at the doors. It is a place of public resort not licensed by the Lord Chamberlain, but is licensed for music and dancing by the county justices under 25 Geo. 2, c. 36. What would be the pit in an acknowledged theatre is there a large space occupied by tables at which refreshments are served. In the place where boxes are in an acknowledged theatre are places resembling private boxes, and balconies with a reserved part like stalls, all which are for the use of spectators. There is an orchestra with a full band of musical performers, a stage and proscenium lighted by foot and side lights, a curtain called a tableau curtain, wings and grooves for scenes composed of many pieces, with drops and flies. There are various platforms so supported and inclined as to enable persons to come down from a considerable height at the back of the building to the stage, and are painted to represent rocks. A cascade of water falls among them from a place thirty feet high on the wings, and the scenes at the back are painted palm trees; the whole representing an oriental landscape with a waterfall among rocks. Sixty to seventy females dressed in the ordinary costume of theatrical ballet dancers came down through a large opening at the top of the platform painted as rocks, and danced down them to the stage. They were not dressed alike, some had gold tissue skirts over white. Those who first descended danced on the stage in a serpentine figure, so as to occupy the whole front of the stage till all had come down. When all were down they defiled to the right and left, four were placed on each side in front of the proscenium with property, namely, sham musical instruments, in their hands supposed to be played by them to the dancers. The dancers began to dance the Pas des Poignards, each lady armed with two daggers, charging through each other's ranks, striking right and left in mimic warfare, then in front as far as the footlights. This performance of the dagger dance ended in several of the females standing over others as if in triumph and retiring when others came forward holding property, namely, sham palm leaves, in their hands, and danced waving them, and formed an avenue as expecting an arrival. Then a lady dancer, who at regular theatres would be called *la première danseuse*, passed down the avenue formed by the other dancers, who retired while she performed a pas seul with gestures. The other dancers then formed groups, placing the palm leaves so as to represent the opening of a flower. Others had property called a pallasade and danced with it so as to represent a basket of flowers. Several more pas seuls having been executed by the *première*, the rest went through other evolutions and the performance concluded. That performance is in the theatrical profession called a ballet divertissement, and could not be presented as such without the stage accessories above described; without them it would be mere rehearsal.

A witness from the Lord Chamberlain's office, called a reader of plays, styled it an entertainment of the stage. A ballet of action has a plot, a ballet divertissement has none, but cannot be performed without pantomimic action and gestures. It is not confined to the steps of the dancers; dancing quadrilles on the stage would be without such gestures. This dagger dance was brought out originally at Drury-lane Theatre, being then danced by Almas in an Egyptian scene as at the Alhambra in an Oriental. A ballet divertissement can be described so as to enable a copy of the directions for it to be sent to the Lord Chamberlain.

C. P.]

WIGAN v. STRANGE.

[C. P.]

according to 6 & 7 Vict. c. 68, s. 12. The ballet of "Ondine," with all its details, has been so described. The Lord Chamberlain has not required copies of the directions of such ballets to be sent in till recently; he has interfered at the Italian Opera, where complaints have been made of the costumes of the female ballet dancers.

On the 11th Jan. 1865, I convicted the deft. on nearly similar evidence, after considering 10 Geo. 2, c. 28, s. 2; 25 Geo. 2, c. 36, s. 2; *Rex v. Handy*, 6 Term Rep. 286; *Gallini v. Laborie*, 5 Term Rep. 242. That conviction was quashed by the Middlesex Quarter Sessions in April 1865. The complainant being dissatisfied with that result, applied for the present summons, on evidence of another performance at the Alhambra, at a later date, which I did not feel competent to refuse, and granted the summons above set forth. After hearing counsel for the deft., I thought it my duty to act in conformity with the decision of the Superior Court, viz., the Quarter Sessions for Middlesex, though entertaining a different opinion from them, and dismissed the summons, but, on request by the complainant, granted him a special case under 20 & 21 Vict. c. 48, for the opinion of this honourable court.

The question for the opinion of this honourable court is, whether the performance above described was legal without the licence of the Lord Chamberlain. If this honourable court shall be of opinion that I ought to have convicted the deft., the parties seek that the summons shall stand, and that this case be remitted to me to make such order as under the guidance of this honourable court shall seem fit. (Signed) R. P. TYRWHITT.

By the 6 & 7 Vict. c. 58, s. 2, it is enacted,

That it shall not be lawful for any person to have or keep any house or other place of public resort for the public performance of stage plays, without authority by letters patent from Her Majesty, her heirs, &c., or without licence from the Lord Chamberlain of Her Majesty's household for the time being, or from the justices of the peace as hereinafter provided; and every person who shall offend against this enactment shall be liable to forfeit such sum as shall be awarded by the court in which, or the justices by whom, he shall be convicted, not exceeding 20*l.* for every day on which such house or place shall have been kept open by him for the purpose aforesaid without legal authority.

By sect. 23 the words "stage play" shall be taken to include any tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, or other entertainment of the stage, or any part thereof.

Serjt. Tindal Atkinson (*Bosanquet* with him) for the app.—The question is, if this performance was legal without the consent of the Lord Chamberlain; and I submit that it was an entertainment of the stage within the meaning of the 6 & 7 Vict. c. 68, s. 2. The note to *Rex v. Neville*, 1 B. & Ad. 489, at p. 497, gives the history of the legislation on this subject. It will be contended on the other side that the resp. was protected by his licence from the magistrates, under the 25 Geo. 2, c. 36; but I say this is not within the purview of that statute, but is strictly a stage representation under the 6 & 7 Vict. c. 68; and I submit that it ranges itself under the head of "pantomime or other stage play." This case is on all fours with *Gallini v. Laborie*, 5 T. R. 242, which was decided in 1793, after the 10 Geo. 2, c. 28, and 25 Geo. 2, c. 36, were passed. That was an action against a foreign dancer who had undertaken to dance at the Italian Opera, or such other place as the plt. should appoint, and the deft. never came; but it appeared that during the time there was no licence from the Chamberlain to the Italian Opera, and Lord Kenyon says: "I think the statute 10 Geo. 2, c. 28, does extend to this and every other species of stage entertainment. The words are general; and the intent of the Legislature manifestly was to put all places of public diversion under the control of the magistracy." This is found by

the magistrate to be a ballet, and one which cannot be performed with effect without stage representations. The case on which my friend will rely is *Rex v. Handy*, 6 T. R. 286. There it was held that tumbling was not an entertainment of the stage within the 10 Geo. 2, c. 28; and *Gallini v. Laborie* is referred to in the arguments, but that case is not in point, as tumbling alone might be exhibited out of doors or in a room as well as on the stage. In *De Begnis v. Armistead*, 10 Bing. 107, *Gallini v. Laborie* was acted on. *Day v. Simpson*, 18 C. B. N. S., 680, differs from the present case in this respect, that there there was a dialogue, but Erle, C. J. says, "it has a curtain, foot lights, drop scene, and wings, living actors on the stage at the commencement, a dialogue, dancing, music and singing, and all seen and heard by the audience." Here we have all those but singing and dialogue, here there were characters on the stage, and their performance was calculated to excite emotions. There is also a case of *Russell v. Smith*, 12 Q. B. 217. I do not lay much stress on those cases, but I use them as illustrations. I say this is a ballet and a dramatic performance, on the authority of *Gallini v. Laborie*. [ERLE, C. J.—There the contract was to perform in a ballet at the Italian Opera; that is assumed all through; and Lord Kenyon seems to have had judicial cognisance that the ballet was a part of the opera.] Then I should ask your Lordships to take judicial cognisance that ballets are now performed at the operas which are no part of the opera itself. (He referred to the definition of ballet in Webster's Dictionary.) This ballet was originally brought out at the Drury-lane Theatre, and I submit that it is essentially a dramatic performance, and comes within the words, "pantomime or other stage play," in the statute.

*Poland* (*Hawkins*, Q. C. with him) for the resp.—The resp. has a licence from the magistrates, under the 25 Geo. 2, c. 36, and the performance under that statute may be dancing, or music, or the two combined, so long as it is not a 'stage play.' It is clear that that statute applies to places where people resort for the purpose of being entertained, and it contemplates that the entertainment shall be provided by the proprietor. In *Clarke v. Searle*, 1 Esp. 25, it was held that the statute applied to houses kept for private dancing, as well as to public places, thereby assuming that it applied to places where hired dancers were kept. It is clear that Lord Kenyon thought that in 1793 it applied to Sadlers Wells, and a place called the Circus, and I find that at that time those places had licences from the magistrates, and people paid to go there to see dancing. In *Guaglieni v. Matthews*, 84 L. J. 116, M. C., it was held that the dancing need not be by the public. In *Gallini v. Laborie*, it was held illegal, because there was neither a licence from the Lord Chamberlain, nor under the 25 Geo. 2. In the 6 & 7 Vict. c. 68, the word "ballet" is omitted, and apparently purposely, as the words "burletta" and "pantomime" are added to the list contained in the old Act. Therefore, we may assume that the Legislature intended the magistrates to have supervision in such a case as this: (*Lee v. Simpson*, 3 C. B. 871.) The word "copy" is used all through the Act, which shows that it was not intended to apply to "ballets," as the word applicable to them would be description. In *Thorne v. Colson*, 3 L. T. Rep. N. S. 697, two persons acted fourteen different parts, and it was attempted to evade the statute by calling it a "dialogue;" but it was clearly a stage play. It is a question of fact in each case whether the performance is a dance or a stage play, and should have been decided by the magistrates; and if the court hold against me, the case ought to be sent back to be decided on appeal to the quarter sessions.

*Atkinson* in reply.

[C. P.]

WIGAN v. STRANGE.

[C. P.]

ERLE, C. J.—This was a proceeding against the resp. for representing a stage play without a Chamberlain's licence, and the magistrate refused to convict, but has stated the facts that were in evidence before him, and has asked my opinion whether, upon those facts, he ought to have convicted, and, if he ought to have convicted, to send the case back to him. Now, after having given to this case the best attention that I can, it appears to me that the question propounded for me is a question of degree; that it is more a question of fact than a question of law; and, as far as I can understand the case, I incline to the opinion—subject to very great doubt whether I can appreciate the scene that was before the audience at the Alhambra—upon the best understanding that I can have from the description by the magistrate, that the decision that he has come to, not to convict, is the right one. But I say it is entirely a question of degree, and where dancing ceases to be lawful and becomes a stage play is a definition that I am not at all prepared to offer. The earlier statutes required a licence for the representation of a stage play, and there were several specifications of what should be a stage play within the meaning of the statute—tragedy, comedy, farce, opera, burletta, melodrama, and so forth, and entertainment of the stage; and they must have a Chamberlain's licence. That is the 10 Geo. 2, c. 28. It appears, in the case before Lord Kenyon, that a doubt arose as to what came within the description that is there mentioned, and the Legislature appears to me to have provided that there should be an agreeable entertainment, for persons who, perhaps, could not afford to attend at the London theatres, at houses of public resort—agreeable entertainments in the shape of music and dancing, provided that the houses of public resort had a magistrates' licence. Now the resp. has, in literal terms, confined his representation to music and dancing, and the great matter contended for on the part of those who applied for a conviction is, whether he added to music and dancing such an approximation to a dramatic performance as made it come within the description of a stage play. I have heard arguments addressed by those who press for the conviction about the great interest of morality in the matter, but as far as I can see there is no interest of morality at stake. It is a question whether the amusements such as the resp. offers at a place of public entertainment upon cheap terms should be allowed to continue, or whether they should be put a stop to, so that the very same species of public entertainment should be permitted at the licensed theatres, where, in point of fact, those who have a licence would have something in the nature of a monopoly. Dancing and music are clearly lawful without the Chamberlain's licence. A stage play is clearly not lawful without the Chamberlain's licence. Then a very minute detail has been given here of women in numbers coming down from rocks and dancing opposite to each other, forming two ranks; and then another woman coming down of a superior order of dancing and dancing alone, and as far as I can see, if there had been nothing more in the matter than that, I could not have said that this dancing had risen out of the sphere of music and dancing, and had gone into the sphere of a stage play. But the magistrate adds to that, that a number of women came down at once with daggers in their hands, and that a number of women came down afterwards with palm leaves in their hands, and that in the course of their dancing movements the one stood over the other and represented a species of triumph. And that comes very nearly to a dramatic performance; very nearly to it. But there is a place where the line must be drawn, and the magistrate has used terms of art which incline

me very much to take the line between what requires a Chamberlain's licence and what is lawful under the magistrates' licence; to what lies between the two terms of art that he has used here. Because he says this is a ballet divertissement in which there is no consecutive train of ideas, but a number of persons, no doubt elegant in shape and agreeable in their action, so that it would be an agreeable entertainment to be performed; that it is a ballet divertissement without any consecutive train of ideas between one part of the performance and another part of the performance, like a number of agreeable scenes unconnected dramatically, but something passes in succession which those who are at the place of entertainment are supposed to be amused by. That is a ballet divertissement. On the other hand, there is a ballet of action in which there is intended to be represented a regular dramatic story beginning at the beginning and performed to the end, and that may give rise to all manner of emotions that are incidental to tragedy, comedy, farce, or the like, accompanied at the same time by elegance of form and elegant movements, and other matters that are incidental to ballet. I am inclined to say that I could not in the least pretend to have a decided opinion from the description of this representation given by the learned magistrate, for whom I entertain the highest respect, and whom I wish to speak of with the highest possible respect; but if I am called on to say as a matter of law that this which you describe as a ballet divertissement, and not coming up to the degree of a ballet of action, is a stage play, I am unable to affirm that as a matter of law. That is the point at which I stop—I cannot say that I certainly consider that this performance at the Alhambra was a stage play—I could not pretend to have a confident opinion upon it. If I had gone and seen it, or if I had had a graphic description given me by the witnesses, it is very possible that I might have come to the conclusion that the party ought to have been convicted on the facts; but stated as they are stated here, I cannot say from this description that the point of degree at which music and dancing become a stage play has been passed by the resp. against whom this application has been made.

WILLES, J.—I am of the same opinion in the result of our judgment. Certainly, when the difficulty is put of deciding whether any representation, which is not actually a play or a pantomime, such as one has seen upon the stage and recognises at once, is of a dramatic character, and falls within the Act, it is impossible to tell whether it be or not without seeing it; I own I am unable to get over that difficulty to this extent, that I am unable to say judicially, upon any description short of a natural definition of something which I know must be an entertainment of the stage, that the thing so described is an entertainment of the stage. But I own that, reading the facts stated in this case, my first impression was that those facts did state a representation of the stage. But upon hearing the reasons which have been advanced by my Lord, I am disposed to think that the conclusion at which I had arrived was rather a conclusion of fact than a conclusion of law. I own my impression of the facts was, that the first judgment of the magistrate was a correct judgment, that this is an entertainment of the stage; but not now holding that opinion, for the reasons I have heard, as an opinion in point of law, I cannot say that the case ought to go back to the magistrate to convict. On reading these sections one quite perceives the justice of the remark made by Mr. Russell during the argument of the case in the 6 Term Rep., that we are dealing with



[C. P.]

WIGAN v. STRANGE.

[C. P.]

an entertainment on the stage and of the stage. The force of that remark is quite obvious, because we know that some of the representations on the stage are of the highest order of genius, whilst others are appertaining rather to what may be represented in a booth at a fair. If so, you must at once see that you cannot construe the section by looking at what is ordinarily represented on the stage. In our time there have been seen upon the stage of a theatre of the highest character the performance of Paganini, and Van Amburgh and his lions. It is impossible, therefore, to construe this section by ascertaining whether the ballet divertissement, the sort of thing described in this case, was as a matter of fact represented ordinarily or occasionally upon the stage at the time when the 6 & 7 Vict. passed, and then come to the conclusion that the words "other entertainment of the stage" must necessarily include that, because it was represented on the stage. I think those words, "other entertainment of the stage," must be construed with reference to the previous words as including only entertainments of the same kind as those which are specified expressly before those words—"tragedy, comedy, farce, opera, play, interlude, melodrama, pantomime"—as extending only to entertainments of a dramatic character. No doubt a ballet represented by dancing and other action, a connected story, would properly be called an entertainment of the stage: that is, a ballet which represents a story, and which is of a dramatic character, although there was no speaking. On the other hand, a mere dance on the stage might not do so. You might instance the case, in dealing with this subject, in which a statue may be represented by the human figure, such as one has seen represented for the amusement of the public in recent times. That might be put as a case in which there was nothing dramatic—something statuesque, not dramatic, no story; a representation put on the stage, but no story. On the other hand, you might put the case of the Tarantula, where a story was actually represented on the stage, an incident suggested, and various emotions which flowed from it, and the result of that exhibited by action. As at present advised, I should have thought that was an entertainment of the stage, because there was a connected story; whether that be a conclusion of law or of fact, I do not pause to inquire. Dealing with this case by the light of these illustrations, which are the nearest that I can bring to bear upon it, I think the reasons which would induce me to come to the conclusion that this was in fact an entertainment of the stage would be these—that there are not merely the accessories of the stage, but that there are persons who represent, or may be taken to represent, a combat, followed by a triumph, and then a reconciliation under some supposed superior influence, represented by the great performer who is introduced while the previous representation is being gone through. On the other hand, it may be that a person looking at this entertainment as actually represented on the stage would treat what passed before the *première danseuse* came on and performed hers, which was the principal part, as mere fringe—only an accessory to her coming on and dancing, so that the principal character of the entertainment was not dramatic. I should conceive that this is so—that therefore it may well be treated as a question of degree whether the representation is of a dramatic kind so as to come within the description of an entertainment of the stage. For these reasons, though speaking, as it is hardly necessary for me to say, with profound deference to the impression of my Lord on the question of fact, I own I should rather have adopted the impression of the magistrate upon the question of fact; but on the question of law as to how this case ought to be

now disposed of, I concur in the judgment of my Lord.

BYLES, J.—I agree with my Lord that this must be a question of degree. It is extremely difficult to draw the line; nevertheless, I cannot but give my opinion, unless I state where it seems to me the line ought to be drawn. I conceive that any of the ordinary dances represented in public would not be within the statute, that is, dancing as regarded under the music licence, not the licence of the Lord Chamberlain. But whenever there is a representation on the stage by dumb show the statute uses the word "pantomime;" whenever there is represented on the stage the events or actions of human life, that, I apprehend, does fall within the statute, and not the less within the statute because the actors perform while they are dancing. Now, in this case there is represented a descent from rocks; there is a cascade; there are persons who file or form on the stage; there is a success, as my brother has pointed out, a triumph, and if anything else was necessary, there are all the theatrical accessories. I own as a question of fact if I had to draw an inference I should have thought that this did fall within a stage play. But the court are of opinion that it is not a matter of law, and I do not say that I can dissent from them on that matter; but the conclusion which the magistrate drew in the first instance, I am bound to say if I had been sitting in his place I should myself have drawn.

KEATING, J.—I agree with the rest of the court in the conclusion at which we have arrived, that this is in truth a question of degree, and resolves itself ultimately into a question of fact. I entirely agree with my Lord in his statement of the difficulty that exists in drawing the line between public music and dancing and a dramatic representation. It is not necessary to the conclusion at which we arrive that we should draw the line; but, inasmuch as the other members of the court have given their opinion on which side of the line the present case would range itself, I am obliged to say that, if I were bound to form an opinion and pronounce a judgment as to which side of the line the facts so clearly stated by the magistrate bring the present case, I should have thought that it did come within the statute, and that it was a dramatic representation. The reasons for that have been already pointed out by my brothers Willes and Byles very clearly, and in those reasons, with the greatest possible deference, even on a question of fact, to the opinion expressed by my Lord, I entirely concur. It seems to me that here was a representation by pantomimic gesture of events upon the stage—short, it is true, and few in number, but still amounting to what I should have called a dramatic representation, namely, the triumph of peace over war. For these reasons I should, if obliged to give an opinion, have taken the same view of the question of fact as taken by my learned brethren; but I quite agree with my Lord that this is a question of degree, and thereby resolves itself into a question of fact, and prevents our sending it back to the magistrate for his decision.

*Judgment for the resp.*

Attorney for the app., *H. T. Roberts.*

Attorney for the resp., *G. Lawrence.*

[Ex.]

LOWE v. HORWARTH.

[Ex.]

## COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Monday, Nov. 13, 1865.

LOWE v. HORWARTH.

*Conviction for assault—Imprisonment with fine under sect. 74 of 24 & 25 Vict. c. 100—Subsequent action for damages for the same assault—Conviction, imprisonment, and fine pleaded in answer—Demurrer.*

*The conviction of deft. on an indictment for unlawfully wounding, and his being sentenced therefor to a term of imprisonment, and to pay a sum of money to plt., the prosecutor of the indictment, for his necessary costs of the prosecution, and a moderate allowance for his loss of time, pursuant to sect. 74 of 24 & 25 Vict. c. 100, form no bar to the plt.'s subsequently suing the deft. in a civil action for the same assault, and recovering damages for his bodily suffering and medical expenses occasioned thereby; and a plea setting up such conviction, imprisonment, and payment of a fine is bad on demurrer, and no answer to such action:*

*So held by the Ex. in the above case.*

This was a demurrer to a plea.

At the Manchester Summer Assizes 1864, deft. was indicted for, and convicted of, unlawfully wounding the plt., the prosecutor of the said indictment, and was thereupon sentenced by the learned commissioner (Aspinall, Q. C.), before whom he was tried, to four months' imprisonment with hard labour, and he was also ordered and adjudged, under the provisions of sect. 74 of the 24 & 25 Vict. c. 100, to pay to plt., the prosecutor, 26*l.* 17*s.* 4*d.*, plt.'s actual and necessary costs of the said prosecution, together with the further sum of 15*l.*, being "such a moderate allowance for plt.'s loss of time as the court had, upon inquiry, ascertained to be reasonable," with the further sentence of three months' additional imprisonment in case the same several sums should not be sooner paid. The deft. underwent his term of four months' imprisonment, and, failing at the end thereof to pay the above-mentioned sums, he remained in prison for the additional term of three months also; and the said sums were levied upon his goods by virtue of a warrant under the hand and seal of the said commissioner, in pursuance of sect. 75 of the above-mentioned Act, and the amount thereof was paid over to the plt., as the prosecutor of the indictment.

Under these circumstances the prosecutor, the now plt., brought the present action against the deft., to recover damages for the above-mentioned assault and battery, alleging in his declaration as special damage that he was, by means of such assault, &c., prevented following his usual occupation and gaining his livelihood, and was permanently injured and disabled from so doing, and had been forced to, and did necessarily, incur and pay a large sum of money in and about being cured of the wounds, &c.; and he claimed 500*l.* damages.

Plea 2:

That after the committing, &c., and after the 24 & 25 Vict. c. 100, deft. was in due form of law indicted and tried, together with one J. H., for the trespasses in the declaration mentioned at the general sessions, &c. (the summer assizes at Manchester in 1864 before Cockburn, C. J., and others assigned, &c.), and was at the same session, together with the said J. H., duly convicted of the trespasses, &c., and deft. was sentenced by the court there for his said offence to be imprisoned and kept to hard labour, &c., for the term of four calendar months; and it was ordered, &c., that, in addition to the said sentence, the deft. should pay to plt. (the plt. being the prosecutor of the said indictment) 26*l.* 17*s.* 4*d.*, being his actual and necessary costs and expenses of the said prosecution, together with the further sum of 15*l.*, being (with a certain sum of 10*l.* ordered to be paid to plt. by the said J. H.) such a moderate allowance for the loss of time of plt. as the said court there had, upon inquiry and examination ascertained to be reasonable. And it was further ordered, &c., that unless the

said several sums of 26*l.* 17*s.* 4*d.* and 15*l.*, so awarded, &c., should be sooner paid, deft. should be imprisoned in, &c., for three months, in addition to the said term of imprisonment to which he has been so sentenced, as aforesaid, for his said offence. And deft. says that afterwards H. M. Richardson and Brandwood, being the attorneys of and for plt. duly authorised by plt. in that behalf, signed and served the deft. with a notice in the words and figures following (the plea here set out *verbatim* a demand for immediate payment of the said 26*l.* 17*s.* 4*d.* and 15*l.*, so adjudged to be paid by deft. to plt. as aforesaid, and a notice that in default of payment the same would be levied upon deft.'s goods under sect. 75 of 24 & 25 Vict. c. 100). And deft. says that the said sum of 26*l.* 17*s.* 4*d.* and 15*l.* were not paid according to the requisition of the said order, and therefore the said J. B. Aspinall, Esq., barrister-at-law, one of the said commissioners, &c., and before whom as such commissioner deft. was so convicted, made his warrant under his hand and seal in these words (the plea here set out *verbatim* the warrant, whereby after reciting the conviction of deft. under the above-named indictment, and his being sentenced to imprisonment and adjudged to pay to plt. the prosecutor, &c., 26*l.* 17*s.* 4*d.* for costs and the further sum of 15*l.* for his loss of time, &c., with three months' further imprisonment in case of default in such payment, the said commissioner did order the sheriff of the said County Palatine of Lancaster to levy the said several sums of 26*l.* 17*s.* 4*d.* and 15*l.* by distress and sale of the goods, &c., of the deft.)

## Averments:

That the said commissioner then set his hand and seal to the said warrant and delivered the same to the said sheriff. That afterwards and before suit the sheriff, pursuant thereto, levied the said sums, and deft. paid the same to plt. together with the costs of execution; that after the said sentence deft. was, in pursuance and execution of the said sentence, imprisoned and kept to hard labour in the said house of correction, &c., for the said period of four calendar months and three calendar months respectively.

Demurrer, and joinder in demurrer to the said plea.

Plt.'s points:—1. That the conviction and imprisonment of deft., and the costs and fine paid by him, only expiated his offence against the public peace. 2. That the fine inflicted and paid was, as required by the statute 24 & 25 Vict. c. 100, ss. 74, 75, only "a moderate allowance for the loss of time" by the plt., and not for his suffering, permanent disability, and expenses. 3. That it was not the intention of the said statute to deprive a prosecutor, under similar circumstances, of his civil remedy.

Deft.'s points: 1.—That the offences described in the declaration are not remediable by action. 2. That, assuming them to be remediable, nevertheless the causes of action in respect of them have been extinguished by the facts set forth in the plea.

The 24 & 25 Vict. c. 100, s. 74, enacts that

Where any person shall be convicted on any indictment of any assault, whether with or without any battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry or examination, ascertain to be reasonable; and, unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence.

## Sect. 75:

The court may, by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor; and that the surplus, if any, arising from such sale shall be paid to the owner; and in case such sum shall be so levied, the imprisonment awarded until payment of such sum shall thereupon cease.

C. H. Hopwood, for plt., supported the demurrer, contending that the matters disclosed in the plea constituted no bar to the action, and were no satisfaction of plt.'s claim. No doubt the jury, in estimating damages, might take plt.'s receipt of the 15*l.* into account, but, inasmuch as by the express terms of the statute it was paid for his loss of time, as prosecutor of the indictment, it was still open to him to sue deft. civilly in respect of his bodily suffering and permanent injury, and his medical expenses. [BRAMWELL, B.—Surely this plea is a novelty? Is a man to be assaulted and suffer great

ARCHES.]

EDWARDS AND MANN v. HATTON—EDWARDS v. MARTIN.

[V. C. S.]

bodily injury, and then, because the party committing the assault is prosecuted criminally, is the injured man not to bring an action for damages? POLLOCK, C. B.—Is there any authority to show that this plea is an answer to the action? (He was here stopped.)

Gray, Q. C., for deft., in support of the plea.—If the “loss of time,” for which the 15*l*. was paid to plt., meant his loss of time in consequence of the assault, and not his loss of time in prosecuting, then it might be said that he was estopped in his present action. But having regard to the terms of the statute and the sentence, he was bound to confess that he could not support the plea.

The Court (Pollock, C. B., Bramwell, Channell, and Pigott, BB.) held the plea to be bad, and gave judgment for plt. in favour of the demurrer.

*Judgment for plt.*

Attorneys for plt., Chester and Urganhart, Staple-inn, agents for H. M. Richardson and Brandwood, Bolton.

Attorneys for deft., Clarke, Woodcock, and Rylund, Lincoln's-inn-fields.

### COURT OF ARCHES.

(CANTERBURY.)

Reported by Dr. SWABEY, of Doctors'-commons.

Friday, June 16, 1865.

(Before the Right Hon. STEPHEN LUSHINGTON, D.C.L., Dean.)

EDWARDS AND MANN v. HATTON.

Church-rate—Mode of taking evidence—17 & 18 Vict. c. 47.

*An application made by either party under the above Act to take evidence vivâ voce will be granted unless the party opposing such application can show sufficient reason why it should not.*

This was a point of practice arising in a suit for subtraction of church-rate. For an earlier stage of the case see *ante*, p. 289.

The chief question raised on the pleadings was the equality of the assessment; the deft.'s allegation specified 146 properties said to be unfairly assessed.

Dr. Swabey, for the plts., now moved the court to order the evidence to be taken *vivâ voce*.—The 17 & 18 Vict. c. 47 enacts, “That in any suit or proceeding depending in any Ecclesiastical Court in England or Wales, the court, if it shall think fit, may summon before it and examine, or cause to be examined, witnesses by word of mouth, and either before or after examination by deposition or affidavit, &c.” It is submitted that both the court and the parties will be gainers by adopting this method. The court will more readily judge of the value of conflicting evidence, and will have the opportunity of questioning witnesses itself. The parties will have the benefit of the cross-examination of the witnesses, and will probably avoid the great expense caused by taking and reducing the depositions into writing in the country.

Dr. Deane, Q.C., for the deft., opposed the motion.—These cases, turning on valuation, are really questions of accounts. If such a case came on at Nisi Prius, it would be referred. A number of witnesses must be brought to and kept in town if the case is to be heard *vivâ voce*, and it is difficult to see how expense can be saved by that.

Dr. Lushington.—The question is properly this, whether the party whom Dr. Deane represents has shown sufficient reason why the evidence should not be taken *vivâ voce*. I am of opinion he has not. I think the court will be much better able to deal with such a case on *vivâ voce* evidence. In the *Tamworth* case a few questions put to some of the witnesses might have guided me to a conclusion in much shorter time than I was forced to take to arrive at it. As to expense, as long as the law on the point remains what it is, I am afraid a large expense is unavoidable.

Moore and Currey, proctors for plts.

Crosses for deft.

### V. C. STUART'S COURT.

Reported by EDWARD WIDDELOW, Esq., Barrister-at-Law.

Monday, Nov. 6, 1865.

EDWARDS v. MARTIN.

*Bankruptcy—Reputed ownership—Order and disposition—Notice of assignment of policies of insurance.*

*From the evidence of a secretary of an insurance company, it appeared that the assurer, prior to his bankruptcy, happening to call at the office of the company respecting the payment of a premium, told the secretary casually, in the course of conversation, that the policy was deposited with his bankers, as in fact it was, though no notice was ever sent to the company; and the secretary made no memorandum of the statement, as he said he should have done if he had regarded it as notice of a dealing with the policy:*

*Held, that this was not sufficient evidence of notice to the company to give validity to the deposit as an equitable assignment by way of mortgage as against the assignees in bankruptcy.*

The question in this case was as to the right of the plts., the assignees in bankruptcy of the late Mr. John Glenn, as against the defts., Messrs. Martin and Co., bankers, of Lombard-street, to the proceeds of two policies of assurance which had been effected by Mr. Glenn on his own life.

The facts of the case were as follows:

In 1853 Glenn deposited with the defts. the policies in question for the purpose of securing a debt then due to them. No memorandum in writing accompanied the deposit, and no formal notice was given to the insurance companies of such deposit. In Nov. 1855 Glenn was adjudicated a bankrupt, and in Nov. 1862 he died.

Mr. Francis, the secretary of one of the companies, a witness on the part of the plts., deposed that the prospectuses issued by the company contained an announcement that notices of the assignment of policies would be registered, and, when required, duly acknowledged; and that although generally written notices of any assignment or dealing with the policy were given, yet if verbal notice only were given, the particulars of such verbal notice would be entered in the book, but information acquired casually, respecting any dealing with a policy, in the course of conversation would not be so entered. Previously to Mr. Glenn's bankruptcy no notice of any assignment of the policy appeared in the book, and to deponent's knowledge and belief no written notice had been given. Deponent, however, recollected, that on Mr. Glenn calling in the year 1853 to take up a dishonoured cheque which had been given in payment of a premium, Mr. Glenn in reply to a remark of deponent's, that to preserve the policy the premium must be paid at once, said that “the policy was in fact held by

V.C. S.]

REG. v. THE GUARDIANS OF THE HASTINGS POOR-LAW UNION.

[Q. B.]

Messrs. Martin." This statement was merely a casual one made in the course of general conversation, and deponent made no memorandum of it, nor did he enter any particulars of it in the books of the company, as he should have done, and as it would have been his duty to have done, if he had regarded it as notice of a dealing with the policy.

Mr. Stevens, defts.' solicitor, deposed that, in Jan. 1861, Mr. Glenn stated in his (Stevens's) presence, that he (Glenn) had before his bankruptcy given the insurance companies notice of the deposit of the policies with the defts.

Since the bankruptcy of Glenn the defts. had paid the premiums on the policies; and since his death the policy moneys had been recovered, and were now standing in the joint names of one of the plts. and one of the defts. as stakeholders.

Bacon, Q. C. and Swanston, for the plts., argued that no sufficient notices had been given to the companies, and consequently that the policies were still in the order and disposition of the bankrupt. They cited

*Ex parte Hennessy*, 1 Con. & L. 559; and 2 Drew. & War. 551;

*Ex parte Arkwright*, 8 M. D. & D. 129;

*Ex parte Ellis*, 1 Atk. 101;

*Ex parte Carbis*, 4 Dea. & C. 854.

The evidence as to notice merely went to alleged conversations, and that was not enough to take the policies out of the bankrupt's order and disposition. It was essential that the notices should be shown to have been given to the insurance offices, and this had not been done. They also cited *Smith v. Smith*, 2 Cro. & M. 231; and see further the cases collected at Shelford on Bankruptcy, 279-281.

Greene, Q. C. and T. Stevens for the defts.—The notices which had been given to the secretaries of the companies were sufficient. The onus of the proving that notice was given to the office before the bankruptcy lies on the plt.: (*Ex parte Re Stevens*, 4 Dea. & C. 117.) Even without notice it has been held that a deposit of a policy with bankers before the bankruptcy for moneys already advanced is sufficient to disentitle the assignees to recover in trover, on the ground that it is not in the order and disposition of the bankrupt, with the consent of the true owner: (*Gibson v. Overbury*, 7 M. & W. 555.) But here actual knowledge of the assignment of the policies had been conveyed to officers of the companies, and the object with which that information had been given was immaterial. They cited

*Ex parte Dignold*, 8 M. & A. 477;

*Ex parte Stright*, M. 502; 2 Dea. & C. 314;

*Gale v. Lewis*, 16 L. J. 119, Q. B.;

*Ex parte Barnett*, 1 De G. 194.

The VICE-CHANCELLOR.—The only question is, whether sufficient notice has been given to the insurance companies of the deposit, and I am of opinion that there is no evidence of any sufficient notice. It is quite plain upon the authorities cited that the title to the policies, under the circumstances of this case, is in the assignees in bankruptcy of Glenn. The defts. will be entitled to be repaid the premiums paid by them, with interest at 5 per cent., and subject to that deduction and the payment of the costs of the suit, as agreed upon between the parties, out of the proceeds of the policies, the residue of these proceeds will be payable to the plts.

Solicitors for the plts., Chilton and Co.; for the defts., Charles Stevens.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Nov. 8 and 20, 1865.

REG. v. THE GUARDIANS OF THE HASTINGS  
POOR-LAW UNION.

Order of removal—Settlement by renting a tenement—  
Hiring for a year under the 6 Geo. 4, c. 57.

Though a tenancy is terminable by a notice to quit within a year, yet if the terms of the hiring are such as to show that the parties contemplated that the tenancy would, unless the notice was given, endure for a year or more, and it does endure for a year, it will be sufficient (so far as the length of tenancy is concerned) to confer a settlement under the 6 Geo. 4, c. 57.

W. W., by written agreement, agreed to let to J. H. a certain house "quarterly, at a yearly rent of 25l., to be paid on the 29th Sept., 25th Dec., 25th March, and 24th June; taxes to be paid by tenant; to be left in tenantable repair. A quarter's notice to be given by either party." The tenant occupied under this agreement for six years:

Held, that he gained a settlement under the 6 Geo. 4, c. 57.

This was a case stated under the 12 & 13 Vict. c. 43, for the opinion of the court as to whether the pauper lunatic, John Hagel, had acquired a settlement by renting a tenement. It appeared he had rented a house for the period of six years under the following agreement:

An agreement between William Wellard and John Hazel. William Wellard agrees to let, and John Hazel agrees to hire, the house No. 62, George-street, quarterly, at a yearly rent of 25l., to be paid on the 29th Sept., 25th December, 25th March, and 24th June; taxes to be paid by tenant; to be left in tenantable repair. A quarter's notice to be given by either party.

Hastings, 26th July 1865.

By the 6 Geo. 4, c. 57, s. 2 (which is the statute applicable to this point), it is enacted, that

No person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of settling upon, renting, or paying parochial rates for any tenement not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house, or building, or of land, *bona fide* rented by such person in such parish or township at and for the sum of 10l. a-year at the least for the term of one whole year; nor unless such house, or building, or land shall be occupied under such yearly living; and the rent for the same to the amount of 10l. actually paid for the term of one whole year at the least.

Poland now appeared in support of the order of removal, and contended that the renting was for the term of one year, and that the term "quarterly," as used in the agreement, must be taken with reference to the whole agreement, for that the mentioning of the four quarterly days of payment shows that it was contemplated that the tenancy should endure for a year at least; that the parties clearly contemplated a hiring for a year defeasible by a quarter's notice:

*R. v. St. Giles's, Cripplegate*, 4 Beas & Sm. 509.

Hurst, for the apps., argued that the use of the word "quarterly" clearly indicated that it was not a yearly hiring; that the mention of the four quarterly days throughout the year only indicated when the rent was payable if the tenancy continued, but did not make the hiring a yearly one. If this had been a yearly hiring the notice to quit should expire at the end of the year; but here a quarter's notice may be given at any time, and he may have gone out in fact before the end of the first year. BLACKBURN, J.—The case of *Re v. Herstonneauz*, 7 B. & C. 551, where the rent was to be paid weekly and either party to be at liberty to determine the tenancy by a quarter's notice from any quarter-day,

Q. B.]

REG. v THE GUARDIANS OF THE HASTINGS POOR-LAW UNION.

[Q. B.]

is against you, for there it was held that a settlement was gained by renting a tenement for a year.] In that case no precise time of holding was stated, and therefore it was considered to be a holding for a year; but in the present case the holding is expressly stated to be a quarterly holding:

*Wilson v. Abbott*, 3 B. & C. 88;

*R. v. Warminster*, 6 B. & C. 77.

Poland, in reply, referred to

*The Overseers of Willesdon v. The Overseers of Paddington*, 3 Best & Sm. 593.

*Cur. adv. vult.*

Nov. 20.—COCKBURN, C. J.—In this case the question is, whether John Hazel, a pauper, had acquired a settlement in St. Clement's, Hastings, by renting a tenement for the term of one whole year within the meaning of the statute 6 Geo. 4, c. 57. The pauper actually occupied the premises for six years, under an agreement in the following terms: "Wm. Wellerd agrees to let, and John Hazel agrees to hire, the house, No. 62, George-street, quarterly, at a yearly rent of 25*l.*, to be paid on the 29th Sept., 25th Dec., 25th March, and the 24th June. Taxes to be paid by tenant, to be left in tenantable repair. A quarter's notice to be given by either party." The language of the agreement, speaking as it does of a yearly rent, and mentioning the four quarter-days, shows that the parties contemplated that the tenancy would probably continue for a year, but it was in the power of either party to put an end to the tenancy by a quarter's notice, and we think that the use of the word "quarterly" shows that it was intended that the notice might terminate at the end of any quarter, so that it was at the option of either party, by giving a proper notice, to terminate the tenancy before the end of the year. If we were now for the first time construing the statute 6 Geo. 4, c. 57, we should not be disposed to hold that this was a hiring for a whole year, as there is great force in the argument that the true construction of the statute is, that the tenancy must be such as must endure for a whole year; but in *Rex v. Herstonceaux*, 7 B. & C. 551, though it was justly contended in the argument that such was the true construction, Littledale, J. decided, after taking time to consider, that "a taking at twenty guineas a-year, the rent to be paid weekly, and either party to be at liberty to give three months' notice from any quarter-day, and at the expiration thereof to determine the tenancy, was a taking for a year, unless within the year notice should be given, and that notice not having been given, the occupation was under a letting for a whole year within the meaning of stat. 6 Geo. 4, c. 57." This case was followed by the court in *The Overseers of Willesdon v. The Overseers of Paddington*, 3 B. & S. 593. In that case there was an obscurely worded agreement: Wightman, J., in his judgment, states its effect to be "a demise for three months certain from the 25th Dec. 1859, but that, if the parties should go on as landlord and tenant after that time, it should be a yearly tenancy at the rate of 18*l.* a-year, payable monthly, and determinable by giving three months' notice, which" Wightman, J. thought "might be given at any time, and need not be a notice expiring at any particular time." "Then," said he, "the pauper having occupied for more than a year, has rented a tenement for the term of one whole year within the meaning of stat. 6 Geo. 4, c. 57." Crompton, J. seems to have inclined to think that the construction of the agreement was that the notice to quit must expire at the end of the year (on which reading of the agreement the present question could not arise.) But he expresses no dissent from the view of Wightman, J., and no disapprobation of *Rex v.*

*Herstonceaux*. In *Rex v. St. Giles's, Cripplegate*, 4 B. & S. 509, the case of *Rex v. Herstonceaux* was again followed. There the letting was of a house from the 25th March 1858, at the monthly rent of 1*l.* 1*s.* 8*d.* ... "one month's notice to expire either on the 25th March, 25th June, 25th Sept., or 25th Dec., shall be a good and sufficient notice on either side" for the tenant to deliver up possession. Though the rent was expressed to be monthly, it was clear from the agreement as to the notice to quit that the tenancy was intended to be more than a monthly one. The Court say: "To what other conclusion can we come than that it was a hiring of the tenant indefinite as to duration, but terminable at a month's notice on either side on any of the specified quarterly days, and the house having been actually occupied under that hiring for upwards of two years, it appears to us to have been an occupation under a hiring for a whole year." No case was cited, nor are we aware of any, in which the authority of *Rex v. Herstonceaux* has been questioned, and on this state of the authorities we feel ourselves bound to hold, that though a tenancy is terminable by a notice to quit within a year, yet, if the terms of the hiring are such as to show that the parties contemplated that the tenancy would, unless the notice was given, endure for a year or more, and it does endure for a year, it will be sufficient to confer a settlement. We do not intend to decide that a weekly tenant at a weekly rent, who, by payment of rent, becomes a tenant from week to week so long as both landlord and tenant please, gains a settlement at the end of fifty-two weeks, as having held under a letting for a whole year. We think that the decisions only apply to cases where it appears, from the terms of the letting, that the parties contemplated originally that the holding would endure for a year, though it might be put an end to before the expiration of the year. In the present case, indeed, the parties say that the house is to be let "quarterly," and if the agreement stopped there, the inference would be, that they did not contemplate that the holding would continue for a whole year; but they proceeded to say, that it shall be at a yearly rent, payable on the four usual quarter-days. This seems to us to show quite as strongly as anything in the agreements in *Rex v. Herstonceaux*; *Willesdon v. Paddington*, and *R. v. St. Giles's, Cripplegate*, that it was contemplated by the parties that the holding would continue for a year or more, though it might be put an end to before the expiration of a year, and the word "quarterly" will, we think, have sufficient effect given to it by using it to show that it was intended that the quarter's notice might terminate at the end of any quarter without giving it the effect of nullifying these expressions. Had the word "quarterly" been omitted, and the words "ending on any quarter-day" been inserted at the end of the agreement, the effect of the agreement would have been precisely the same, both as to the continuance of the holding, and the mode in which it was to be determined. The case would have then been identical with *Rex v. Herstonceaux*, and we think that we ought not to make a nice distinction between the effect of agreements according to their words, when the intention of the parties, as expressed by the words used, and the legal effect of the agreements, are identical. It is important that points arising upon settlement law, when once determined, should not be again disturbed, except on most cogent grounds, and we should therefore not feel justified in overruling the three cases already decided on this subject, although we may doubt the correctness of the original decision. The order should therefore be affirmed.

Order affirmed.

Q. B.]

REG. on the the prosecution of HUGHES v. THE OVERSEERS OF BILSTON.

[Q. B.]

Saturday, Nov. 11, 1865.

SAUNDERS (app.) v. BALDY (resp.)

*Game*—Using an instrument for the purpose of taking game without a certificate—Close time—Penalty—1 & 2 Will. 4, c. 32, s. 23.

Upon an information under sect. 23 of the 1 & 2 Will. 4, c. 32 (Game Act), for using an instrument for the purpose of taking game (pheasants) without a game certificate, it is no answer to the information that the act was committed in "close time" (13th March), when, if the deft. had possessed a game certificate, it would not have availed him to have taken game.

The penalty imposed by sect. 23 has no reference to any particular time of the year, but applies to the offence described if committed at any time of the year.

This was a case stated by certain justices acting for the division of Hailsham, Sussex (under the 20 & 21 Vict. c. 43), upon a dismissal by them of an information against the resp. under sect. 23 of the 1 & 2 Will. 4, c. 32 (the Game Act.) That section enacts that,

If any person shall take or kill any game, or use any dog, gun, net, or other engine or instrument for the purpose of searching for, or killing, or taking game, such person not being authorised so to do for want of a game certificate, he shall, on conviction thereof before two justices of the peace, forfeit and pay for every such offence such sum of money, not exceeding five pounds, as to the said justices shall seem meet, &c.

The 3rd section also provides a penalty for killing game out of season, which period, in case of pheasants, extends from the 1st Feb. to the 1st Oct.

At the hearing it was proved that on the 13th March last the resp., who had no certificate, set a trap with barley scattered around it in a plantation belonging to Sir Charles William Blunt, Bart., where there were pheasants, with the purpose of catching some of them. The justices, however, were of opinion that as at such season no game certificate would have been a protection, so it was no offence under the statute to use an engine at such a time for the purpose of taking game without a certificate, and therefore they dismissed the information.

HANNA now appeared for the app. (the informant), and contended that the justices were wrong, for that, irrespective of the season, no one had a right at any time to search for game without a certificate; that the 3rd section would not apply to the case, inasmuch as no game was actually killed, and that the object of the 23rd section was the protection of the revenue, and had no reference to any particular time of the year; that the two sections refer to two distinct offences, the 3rd to killing game during the "close time," and the 23rd to taking or searching for game at any time without a certificate. He was stopped by

COCKBURN, C. J.—That is clearly so. The object of the one section is the protection of the game, and that of the other the protection of the revenue. To constitute an offence under the first section the game must be actually killed; but under the other section it was committed if the instrument was merely used for the purpose by an uncertificated person, whether any game were killed or not.

LUSH, J.—I am of the same opinion. The two enactments are quite distinct and for different objects, and the penalties are cumulative. Both offences may be committed, and both penalties may be incurred.

*The case to be remitted to the justices with the opinion of the court.*

Wednesday, Nov. 15, 1865.

REG. on the prosecution of HUGHES (app.) v. THE OVERSEERS OF BILSTON (resps.)

*Parochial assessment*—Poor-rate—Deduction for water supply—Net annual value.

Water was supplied to houses by town commissioners at certain rates, and it was matter of arrangement whether the water was supplied to the landlords or tenants; but it was entirely optional with the owners or occupiers to refuse to be supplied by the commissioners:

*Held*, that the sum paid for water, even though by the landlord, was not an item for deduction in estimating the net annual value under the Parochial Assessment Act.

This was an appeal against a poor-rate of the parish of Bilston of the 24th May 1864.

The following is an extract from the rate-book of the assessment which was the subject of this appeal:

No.	Name of Occupier.	Name of Owner.	Description of Property rated.	Name and Situation of Property.	Gross estimated Rental.	Rateable Value.
3781	Isaac Hughes.	Richard Dodd and John Southam.	House.	New Village.	£ s. d. 11 5 0	£ s. d. 9 0 0

The appeal was heard at the Staffordshire Epiphany Quarter Sessions 1865, and the court found that the gross estimated rental was 9l. 2s., and that to arrive at the net rateable value the app. was entitled to a deduction of the following sums as yearly outgoings which the overseers ought to allow under sect. 1 of the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, viz.:

Repairs and insurance at one-sixth of rental	£1 18 4
Poor rates .....	1 8 8
Sewers rates .....	0 4 5
Highway rate .....	0 3 4
Town improvement rate .....	0 8 10
Water rate .....	0 11 4

£4 13 11

In accordance with such finding the Court reduced the gross estimated rental to 9l. 2s., and the net rateable value to 4l. 9s. 1d., subject, as to the last of the above deductions of 11s. 4d. for water rate, to the opinion of the Court of Q. B. upon the following case:

The township of Bilston is supplied with water partly from pumps and partly from works by the Dudley Waterworks Company, under an Act 4 Will. 4, c. 42, and it was entirely in the option of owners or occupiers to accept or refuse the water supplied under that Act.

By the Bilston Improvement Act 1850 (13 & 14 Vict. c. 96), the Bilston Commissioners have power to purchase the works of the Dudley Waterworks Company within Bilston, and to hold the works so purchased in the same manner and with the same powers in all respects as if the same had been made, constructed, or purchased by the commissioners under the powers and for the purposes of the Bilston Improvement Act, and they were compellable, at the request of the owner or occupier of any house, or part of a house, in any street in which any water-pipe of the commissioners should be laid, or of any persons who, under the provisions of any Act incorporated with the Bilston Improvement Act, should be entitled to demand the supply of water for domestic purposes, to furnish to such owner or occupier, or other person, a sufficient supply of water for their domestic uses, at certain rates therein specified.

Q. B.]

REG. v. SPURRELL AND WALKER.

[Q. B.]

Under sect. 76, the commissioners have power to levy a waterworks rate for the purpose of purchasing, making, and maintaining waterworks, but no such rate has, in fact, ever been made or levied.

In the year 1853 the commissioners purchased from the Dudley Waterworks Company all the plant and main of the company within the township of Bilston, and since that time have supplied water to all persons desirous of accepting it at a regular scale of prices, of which the following is a copy of the one at present in force.

THE BILSTON IMPROVEMENT ACT 1850.

WATER RATES.

*Revision of the Scale of Charges*

Notice is hereby given, that the Bilston Township Commissioners and Local Board of Health have found it necessary to revise the scale of charges, and that the following will be the quarterly payments for water consumers after the 25th Sept. 1863:

*Charges for Domestic Consumption.*

Owners' composition payable whether occupied or not.  
Tenements rated under ... .. £6 7 8 9 10  
To pay quarterly ... .. 2/ 2/6 2/9 3/ 3/4

*Occupiers' charges.*

Premises rated at ...£11 12 13 14 15 16 17 18 19 20  
To pay quarterly ...£3/10 4/2 4/6 4/10 5/2 5/6 5/10 6/ 6/2  
&c., &c.

Charges for trade purposes by special arrangement.—By order of the board, R. H. HARPER, Clerk.  
Commissioners' Office, Church-street, Bilston,  
Nov. 18th, 1863.

The water is supplied by pipes from the mains to the houses, and when the water rent is in arrear or unpaid after notice, the supply is cut off and withdrawn. About one-half of the inhabited houses are supplied with water from these waterworks, and pay rent for the same to the commissioners, and as to these it is a matter of arrangement between the landlord and tenant to which of the two the water is supplied, and which of the two pays the water rent. The inhabitants of those houses to whom there is no supply from the waterworks procure their water from their own wells or other sources. In the present instance the water is supplied from the waterworks; the landlord pays the water rent, and the occupier has nothing to do with it.

The app. contends that the payment for water is a deduction to which he is entitled under the Parochial Assessment Act, as being an expense necessary to maintain the premises in a state to command such rent.

The resps. contend that, inasmuch as it is optional with the owner and occupier of the house whether they will take their supply of water from the commissioners, or obtain it from other sources, it is not a necessary expense or outgoing which they ought to allow as a deduction from the rateable value.

If the Court shall be of opinion that the deduction ought to be allowed, the rate is to stand as reduced, viz., at 4l. 9s. 1d.; if on the contrary, an addition of 11s. 4d. is to be made to the sum to which the rateable value was reduced by the Court of Quarter Sessions.

M'Mahon (D. D. Keane, Q. C. with him) argued for the app.—This deduction for the water rate ought to be allowed. The words of the Parochial Assessment Act (6 & 7 Will. 4 c. 96), s. 1, are: "No rate for the relief of the poor shall be allowed by justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." The quarter sessions have found as a fact that the app. is entitled to a deduction in respect of water rent of 11s. 4d.; that is, they have found that the

payment of the water rent which was by the landlord here was a necessary expense to maintain the premises in a state to command the rent obtained. [MELLOR, J.—Suppose the water rent is not paid, and the water is cut off, could the deduction be claimed then? Or, suppose the tenant obtained his water from a pump on the premises, ought the expenses of the pump to be deducted?] The expense of keeping the pump in repair ought to be deducted. In *Reg. v. Hall Davy*, 84 L. J. 17, M. C., it was held that the sewers rate and expenses of sewerage works ought to be allowed as deductions in estimating the net annual value. [MELLOR, J.—Though it is called a water rate, it is in reality money paid for so much water. The parties need not take it unless they like. LUSH, J.—Suppose it was for gas instead of water, and by arrangement the landlord paid the charge, could it be claimed as a deduction?] It is submitted on the facts and finding of the quarter sessions in this case the water rent should be allowed as a deduction.

*Staveley Hill*, for the resps., was not called upon.

COCKBURN, C. J.—This case is quite clear. The question is, whether the water rent is to be deducted in estimating the net annual value of the app.'s premises for the purposes of the poor-rate. I am of opinion that it ought not. The expenses to be deducted are such as are necessary to keep the premises in such a position as to command the rent obtained for them. The deductions have nothing to do with what the landlord agrees to find, and what the tenant would have to find for himself but for such agreement on the landlord's part.

MELLOR and SHEW, JJ. concurred.

LUSH, J.—I am of the same opinion. The payment for water has no more to do with the necessary expense of keeping the premises in such a state as to command the rent than the payment for gas.

*Judgment for the resps.*

Wednesday, Nov. 15, 1865.

REG. v. SPURRELL AND WALKER.

*Overseers of poor—Substantial householders—Master and servant—43 Eliz. c. 2, s. 1.*

*A farm bailiff was engaged as weekly servant at 14s. per week, and the occupation of a cottage, rent free:*

*Held, necessary to ascertain whether the occupation of the cottage was subservient to the service, or simply part of the remuneration for the service, in order to determine whether the occupation was that of servant, and so the servant's occupation was the master's occupation, or quid tenant, so that the servant could be considered as a substantial householder capable of being appointed an overseer of the poor within 43 Eliz. c. 2, s. 1.*

Appeal against an order of two justices of the county of Norfolk, nominating and appointing "John Spurrell and Wm. Walker, substantial householders, within the parish of Pudding Norton, in the county, to be overseers of the poor of the said parish, together with the churchwardens thereof, until 25th day of March 1865, and fourteen days afterwards, unless other overseers shall be previously appointed in their stead."

The app., John Spurrell, is tenant under Wm. Boycott and others, trustees, under the will of John Moore, deceased, of a farm of 812 acres, together with a farm-house and premises, and a cottage adjoining, and forming part of the said premises, but



Q. B.] REG. v. THE PATENT EURIKA AND SANITARY MANURE COMPANY (LIMITED). [Q. B.]

fifty yards or more from the farm-house, at one entire rent; such cottage being a separate and distinct tenement. The farm is co-extensive with the parish of Pudding Norton, and the said John Spurrell resides with his family and servants in the farm-house, which, excepting the cottage above mentioned, is the only human habitation in the parish. The app., Wm. Walker, is his farm-bailiff, and looks after the men. He is a weekly servant, and receives 14s. a-week, and occupies the above cottage (which is furnished with his own furniture) rent free, in part payment for his services. But for the cottage his wages would be higher.

No poor-rates are paid for the parish of Pudding Norton, but the said J. Spurrell pays to the treasurer of the Walsingham Union, which comprises the said parish, the county rate in respect of the farm and cottage.

The parish of Pudding Norton is an immemorial parish and rectory. The church is in ruins. The present rector was appointed in 1854, and receives the tithes.

On behalf of the apps., it was contended that W. Walker was not a substantial householder within the 43 Eliz. c. 2, s. 1.

The Court of Quarter Sessions gave the following judgment: We find that under the circumstances of this case, both apps. were substantial householders within the statute, and we confirm the order, subject to a case for the opinion of the Court of Q. B.

*D. Brown* having obtained a rule nisi to quash the order of sessions,

*Denman, Q. C.* and *Staveley Hill* showed cause.—The app. Walker was a substantial householder within the meaning of the 43 Eliz. c. 2, s. 1. The object in setting aside the appointment is, to avoid the payment of the union rating altogether, as the appointment of one overseer only would be bad: (*Reg. v. Cousins*, 33 L. J. 87, M. C.) The 43 Eliz. only requires the churchwardens of every parish, and four, three, or two substantial householders there as should be thought meet to be appointed yearly as overseers. When a rule was applied for in the Bail Court for a *certiorari* to bring up this order, *Crompton, J.* said he was inclined to think that Walker was a householder. In *Re Overseers of Pudding Norton*, 33 L. J. 136, M. C., the Court of Quarter Sessions found that he was a substantial householder. The occupation here was that of tenant. Walker received less weekly than he otherwise would but for the occupation of the cottage. [*Mellor, J.*—In *Reg. v. Stubbs*, 2 T. R. 395, one of the overseers was a servant.] The test for determining whether the occupation was as tenant was put by *Tindal, C. J.*, in *Hughes*, app. v. *Chatham*, resp., 7 Sc. N. R. 606, viz., whether the servant was required to occupy in the performance of his contract to serve his master.

*Mellish, Q. C.* and *Bulmer, Q. C.*, in support of the rule. Walker's occupation was that of a servant merely, in the same way as a gardener or gamekeeper sometimes occupies—a tenant of his employer's in addition to weekly wages. There is no separate agreement for the cottage, and he would have no right to go and live anywhere else. A servant occupying a cottage with less wages, on that account does not occupy as tenant: (*Birtie v. Beaumont*, 16 East 33.) In law the servant's occupation is that of the master:

*Reg. v. Kelstern*, 5 M. & S. 136;  
*Reg. v. Chesnut*, 1 B. & Ad. 478;  
*G. Brown's case*, 2 East, P. C. 501.

*Cockburn, C. J.*—With reference to the last point, it is clear that a servant cannot be a householder

who has not an occupation independent of his master. The real question is, whether on the finding by the sessions we can say that there was not the relation of landlord and tenant between these parties. The facts are not sufficiently found to enable us to determine that question. One essential element to be considered is omitted, viz., whether the occupation of the house was necessary to the service or not? For if it was, then it was the occupation of the master, although the servant's remuneration was less on account of his having the house to live in. On the other hand, if the occupation was not necessary to the service, then the fact that the occupation forms part of the remuneration for the service will not render the occupation less an occupation *quod* tenant than if the servant had paid rent for it. It may be convenient to both master and servant that an arrangement should exist, that instead of receiving so much wages the servant should inhabit some tenement of his master's as part of the wages. It does not follow that because the relation of master and servant may happen to exist, there may not be an occupation of the master's premises by the servant *quod* tenant. One essential element in the inquiry is, whether the occupation is simply part of the remuneration for the service or simply subservient to the service. That element should have been before us. If that is ascertained by the sessions, there will probably be no difficulty in dealing with the case after what has fallen from the Court.

The rest of the Court concurring,

Case remitted to the Sessions.

—  
Wednesday, Nov. 22, 1865.

REG. v. THE PATENT EURIKA AND SANITARY MANURE COMPANY (LIMITED).

Indictment—Change of venue—For what cause alone permitted.

The court will not permit the venue in an indictment to be changed for any other cause than the inability to obtain a fair trial in the original jurisdiction.

Where, therefore, an indictment for a nuisance was found against the defts. at the last assizes for Cheshire, and an action for the same nuisance was brought against the defts. in the Court of C. P., and an application was then made to such Court of C. P. for an injunction under sect. 82 of the C. L. P. A. 1854, which was discharged upon the undertaking of the defts. to consent to the indictment being tried at the ensuing winter assizes for the city of Manchester, the Court of Q. B. refused to permit the trial to be had at such assizes.

This was an indictment found against the defts. at the last assizes for the county of Chester for a nuisance, and which, therefore, stands for trial at the next spring assizes for that county. An action had also been brought, and is now pending against the said defts., for a nuisance arising out of the same facts, and in that action the plt. applied to the Court of C. P., in which it was brought, under the 82nd section of the C. L. P. A. 1854, for an injunction against the defts. Upon the argument of that rule it was suggested that the indictment might be tried, and so the question be settled at an earlier period than the ensuing spring assizes—namely, by the venue being altered to Manchester, for which place an assize will be held early in the coming month of December. To this the defts. assented, and the rule for an injunction was accordingly discharged upon the undertaking of the defts. not to offer any opposition to the trial of the indictment at Manchester. At the Crown-office, however, it was stated

Q. B.] THE MIDLAND RAILWAY CO. v. THE COUNCIL OF THE BOROUGH OF BIRMINGHAM. [Q. B.]

that upon an indictment no such change of venue had ever been known or permitted; the only ground of change being inability to obtain a fair trial.

*McIntyre* thereupon obtained a rule to enter a suggestion on record that the indictment can be more conveniently tried at Manchester than at Chester, and he now moved to make that rule absolute, and contended that, as the matter was a pressing one, involving the health of the neighbourhood, and as the manufactory, though in Cheshire, was, in fact, within seven miles of Manchester the court should permit the change. [COCKBURN, C. J.—The master of the Crown-office informs the court that there is no instance of a change of venue in a criminal case except upon the ground of the probability of not obtaining a fair trial in the original jurisdiction.] In the case of *Clark v. The Queen*, 29 L. J. 232, Q. B., a change was permitted upon similar grounds as the present. [COCKBURN, C. J.—That was a *quo warranto* information, which in reality is to try a civil right.] The principle is the same. It may be suggested then that a fair trial cannot be had in Cheshire. [Quain said he was ready to assent to that if it could be done. COCKBURN, C. J.—We cannot sanction such a suggestion unless there is an affidavit of the fact.]

Quain appeared for the defts., and stated that, in accordance with the undertaking he gave in the C. P., he was ready to agree to any arrangement by which the indictment might be speedily tried.

COCKBURN, C. J.—This court cannot interfere upon the subject. There is no precedent whatever for changing the venue upon a suggestion of the convenience of the parties. If the court could be satisfied that by retaining the venue a fair trial could not be insured, it might be otherwise. We should, moreover, be exceedingly averse to allowing the indictment to be tried at the ensuing Manchester assizes, which are about to be held for the convenience of the inhabitants of that city alone, and the holding of which, as it is, seriously interferes with the progress of business in London.

*Rule discharged.*

*Tuesday, Nov. 28, 1865.*

THE MIDLAND RAILWAY COMPANY v. THE COUNCIL OF THE BOROUGH OF BIRMINGHAM.

*Borough improvement rate—Rateable value of railway goods—Station.*

*By a borough improvement Act authorising a rate to be levied, it was enacted, that the occupiers of any land used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament, should be rated at one-fourth part only of the net annual value.*

*Certain sidings and turn-tables, occupying about ten acres of land, were used for loading trucks and carriages with goods, and also as a standing place for laden and unladen carriages, and were found in the special case to be necessary for conducting the traffic of the railway:*

*Held, rateable at one-fourth only of their net annual value.*

This was an appeal by the Midland Railway Company against a borough improvement rate, to the Birmingham Borough Sessions, and a case was stated by consent under the 12 & 18 Vict. c. 45.

The apprs. are the Midland Railway Company, who are the owners and occupiers of a railway constructed under the powers of several Acts of Parliament for public conveyance, part of which railway,

and of the lands, buildings, and works occupied therewith, is situate and lies within the borough of Birmingham.

The resps. are the council of the borough of Birmingham, who, by the Birmingham Improvement Act 1851, s. 127, are authorised and empowered to levy upon the occupiers or owners of all buildings and lands within the borough, as in the said Act provided, a borough improvement rate, subject to a proviso that such rate should not exceed in any one year the sum of 2s. in the pound on the annual value of such buildings and lands, and to a further proviso in sect. 129 of the said Act contained:

That the occupiers of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, should be rated in respect of the same to the rates authorised to be levied by the said Act at one-fourth part only of the net annual value.

On the 18th Feb. 1862, the resps. for the purposes of the said Act made a borough improvement rate of 2s. in the pound, and thereby assessed the apprs. as owners and occupiers of certain property, in the said rate described as "passengers and goods stations, offices, warehouses, stables, workshops, locomotive engine-house, cattle stalls, sheds, platforms, weighing machines, turn-tables, machines, wharves, houses, lands, and premises, in various wards within the borough," on the annual value thereof.

The total rateable value of the property so described and assessed in the said rate is 2905*l.* 10*s.*, and it is agreed for the purposes of this case that the sum of 1588*l.* 10*s.* part thereof shall be taken as the rateable value of the property so assessed, which consists of the lands and buildings occupied by the apprs. with their said railway, and the sum of 1317*l.* residue thereof at the rateable value (supposing the contention of the resps. to prevail) of the property so assessed, which consists of the lands occupied by the sidings and turn-tables necessary for the use and working of the said railway, and used therewith, which last-mentioned property the apprs. contend is rateable on one-fourth only of the net annual value thereof.

The land so occupied by the sidings and turn-tables of the station covers ten acres or thereabouts.

The main lines of railway and sidings, and the buildings shown upon the plans, constitute the Lawley-street and Campbells stations where goods are laden into trucks and carriages when about to be conveyed on the apprs.' railway, and are unladen from them after such conveyance.

The sidings are also used for the standing of loaded and unloaded trucks and carriages belonging to the apprs., when at rest; two of such sidings, marked A. and B. on the plan of the Lawley-street station, are used for standing and unloading of such trucks and carriages as belong to coal owners or coal traders using the line of railway.

There are usually a considerable number of trucks and carriages at rest on the sidings when not wanted to travel. The apprs. have required traders who use their own trucks, and leave them on the sidings and turn-tables without unloading for forty-eight hours after notice of arrival, to pay, and such traders have in some cases paid, 1*s.* a-day per waggon for every day's delay, but the apprs. have no power to enforce this charge by their Acts of Parliament, and they make no profit by it.

The sidings, switches, and turn-tables are used for the purpose of passing trucks or carriages from one part of the station to another, and they are also used in connection with the main lines of railway. They terminate at the end next Lawley-street on the plan, and do not run into any railway at that end, but are all connected with the main lines, and with each other by switches and turn-tables. The sidings run into the buildings marked pink on the plan, which consist of goods sheds and an engine

Q. B.]

REG. v. WM. FISHER.

[C. CAS. R.]

house, except those sidings which are shown with dead ends.

The sidings and turn-tables are all necessary for conducting the traffic of the railway, and have been necessarily enlarged as the traffic increased.

The land so occupied by the sidings and turn-tables of the goods station is coloured yellow on the plans annexed to this case.

The apps. contend that the said sidings and turn-tables are rateable upon one-fourth part only of the net annual value thereof.

The question for the decision of the Court is :

Whether, under sect. 129 of the Birmingham Improvement Act 1851, the apps. are rateable in respect of the lands occupied by the said sidings and turn-tables on the annual value thereof, or at one-fourth part only of the net annual value thereof.

*J. Brown, Q.C. (Field, Q.C. and J. O. Griffiths with him)* for the resps.—The land in question is the Lawley-street goods station, which, it is submitted, is liable to be rated at the full annual value. The 129th section comes by way of proviso on the 127th section. This station is similar to an inn-yard where the stage-coaches and waggons stand, and that could not be considered as part of the "road" on which the stage-coaches travel; so neither can this station be considered as part of the railway proper, as it was termed in *The South Wales Railway Company v. The Swansea Local Board of Health*, 4 E. & B. 189. This station is also analogous to a wharf alongside a canal which would not be within the reduced rating, although the canal is:

*Newport Dock Company v. Newport Board of Health*, 2 B. & S. 708;

*Reg. v. Eastern Counties Railway*, 4 B. & S.

*Wills (J. C. Carter with him)*, for the apps., was not called upon to argue.

**MELLOR, J.**—I am of opinion that our judgment should be for the apps., who, upon the 129th section of the Improvement Act, are entitled to be rated in respect of these sidings and turn-tables at one-fourth part only of their net annual value, and at no higher rate. The term "railway" in the Act is not confined to the two lines of rails necessary for carrying goods and passengers from one place to another. By the *Swansea* case it was determined, on the construction of a similar section in the Public Health Act, that the word "railway" means not only the actual lines of railway, but also the turn-tables and sidings necessary for conducting the traffic of the railway. If the sidings are not necessary for conducting the traffic, but are made mainly for warehousing accommodation, they are rateable at their full annual value. There is no other limitation than what is necessary for the conduct of the business of the railway. We are relieved by the case from any difficulty, because these turn-tables and sidings are found to be necessary for the traffic of the railway. I can well understand why a distinction should be made between watching and lighting and improvement rates and the poor-rate; and that as to the poor-rate the rating should be upon the full productive value, whereas in regard to improvement and sanitary rates, which are for works necessary for the health and comfort of the inhabitants, a limitation should be upon the rating in the case of railway companies. With reference to such objects as those, there seems to be no difference between the sidings and turn-tables and the main line. I agree with the *Swansea* case, confirmed as it is by the subsequent case. If there is any excess of land occupied for the sidings and turn-tables, that is a matter for the sessions, not for this court. Our judgment will be for the apps.

**SHEE, J.**—I am of the same opinion. The question is, whether the sidings and turn-tables come within the meaning of the proviso as "land used only as a railway." Does the proviso mean land occupied by the rails only on which goods and passengers are carried from place to place; or does it include land used for the purpose of turning carriages from one line to another, by sidings and turn-tables? I think that it includes both descriptions of land. The *Swansea* case is an authority for the decision of this case. Mr. Brown pressed on us the consideration that there might be lines of railway in connection with the running lines for passengers, used only for the purpose of warehousing the carriages. If such a case came before us, probably it might be right not to include such in the reduced rating. That is not the case before us, because it is found in the case that these sidings and turn-tables were necessary for the working of the railway proper.

**LUSH, J.**—I am of the same opinion.

*Judgment for the apps.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 11, 1865.

(Before POLLOCK, C. B., WILLES and SHEE, JJ.,  
PIGOTT, B., and SMITH, J.)

REG. v. WM. FISHER.

*Malicious injury to property—Damaging a machine with intent to render useless—24 & 25 Vict. c. 97, s. 15.*

*The working parts of a steam threshing machine were designedly screwed too tight, which prevented it from working; and the plug of the pump was designedly taken out, and replaced with the wrong side up, so that no water could pass from the pump to the boiler; and the pipe leading from the plug to the boiler was stopped up by a piece of stick, and the machine was thus rendered temporarily useless, and exposed to danger. But when the working parts of the engine were loosened, the plug properly replaced, and the stick taken from the pipe, the engine was as good as before these acts were done:*

*Held, that these acts constituted damage to the machine within the 24 & 25 Vict. c. 97, s. 15.*

Case reserved for the opinion of this court by the Chairman of the Suffolk Quarter Sessions.

At the General Quarter Sessions of the peace for the county of Suffolk, held by adjournment at Bury St. Edmunds on the 4th July 1865, William Fisher was arraigned upon an indictment framed on the 15th section of the statute 24 & 25 Vict. c. 97, which charged that he unlawfully, maliciously, and feloniously damaged with intent to destroy or render useless a certain threshing machine, the property of Edward Kersey Green.

At the trial it was shown that the engine in question had been under the prisoner's care as engine driver and servant to the prosecutor, and that on Saturday the 16th May last, in consequence of a difference between him and the prosecutor, the prisoner left prosecutor's service. On Monday the 8th May last the prisoner did not come to work, but in the course of the day he told the prosecutor that he had not a man who could drive the engine, and that he would be glad to take him back. When prosecutor and his other men went to work the engine they got up the steam and tried to start it, but found they could not get it to move; they then unscrewed the engine to ascertain the cause, when they discovered that the working parts of the engine

C. CAS. R.]

REG. v. WM. FISHER.

C. CAS. R.

had been so tightly screwed up that the steam power of the engine was not sufficient to set them in motion, and it was proved that this must have been the result of design, and not of accident. They also discovered that the plug of the pump which supplies the engine boiler with cold water had been taken out, and replaced with the wrong side up, so that no water could pass from the pump into the boiler, and this also it was deposed must have been done designedly, and could not have been accidental. They further found that the pipe leading from the plug of the pump to the boiler had been stopped up by a piece of stick being thrust up it, so that, even supposing that water could have passed through the plug, it could not have got through the pipe into the boiler.

The engine was thus rendered temporarily useless, and it took the prosecutor and his men two hours to get it to work, and it was, moreover, shown that if the fire had been kept up the plunger of the pump would have forced the pump off the boiler, and also that the water in the boiler would have become exhausted, and the boiler would have burst, and serious consequences would have ensued; but it was admitted by the prosecutor that when the working parts of the engine had been loosened, the plug taken out and properly replaced, and the obstruction from the pipe had been removed, the engine was just as good as before. Various circumstances tended to show that these acts had been done by the prisoner.

Upon these facts it was objected by the counsel for the prisoner that there had been no offence committed within the meaning of the statute, inasmuch as there had been no permanent damage done to the engine.

The Court left the case to the jury, and directed them that the preventing the machine from working was "doing damage," and the jury found the prisoner guilty.

Upon the application of counsel for the prisoner, the Court decided to reserve the question of law for the consideration of the Court for Crown Cases Reserved.

"Whether, upon the facts stated, the temporary injury to the engine was such a malicious damage as to bring the prisoner under the penalties of the statute, and whether the prisoner was properly convicted."

The prisoner was discharged upon recognisances of bail to appear and receive judgment when called upon.

*Hillam Mills* for the prisoner.—The conviction cannot be sustained. The indictment is for damaging, with intent to render useless, a certain threshing machine. To support such an indictment some actual injury or damage must be shown to have

been done to the machine. Here there was no injury or damage to the machine itself. There was an obstruction, which could be removed, and when removed the machine was in as good working condition as ever. If any damage had been caused by the obstruction, the case would have come within the section, but the discovery was made before any damage ensued. In all the decided cases that bear on the construction of sect. 15 of the 24 & 25 Vict. c. 97, there was a removal of some part of the machine and positive injury to it. [FISHER, B.—There was some damage here; it required time and labour to put the machine in proper working order again.] That is not the kind of damage contemplated by this section. In *Reg. v. Gray*, 26 L. J. 203, M. C., to support a conviction for exposing a child on a common, under 7 Will. 4 & 1 Vict. c. 85, s. 2, it was held that there must be some *lesion* of the organs of the child. The principle of that decision applies in the present case. [WILLES, J.—There was *lesion* here in the sense of a dislocation of the parts of the engine.] The 29th section of the 24 & 25 Vict. c. 97, provides for this very offence, viz., obstructing the parts of a machine so as to render it useless. And the prisoner might have been indicted under that, but he was not. Or the prisoner might, upon the present indictment, have been convicted of an attempt to damage, but that view was not left to the jury.

Orridge, for the prosecution, was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the conviction in this case should be supported. My brother Willes has suggested the case of spiking a gun. In such a case there is no actual damage done to the gun which has been spiked, as the spike can be taken out; but though the gun is not damaged, it is rendered useless by being spiked. It is damaged for the purpose of rendering it useless. It has been argued that the word damage in the statute does not include such an act as was done to the machine in this case; but it is impossible to say that a steam engine is not damaged when something is put in it which, if the water is allowed to go on boiling, will cause it to burst. The word "damage" is added to the other words "cut," "break," or "destroy," in the section. And can it be said that a machine is not damaged when its parts are so misplaced that if the machine goes on working it will break itself? Until the parts of this threshing machine were replaced it was perfectly useless. For these reasons we are of opinion that the conviction ought to be affirmed.

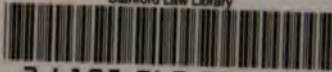
The rest of the Court concurred.

*Conviction affirmed.*





Stanford Law Library



3 6105 062 710 582